FEDERAL REGISTER

Vol. 84 Tuesday,

No. 242 December 17, 2019

Pages 68781–69294

OFFICE OF THE FEDERAL REGISTER

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

Rules and Regulations

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 52

[NRC–2019–0170]

RIN 3150–AK37

Organizational Changes and Conforming Amendments; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule; correction.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is correcting a final rule that appeared in the **Federal Register** on November 29, 2019, and was corrected on December 5, 2019. The document amended the NRC's regulations to reflect internal organizational changes and make conforming amendments, including removing all references to the Office of New Reactors because that office has merged with the Office of Nuclear Reactor Regulation, changing the names of divisions that are affected by the reorganization of the Office of Nuclear Material Safety and Safeguards, and making conforming amendments throughout the regulations to reflect the office merger and the office reorganization.

DATES: Effective on December 30, 2019.

ADDRESSES: Please refer to Docket ID NRC–2019–0170 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0170. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.*
- *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.*
- *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: Jill Shepherd, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1230; email: *Jill.Shepherd@nrc.gov.*

SUPPLEMENTARY INFORMATION: In FR Doc. 2019–25847 appearing on page 65639 in the **Federal Register** of Friday, November 29, 2019, the following corrections are made:

§ 2.101 [Corrected]

■ 1. On page 65643, in the second column, in part 2, in amendment 6, instruction 6.j. is corrected and instructions 6.k. through 6.o. are added to read as follows:

■ 6. * * *

■ j. In paragraph (e)(3), remove ''or as appropriate'';

■ k. In paragraph (e)(6), wherever they appear, remove '', as appropriate'' and ''as appropriate'';

■ l. In paragraph (e)(7), remove '', as appropriate'';

m. In paragraphs (e)(8), (f)(1)(iii), and (f)(2)(i)(A) and (C), remove ''as appropriate'';

■ n. In paragraph (f)(3), wherever they appear, remove ''as appropriate'' and ''or, as appropriate''; and

■ o. In paragraphs (f)(4) and (5), remove ''as appropriate''.

§ 52.1 [Corrected]

■ 2. On page 65645, in the second column, in part 52, in amendment 36, the instruction ''In § 52.1(a), in the definition for *Limited work authorization,* remove ''Director of New Reactors or the'' is corrected to read ''In § 52.1(a), in the definition for *Limited work authorization,* remove ''Director of New Reactors or the Director of Nuclear Reactor Regulation'' and add in its place ''Director of the Office of Nuclear Reactor Regulation''.

§ 52.35 [Corrected]

■ 3. On page 65645, in the second column, in part 52, in amendment 38, the instruction ''In § 52.35, remove ''Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate,'' and add in its place ''Director, Office of Nuclear Reactor Regulation,'' is corrected to read ''In § 52.35, remove ''Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate, (Director)'' and add in its place ''Director, Office of Nuclear Reactor Regulation (Director),''.

Dated at Rockville, Maryland, this 11th day of December 2019.

For the Nuclear Regulatory Commission.

Cindy K. Bladey,

Chief, Regulatory Analysis and Rulemaking Support Branch, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2019–27118 Filed 12–16–19; 8:45 am]

BILLING CODE 7590–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 702

RIN 3133–AF01

Delay of Effective Date of the Risk-Based Capital Rules

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending the NCUA's previously revised regulations regarding prompt corrective action (PCA). The final rule delays the effective date of both the NCUA's October 29, 2015 final rule regarding risk-based capital (2015 Final Rule) and the NCUA's November 6, 2018 supplemental final rule regarding risk-based capital (2018 Supplemental Rule), moving the effective date from January 1, 2020 to January 1, 2022. During the extended delay period, the NCUA's current PCA requirements will remain in effect.

DATES: The effective date of the final rule published on October 29, 2015 (80 FR 66626), delayed November 6, 2018 (83 FR 55467), is further delayed until January 1, 2022. The amendment in the final rule published on November 6, 2018 (83 FR 55467), is delayed until January 1, 2022.

FOR FURTHER INFORMATION CONTACT:

Policy and Analysis: Julie Cayse, Director, Division of Risk Management, Office of Examination and Insurance, at (703) 518–6360; Kathryn Metzker, Risk Officer, Division of Risk Management, Office of Examination and Insurance, at (703) 548–2456; Julie Decker, Risk Officer, Division of Risk Management, Office of Examination and Insurance, at (703) 518–3684; *Legal:* John Brolin, Senior Staff Attorney, Office of General Counsel, at (703) 518–6540; or Rachel Ackmann, Senior Staff Attorney, Office of General Counsel, at (703) 548–2601; or by mail at National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION:

I. Introduction

At its October 2015 meeting, the Board issued the 2015 Final Rule to amend part 702 of the NCUA's current PCA regulations to require credit unions taking certain risks hold capital commensurate with those risks.[1] The risk-based capital provisions of the 2015 Final Rule apply to only federally insured, natural-person credit unions (credit unions) with quarter-end total assets exceeding $100 million. The overarching intent of the 2015 Final Rule is to reduce the likelihood of a relatively small number of high-risk credit unions would exhaust their capital and cause large losses to the National Credit Union Share Insurance Fund (NCUSIF). Under the Federal Credit Union Act (FCUA), federally insured credit unions are collectively responsible for replenishing losses to the NCUSIF.[2]

The 2015 Final Rule restructures the NCUA's current PCA regulations and makes various revisions, including amending the agency's risk-based net worth requirement by replacing credit unions' risk-based net worth ratio with a new risk-based capital ratio. The risk-based capital requirements in the 2015 Final Rule are more consistent with the NCUA's risk-based capital ratio measure for corporate credit unions, and are more comparable to the risk-based capital measures implemented by the Federal Deposit Insurance Corporation (FDIC), Board of Governors of the Federal Reserve System, and Office of the Comptroller of Currency (other banking agencies) in 2013.[3] The 2015 Final Rule also eliminates several provisions in the NCUA's current PCA regulation, including provisions related to the regular reserve account, risk-mitigation credits, and alternative risk weights.

The Board originally set the effective date of the 2015 Final Rule for January 1, 2019 to provide credit unions and the NCUA with sufficient time to make the necessary adjustments—such as systems, processes, and procedures—and to reduce the burden on affected credit unions.

At its October 2018 meeting, the Board issued the 2018 Supplemental Rule to delay the effective date of the 2015 Final Rule for an additional year, moving the effective date from January 1, 2019 to January 1, 2020.[4] The 2018 Supplemental Rule also amended the definition of ''complex'' credit union, adopted in the 2015 Final Rule for risk-based capital purposes, by increasing the threshold level for coverage from $100 million to $500 million. Therefore, only credit unions with over $500 million in assets are now subject to the 2015 Final Rule (''covered credit unions''). These changes provided covered credit unions and the NCUA with additional time to prepare for the rule's implementation, and exempted an additional 1,026 credit unions from the risk-based capital requirements of the 2015 Final Rule without subjecting the NCUSIF to undue risk.

II. Proposed Rule

At its June 2019 meeting, the Board approved a notice of proposed rulemaking (proposed rule) to delay the effective date of both the 2015 Final Rule and the 2018 Supplemental Final Rule for an additional two years, moving the effective date of both rules from January 1, 2020 to January 1, 2022.[5] This proposed delay would provide the Board additional time to holistically and comprehensively evaluate the NCUA's capital standards for credit unions. The proposed rule provided several examples of issues the Board would consider during the delay, including asset securitization, subordinated debt, and a community bank leverage ratio analog.

The proposed rule stated the Board may reconsider how the 2015 Final Rule treats securitizations issued by credit unions.[6] The 2015 Final Rule does not sufficiently address the treatment of credit union issued securitizations. The proposed delay would provide the Board time to consider whether the 2015 Final Rule properly accounts for any asset securitization conducted by credit unions.

The proposed rule also stated the delay would provide time for the Board to consider whether the 2015 Final Rule should be amended to address subordinated debt.[7] The proposed delay would provide the Board additional time to make this decision and conduct the rulemaking. Should the Board finalize such a rule, the delay would also permit credit unions subject to the risk-based capital requirement time to consider the use of any authorized forms of subordinated debt before the risk-based capital rules go into effect.

The proposed rule also stated the delay would provide the Board time to consider whether a community bank leverage ratio (CBLR) analog should be integrated into the NCUA's capital standards. The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 required the other banking agencies, to propose a simplified, alternative measure of capital adequacy for federally insured banks.[8] In February 2019, the other banking agencies issued a proposed rule that would provide qualifying community banks the option to comply with a simplified leverage measure of capital adequacy.[9] The delay in the effective date of the 2015 Final Rule would allow the Board time to examine the other banking agencies' recent CBLR proposal and consider whether adopting an equivalent provision for credit unions is appropriate and consistent with the FCUA.

The proposed rule also stated the delay would provide the NCUA with additional time to prepare for the 2015 Final Rule's implementation. The NCUA has several initiatives in process to improve and modernize how the agency conducts examinations and supervision. These initiatives include

[1] 80 FR 66626 (Oct. 29, 2015).

[2] *See* 12 U.S.C. 1782(c)(2)(A) (The FCUA requires that each federally insured credit union pay an insurance premium equal to a percentage of the credit union's insured shares to ensure that the NCUSIF has sufficient reserves to pay potential share insurance claims, and to provide assistance in connection with the liquidation or threatened liquidation of federally insured credit unions in troubled condition.)

[3] The Board and OCC issued a joint final rule on October 11, 2013 (78 FR 62018), and the FDIC issued a substantially identical interim final rule on September 10, 2013 (78 FR 55340). On April 14, 2014 (79 FR 20754), the FDIC adopted the interim final rule as a final rule with no substantive changes.

[4] 83 FR 55467 (Nov. 6, 2018).

[5] 84 FR 30048 (Jun. 26, 2019).

[6] See also, OGC Legal Op. 17–0670 (Jun. 21, 2017).

[7] The Board indicated in the 2015 Final Rule that it planned to examine additional forms of qualifying capital in a separate proposed rule. Then in February 2017, the NCUA issued an advance notice of proposed rulemaking for alternative capital. 82 FR 9691 (Feb. 8, 2017).

[8] Public Law 115–174 (May 24, 2018).

[9] 84 FR 3062 (Feb. 8, 2019).

the Enterprise Solution Modernization, Call Report Modernization, and Virtual Examination programs. The proposed delay would enable the NCUA to direct additional time and resources toward modernizing examination systems, versus dedicating resources to end-of-life systems being retired.

Finally, the proposed rule stated a delay would further benefit credit unions as they work to implement the Financial Accounting Standards Board's final current expected credit loss (CECL) standard. The Board believes the proposed delay would allow credit unions additional time to allocate resources to the implementation of CECL.

The proposed rule provided for a 30-day comment period, which ended on July 26, 2019.

III. The Final Rule and Public Comments on the Proposed Rule

The NCUA received 29 comment letters in response to the proposed rule. These comment letters were received from credit union trade associations, credit unions, state and regional credit union leagues, bank trade organizations, consumer groups, and an individual. Nearly all commenters supported giving credit unions additional time to comply with the 2015 Final Rule's requirements. Most of these commenters also supported the Board's plan to consider credit union capital standards holistically. A few bank trade organization and consumer group commenters, however, opposed the delay, asserting generally delaying the 2015 Final Rule further would pose potential costs to the NCUSIF and to taxpayers. These commenters also opined the stated reasons for the proposed delay are insufficient and inconsistent with prior agency statements regarding the need for the 2015 Final Rule. The Board has not made any changes to the final rule in response to the comments received. A discussion of the final rule, including a discussion of the comments received, is below.

Comments Supporting the Proposed Delay

The credit unions, credit union leagues, credit union trade associations, and one individual who commented all supported the delay. These commenters generally reiterated the Board's reasons for the proposed delay, including the plan to review credit union capital standards holistically and evaluate rulemaking or guidance options relating to subordinated debt, asset securitization, and an analog to the CBLR. Several commenters also mentioned CECL as support for the delay, which was scheduled to become effective for credit unions in January 2022.[10]

Comments Opposing the Proposed Delay

Two banking trade organizations, as well as two consumer groups, opposed the delay. These commenters discussed several reasons why they believe the 2015 Final Rule, as modified by the 2018 Supplemental Rule, should go into effect on January 1, 2020.

One of the primary concerns expressed was the Board has not adequately explained why a delay is necessary. Specifically, the commenters did not believe the Board sufficiently explained why last year a one-year delay was sufficient and this year an additional two-year delay is necessary, particularly when the factors cited in the proposed rule for supporting the delay, asset securitization, subordinated debt, and the CBLR, were all known to the Board before the 2018 Supplemental Rule. The Board has reconsidered its position on when to implement the 2015 Final Rule for a few reasons.

As discussed in the proposed rule, the Board is now considering a holistic review of the 2015 Final Rule and its risk-based capital standards. When issuing the 2018 Supplemental Rule, the Board was primarily concerned with ensuring credit unions and the NCUA were prepared to implement the 2015 Final Rule in its current form. The Board has reconsidered its position and is now considering whether to make more substantive revisions to the 2015 Final Rule. The Board does not believe it is prudent to allow the 2015 Final Rule to become effective as the Board considers substantive modifications to the rule.

The Board is aware a few of its identified concerns, including asset securitization and subordinated debt were present when it finalized the 2018 Supplemental Rule. The Board, however, has reconsidered the extent of changes those issues may require to the 2015 Final Rule. The Board also notes while the statutory requirement to implement a CBLR had been enacted when the Board finalized the 2018 Supplemental Rule, the other banking agencies had not yet issued their final rule.[11] When issuing the 2018 Supplemental Rule, the Board was not aware of the extent of changes that would be proposed to the other banking agencies' 2013 risk-based capital rule.

The Board believes the reasons stated in the proposal and discussed above, both individually and collectively, sufficiently support the delay. The Board, however, also notes other factors have occurred after the adoption of the 2018 Supplemental Rule that suggest an additional two-year delay is prudent. Other banking agencies are currently reconsidering several fundamental aspects of their 2013 risk-based capital rule, which influenced the adoption of the 2015 Final Rule.[12] The other banking agencies recently stated in a joint rulemaking since the issuance of their 2013 risk-based capital rule, community banking organizations have raised concerns regarding the regulatory burden, complexity, and costs associated with certain aspects of their capital rule.[13] A community banking organization is a depository institution or depository institution holding company with total consolidated assets of less than $10 billion. Additionally, in their Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) report, the other banking agencies stated they are considering simplifications to their capital rule with the goal of meaningfully reducing regulatory burden on community banking organizations.[14] Since the issuance of the 2018 Supplemental Rule, the Board is aware of at least eight rulemakings undertaken by the other banking agencies to amend their 2013 risk-based capital rule.[15] The Board notes one of the rulemakings could provide a simplified capital framework for over 90 percent of small FDIC-insured banks from their 2013 risk-based capital rule.[16]

[10] In November 2019, the FASB finalized a one-year delay in this effective date, which would cause the new CECL standard to go into effect in January 2023 for credit unions. See, *https://www.fasb.org/cs/Satellite?c=FASBContent_C&cid=1176173179331&pagename=FASB%2FFASBContent_C%2FNewsPaghttps://www.fasb.org/cs/ContentServer?c=FASBContent_C&cid=1176173776362&d=&pagename=FASB%2FFASBContent_C%2FNewsPage* (Nov. 15, 2019).

[11] 84 FR 61776 (Nov. 13, 2019).

[12] The Board and OCC issued a joint final rule on October 11, 2013 (78 FR 62018), and the FDIC issued a substantially identical interim final rule on September 10, 2013 (78 FR 55340). On April 14, 2014 (79 FR 20754), the FDIC adopted the interim final rule as a final rule with no substantive changes.

[13] 84 FR 3062 (Feb. 8, 2019).

[14] Joint Report to Congress, Economic Growth and Regulatory Paperwork Reduction Act (Mar. 2017), available at *https://www.ffiec.gov/pdf/2017_FFIEC_EGRPRA_Joint-Report_to_Congress.pdf.*

[15] See, *https://www.fdic.gov/regulations/laws/federal/index.html.*

[16] 84 FR 3062, 3078 (Feb. 8, 2019). Small federally insured banks include banking organizations with total assets less than or equal to $550 million. The Board notes that its current risk-based net worth requirement is applicable to credit unions with quarter-end assets exceeding $50 million and with a risk-based net worth requirement exceeding six percent. 12 CFR 702.103(b).

Given the extent of the proposed changes to the other banking agencies' 2013 risk-based capital rule, and that the Board adopted the 2015 Final Rule, in part, to make its capital framework more comparable to the other banking agencies' 2013 capital rule, the Board believes it is sensible to reconsider the 2015 Final Rule before its effective date of January 1, 2020.

One commenter suggested the Board implement the 2015 Final Rule and then amend it as necessary, instead of allowing the existing risk-based net worth framework to remain in effect. The commenter stated the NCUA has previously noted the current framework has severe weaknesses and was subject to criticism from both the Government Accountability Office (GAO) and the NCUA's Inspector General.[17] The Board continues to believe the current risk-based net worth system has weaknesses and requires risk weights that correspond better to assets' credit risk, as stated in the 2015 Final Rule. The Board, however, does not believe the agency's current risk-based net worth rule is so deficient that the Board should implement the 2015 Final Rule even as the Board considers holistic changes to it. Further, implementing the 2015 Final Rule will impose compliance costs and a substantial regulatory burden on covered credit unions. To comply with the 2015 Final Rule, credit unions are required to update internal policies, software, and train employees, among other things. The Board does not want to impose unnecessary compliance costs to implement a rule and then, shortly thereafter, possibly make substantial amendments to the rule. The Board believes the more sensible and balanced approach is to extend the effective date of the 2015 Final Rule as the Board considers holistic revisions to the 2015 Final Rule.

Other commenters expressed concerns the two-year delay would occur when there is a possibility the economy is weakening. One commenter opined delaying the 2015 Final Rule would threaten the financial security of credit unions, which may harm consumers. Two commenters generally expressed concern about the credit union system not being subject to more stringent capital standards. A commenter stated the Congressional Budget Office has estimated, if the 2015 Final Rule is further delayed, the NCUA will be expected to spend $26 million to resolve failed credit unions from 2020–2022.

The Board agrees higher capital levels keep credit unions from becoming undercapitalized during periods of economic stress. The Board, however, believes the credit union industry is healthy, well capitalized, and most credit unions currently hold capital well beyond the minimum required by the 2015 Final Rule. As stated in the 2018 Supplemental Rule, complex credit unions already hold, on average, more than 17 percent capital, or 70 percent more than the 10 percent required to be well-capitalized under the 2015 Final Rule.[18] Additionally, approximately 99 percent of complex credit unions are holding enough capital to meet the risk-based capital requirements in the 2015 Final Rule.[19] Therefore, implementing the 2015 Final Rule would not require credit unions to raise a significant amount of capital at this time. The NCUA also will continue to address any deficiencies in the capital levels of individual credit unions through the supervision process and through the existing PCA framework. Furthermore, credit unions are expected to incorporate provisions for maintaining prudent levels of capital into their business models and strategic plans.

The Board notes the current health and capitalization levels of the credit union industry are not sufficient justification for rescinding the 2015 Final Rule, as some commenters suggested. The Board, however, is clarifying that the current capitalization of the industry provides time for the Board to consider modifications to the 2015 Final Rule and alleviate the need to immediately implement the 2015 Final Rule. The robust capital levels in the credit union industry, however, do not negate the weaknesses in the current capital standards, and having a strong capital framework with enhanced risk sensitivity is an integral part of the NCUA's supervision of credit unions. The Board believes it is sound regulatory practice to ensure credit unions choosing to hold higher risk assets and liabilities on their balance sheets are required to hold appropriate levels of corresponding capital. The Board also notes repealing the 2015 Final Rule is outside the scope of the proposed rule.

A few commenters stated delaying the effective date of the 2015 Final Rule conflicts with the congressional mandate that the NCUA capital rules adequately address risks and harmonize with the other banking agencies' framework. Specifically, the commenters stated the FCU Act requires the Board to adopt a system of PCA for credit unions that is ''comparable to'' section 38 of the Federal Deposit Insurance Act (FDI Act).[20] The Board believes the current rule meets the statutory requirement for the Board to implement a PCA framework that is comparable to the PCA framework for insured banking organizations in the FDI Act. Additionally, the FCUA requires the Board to adopt a PCA framework comparable to the PCA framework in the FDI Act. The FCUA, however, does not require the Board to adopt a system of risk-based capital identical to the risk-based capital framework for federally insured banking organizations.

Commenters also questioned the need for additional time to prepare for the 2015 Final Rule. The Board would have been prepared to implement the 2015 Final Rule. The Board, however, does not want to allocate the necessary additional resources to implement the 2015 Final Rule, given its decision to comprehensively evaluate the 2015 Final Rule. The Board believes it is more prudent to allocate resources to other priorities that may not require substantial amendment, including several initiatives to improve and modernize how the agency conducts examinations and supervision. The goals of these initiatives are to replace outdated, end-of-life examination systems, streamline processes, adopt enhanced examination techniques, and leverage new technology and data to maintain high quality supervision of federally-insured credit unions with less onsite presence. These initiatives include the Enterprise Solution Modernization, Call Report Modernization, and Virtual Examination programs. The delay enables the NCUA to direct additional time and resources toward modernizing examination systems, versus dedicating resources to end-of-life systems being retired. One commenter noted supervisory guidance has yet to be issued to examiners and the industry to assist in implementing the risk-based capital rules and changes to the Call Report are necessary to capture risk-based capital related information. The NCUA intends to issue additional guidance and make necessary changes to the Call Report prior to the effective date of the risk-based capital rule.

One commenter stated the 2015 Final Rule should be implemented immediately due to concerns with the treatment of goodwill in the agency's current risk-based capital rule. Currently, goodwill is not deducted

[17] 80 FR 66626 (Oct. 29, 2015).

[18] 83 FR 55467, 55469 (Nov. 6, 2018). Complex credit unions are credit unions with over $500 million in assets.

[19] *Id.*

[20] 12 U.S.C. 1831o.

from capital, however, intangible assets such as goodwill are generally deducted from regulatory capital from the other banking agencies' capital rules. The commenter stated that this preferential treatment of goodwill promotes the acquisition of other credit unions and community banks, which has allowed certain credit unions to expand in size and reach unmanageable level of assets. The Board disagrees that the regulatory capital treatment of goodwill has a material effect on credit union merger activity. As stated in the 2018 Supplemental Rule, the 2015 Final Rule provides credit unions with 13 years to write down, or otherwise adjust their balance sheets, to account for goodwill and other intangible assets acquired through a supervisory merger or combination before December 28, 2015. As of December 31, 2018 Call Report data, only 8 credit unions with assets greater than $500 million, report total goodwill and intangible assets of more than 1 percent of assets, and the valuation under Generally Accepted Accounting Principles (GAAP) of these existing assets is likely immaterial by the end of the extended sunset date. Accordingly, the Board continues to believe 13 years to respond to this change is more than sufficient for credit unions impacted.[21]

The same commenter expressed concerns about the agency's ability to properly identify potential concentration risks present in credit unions and believed the 2015 Final Rule may have addressed recent losses related to taxi medallions. Risk-based capital is designed to mitigate losses to the NCUSIF; however, it is not meant to protect the NCUSIF from outside systemic risks such as severe disruptions in a particular market. The Board believes credit unions need to hold capital commensurate with the level and nature of the risks to which they are exposed. The NCUA will continue to address, through the examination process and the agency's various enforcement authorities, any safety and soundness concerns related to deficiencies in capital levels relative to all of the credit union's risk, inclusive of concentration risk.

The Board notes the risk-based capital framework is generally designed and calibrated to reflect risks across the industry and may not always require a specific credit union to hold capital commensurate with its credit, market, operational, or other risks. Thus, even though the 2015 Final Rule imposes higher capital requirements for credit unions with significant concentrations of residential real estate and commercial loans, that framework was broadly based on the credit union industry, and not for specific credit union portfolios, such as those with a high concentration in taxi medallions. The Board also notes the other banking agencies' 2013 risk-based capital rule does not address concentration risk even though both the NCUA's current rule and 2015 Final Rule impose higher capital requirements for credit unions with a significant concentrations of residential real estate and commercial loans.

Other Comments Beyond the Scope of the Proposed Rule

Many commenters also offered recommendations that went beyond the scope of the proposed delay. For example, several commenters recommended the Board consider rescinding the 2015 Final Rule. The Board continues to believe the current risk-based net worth standards have weaknesses and revised standards with enhanced risk sensitivity are appropriate for covered credit unions. In addition, a few commenters recommended the Board change the definition of complex and consider applying the 2015 Final Rule only to credit unions with assets of $10 billion or more. The Board believes this recommendation is beyond the scope of the proposed rule.

Two credit union-affiliated commenters provided suggestions on potential amendments to the 2015 Final Rule. Specifically, a credit union trade association discussed why it supports a more flexible threshold for applying the 2015 Final Rule, as well as how it would envision the Board implementing an analog to the CBLR. The commenter also suggested that the Board consider recalibrating certain risk weights and permanently grandfather excluded goodwill. Separately, an attorney who represents credit unions provided a detailed proposal on how the Board could authorize all credit unions to issue perpetual capital shares that could constitute regulatory capital. The Board believes these comments go beyond the scope of the proposed rule, but will consider them as it undergoes a substantive reevaluation of the NCUA's capital standards.

One commenter noted the 2015 Final Rule eliminates several provisions in the NCUA's current PCA regulations, including provisions related to the regular reserve account, risk mitigation credits, and alternative risk weights. This commenter recommended the Board separately consider addressing these issues in a more immediate timeframe than on the extended timeframe necessary to holistically consider the NCUA's risk-based capital framework. The Board believes these comments are outside the scope of this rule, as they address changes to the current PCA framework, but will consider them as part of their holistic review of the NCUA's capital standards.

Finally, one commenter also asserted the agency's administrative record to support the proposed delay is not sufficient. The commenter attached a study, which only contained a brief discussion of capital, without explaining its relevance. The brief discussion of capital in the study was also reflected in other comment letters and has been addressed by the Board. The commenter also posed numerous questions that it asserts the Board must address in the final rule to comply with the Administrative Procedure Act (APA). The Board disagrees. An agency is not required to include a response to every comment received nor is an agency required to discuss every item of fact or opinion included in the comments.[22] A final rule must summarize the significant comments received and include a response to such comments. A significant comment generally is one that raises a point relevant to the agency's decision and which, if adopted, requires a change in an agency's proposed rule.[23] The Board believes it has addressed the significant points raised by the commenters, even if it has not explicitly addressed each question asked by one commenter.

The Final Rule

The Board is finalizing the two-year delay as proposed. Under the final rule, the NCUA's current PCA regulation remains in effect until the 2015 Final Rule and the 2018 Supplemental Rule's effective date, January 1, 2022. The NCUA will continue to enforce the capital standards currently in place and address any supervisory concerns through existing regulatory and supervisory mechanisms. The Board

[21] The 2015 Final Rule grandfathers goodwill originating from a supervisory merger or combination that was completed on or before December 28, 2015. The two-year delay in the effective date does not affect the 2015 Final Rule's treatment of goodwill or the date for excluded goodwill. Therefore, any supervisory merger or combination completed after December 28, 2015 could not count as goodwill when the 2015 Final Rule becomes effective.

[22] *Resolute Forest Prod., Inc.* v. *U.S. Dep't of Agric.,* 130 F. Supp. 3d 81, 93 (D.D.C. 2015) (citing *Pub. Citizen, Inc.* v. *F.A.A.,* 988 F.2d 186, 197 (D.C. Cir.1993) (quoting *Automotive Parts & Accessories Ass'n* v. *Boyd,* 407 F.2d 330, 338 (D.C. Cir.1968)).

[23] *City of Portland, Oregon* v. *E.P.A.,* 507 F.3d 706, 715 (D.C. Cir. 2007) (quoting *Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977)). Essentially, an agency must state the main reasons for its decision and indicate that it has considered the most important objections.

believes, given the discussion above, extending the implementation period of the 2015 Final Rule and 2018 Supplemental Rule until January 1, 2022 is reasonable and does not pose undue risk to the NCUSIF.

IV. Legal Authority

In 1998, Congress enacted the CUMAA.[24] Section 301 of CUMAA added section 216 to the FCUA,[25] which required the Board to adopt by regulation a system of PCA to restore the net worth of credit unions that become inadequately capitalized.[26] Section 216(b)(1)(A) requires the Board to adopt by regulation a system of PCA for federally insured credit unions ''consistent with'' section 216 of the FCUA and ''comparable to'' section 38 of the FDI Act.[27] Section 216(b)(1)(B) requires that the Board, in designing the PCA system, also take into account the ''cooperative character of credit unions'' (*i.e.,* credit unions are not-for-profit cooperatives that do not issue capital stock, must rely on retained earnings to build net worth, and have boards of directors that consist primarily of volunteers).[28] The Board initially implemented the required system of PCA in 2000,[29] primarily in Part 702 of the NCUA's Regulations, and most recently made substantial updates to the regulation in October 2015.[30]

The purpose of section 216 of the FCUA is to ''resolve the problems of [federally] insured credit unions at the least possible long-term loss to the [NCUSIF].'' [31] To carry out that purpose, Congress set forth a basic structure for PCA in section 216 that consists of three principal components: (1) A framework combining mandatory actions prescribed by statute with discretionary actions developed by the NCUA; (2) an alternative system of PCA to be developed by the NCUA for credit unions defined as ''new;'' and (3) a risk-based net worth requirement to apply to credit unions the NCUA defines as ''complex.''

Among other things, section 216(c) of the FCUA requires the NCUA to use a credit union's net worth ratio to determine its classification among five ''net worth categories'' set forth in the FCUA.[32] Section 216(o) generally defines a credit union's ''net worth'' as its retained earnings balance,[33] and a credit union's ''net worth ratio,'' as the ratio of its net worth to its total assets.[34] As a credit union's net worth ratio declines, so does its classification among the five net worth categories, thus subjecting it to an expanding range of mandatory and discretionary supervisory actions.[35]

Section 216(d)(1) of the FCUA requires that the NCUA's system of PCA include, in addition to the statutorily defined net worth ratio requirement applicable to federally insured natural-person credit unions, ''a risk-based net worth [36] requirement for insured credit unions that are complex, as defined by the Board . . . .'' [37] The FCUA directs the NCUA to base its definition of ''complex'' credit unions ''on the portfolios of assets and liabilities of credit unions.'' [38] It also requires the NCUA to design a risk-based net worth requirement to apply to such ''complex'' credit unions.[39]

V. Regulatory Procedures

Effective Date

The final rule delays the effective date of the 2015 Final Rule and the 2018 Supplemental Rule from January 1, 2020 until January 1, 2022. The previous effective date, January 1, 2020, is less than thirty days after the publication of the final rule. Under the APA, a final rule cannot be effective until 30 days after its publication, however, there is an exception for rules that grant or recognize an exemption or relieve a restriction.[40] Such rules can be effective immediately upon publication.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires, in connection with a final rule, an agency prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of the final rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include credit unions with assets less than $100 million) [41] and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule.

The delay of the 2015 Final Rule and 2018 Supplemental Rule affects only complex credit unions, which are those with greater than $500 million in assets under the 2018 Supplemental Rule. As a result, credit unions with $100 million or less in total assets are not affected by this final rule. Accordingly, the NCUA certifies this final rule will not have a significant economic impact on a substantial number of small credit unions.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number.

The information collection requirements prescribed by § 702.101(b) were set-out in the August 8, 2018 (83 FR 38997), proposed rule and assigned OMB control number 3133–0191. There is no new collection of information contained in this final rule that is subject to the PRA. The rule only extends the effective date.

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[24] Public Law 105–219, 112 Stat. 913 (1998).

[25] 12 U.S.C. 1790d.

[26] The risk-based net worth requirement for credit unions meeting the definition of ''complex'' was first applied on the basis of data in the Call Report reflecting activity in the first quarter of 2001. 65 FR 44950 (July 20, 2000). The NCUA's risk-based net worth requirement has been largely unchanged since its implementation, with the following limited exceptions: Revisions were made to the rule in 2003 to amend the risk-based net worth requirement for MBLs, 68 FR 56537 (Oct. 1, 2003); revisions were made to the rule in 2008 to incorporate a change in the statutory definition of ''net worth,'' 73 FR 72688 (Dec. 1, 2008); revisions were made to the rule in 2011 to expand the definition of ''low-risk assets'' to include debt instruments on which the payment of principal and interest is unconditionally guaranteed by NCUA, 76 FR 16234 (Mar. 23, 2011); and revisions were made in 2013 to exclude credit unions with total assets of $50 million or less from the definition of ''complex'' credit union, 78 FR 4033 (Jan. 18, 2013).

[27] 12 U.S.C. 1790d(b)(1)(A); see also 12 U.S.C. 1831o (Section 38 of the FDI Act setting forth the PCA requirements for banks).

[28] 12 U.S.C. 1790d(b)(1)(B).

[29] 12 CFR part 702; see also 65 FR 8584 (Feb. 18, 2000) and 65 FR 44950 (July 20, 2000).

[30] 80 FR 66626 (Oct. 29, 2015).

[31] 12 U.S.C. 1790d(a)(1).

[32] 12 U.S.C. 1790d(c).

[33] 12 U.S.C. 1790d(o)(2).

[34] 12 U.S.C. 1790d(o)(3).

[35] 12 U.S.C. 1790d(c)–(g); 12 CFR 702.204(a)–(b).

[36] For purposes of this rulemaking, the term ''risk-based net worth requirement'' is used in reference to the statutory requirement for the Board to design a capital standard that accounts for variations in the risk profile of complex credit unions. The term ''risk-based capital ratio'' is used to refer to the specific standards established in the 2015 Final Rule to function as criteria for the statutory risk-based net worth requirement. The term ''risk-based capital ratio'' is also used by the other banking agencies and the international banking community when referring to the types of risk-based requirements that are addressed in the 2015 Final Rule. This change in terminology throughout the Proposal would have no substantive effect on the requirements of the FCUA, and is intended only to reduce confusion for the reader.

[37] 12 U.S.C. 1790d(d)(1).

[38] 12 U.S.C. 1790d(d).

[39] *Id.*

[40] 5 U.S.C. 553(d).

[41] *See* 80 FR 57512 (Sept. 24, 2015).

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the principles of the executive order to adhere to fundamental federalism principles. This final rule extends the effective date of the 2015 Final Rule and the 2018 Supplemental Rule for two additional years, until January 1, 2022. Therefore, this final rule does not have a direct effect on the states, on the relationship between the National Government and the states, and on the distribution of power and responsibilities among the various levels of government.

Assessment of Federal Regulations and Policies on Families

The NCUA has determined this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) generally provides for congressional review of agency rules.[42] A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by Section 551 of the APA.[43] An agency rule, in addition to being subject to congressional oversight, may also be subject to a delayed effective date if the rule is a ''major rule.'' [44] The NCUA does not believe this rule is a ''major rule'' within the meaning of the relevant sections of SBREFA. As required by SBREFA, the NCUA submitted this final rule to the Office of Management and Budget (OMB) for it to determine if the final rule is a ''major rule'' for purposes of SBREFA. OMB determined the final rule was not a major rule. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

List of Subjects in 12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on December 12, 2019.

Gerard Poliquin,

Secretary of the Board.

[42] 5 U.S.C. 801–804.

[43] 5 U.S.C. 551.

[44] 5 U.S.C. 804(2).

[FR Doc. 2019–27141 Filed 12–16–19; 8:45 am]

BILLING CODE 7535–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 13

RIN 3038–AE90

Public Rulemaking Procedures

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (the ''Commission'') is issuing a final rule that amends the Commission's regulations to eliminate the provisions that set forth the procedures for the formulation, amendment, or repeal of rules or regulations. Because the Administrative Procedure Act (''APA'') governs the Commission's rulemaking process, the Commission believes that it is unnecessary to codify the rulemaking process in a Commission regulation. The amended regulation is comprised solely of the procedure for filing petitions for rulemakings, as the APA does not address this process.

DATES: This rule is effective January 16, 2020.

FOR FURTHER INFORMATION CONTACT: Herminio Castro, Senior Special Counsel, (202) 418–6705, *hcastro@cftc.gov;* Dhaval Patel, Counsel, (202) 418–5125, *dpatel@cftc.gov;* Office of the General Counsel, Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Introduction

Part 13 sets forth procedures for the formulation, amendment, or repeal of rules or regulations insofar as those procedures directly affected the public.[1] The Commission promulgated part 13 pursuant to former section 4a(j) of the Commodity Exchange Act (''CEA''),[2] which is currently section 2(a)(12) of the CEA.[3] Section 2(a)(12) states that the Commission is authorized to promulgate such rules and regulations as it deems necessary to govern the operating procedures and conduct of business of the Commission. This section authorizes, but does not require, the Commission to promulgate regulations governing its rulemaking process. The Commission first adopted part 13 in 1976 and has not revised part 13 since that time.

II. The Proposal

On September 20, 2019, the Commission published a notice of proposed rulemaking to amend part 13 of its regulations to eliminate the provisions in part 13 that set forth the process for rulemakings (''NPRM'').[4] The Commission explained that as originally adopted, part 13 was intended to track the APA rulemaking process. However, in its current form, part 13 does not fully conform to the APA, which may have created ambiguity and confusion about the procedures to be followed by the Commission in rulemakings.[5] The NPRM further noted that the APA governs Commission rulemakings and that section 553 of the APA provides for the procedures to be followed by the Commission when promulgating formal and informal rulemakings.[6] Because the APA governs the Commission's rulemaking process, the Commission stated that it was unnecessary to codify the rulemaking process in a Commission regulation that would be duplicative of the APA.[7] The Commission solicited comments on all aspects of the NPRM. The comment period closed on October 21, 2019.

III. Comments

The Commission received two comment letters on the NPRM from Better Markets, Inc. and the Administrative Conference of the United States (''Better Markets'' and ''ACUS'').[8] The ACUS requested that the Commission consider conforming Commission regulation § 13.2 with ACUS's Recommendation 2014–6, *Petitions for Rulemaking.*[9] The ACUS in particular calls for the Commission to

[1] 17 CFR part 13.

[2] *See* 41 FR 17536 (Apr. 27, 1976); Public Law 93–463, Sec. 101(a)(11), 88 Stat. 1391, 7 U.S.C. 4a(j).

[3] 7 U.S.C. 2(a)(12).

[4] *See* Public Rulemaking Procedures, 84 FR 49490 (Sept. 20, 2019) (''NPRM''). The provisions being eliminated are 17 CFR 13.1, 13.3, 13.4, 13.5, and 13.6. 17 CFR 13.2 is being retained and renumbered as 17 CFR 13.1.

[5] NPRM, 84 FR 49490. For example, § 13.4(b) allows formal rulemakings to be conducted through oral presentation or written submissions; in contrast, APA sections 556 and 557 require a trial-like process to be followed for formal rulemakings.

[6] *See* 5 U.S.C. 551 *et seq.;* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

[7] NPRM, 84 FR 49490.

[8] *See* Better Markets Comment Letter No. 62219 (''Better Markets Letter''), dated October 21, 2019, and ACUS Comment Letter No. 62213 (''ACUS Letter''), dated October 9, 2019, *available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=3030.*

[9] *See* ACUS Letter at 1.

implement procedures on petitions for rulemaking that (1) include an explanation of the type of data or arguments that would be useful for the agency to evaluate the petition, (2) permit the electronic submission of petitions, (3) invite public comment on petitions for rulemaking, (4) provide a reasoned explanation beyond a brief statement of the grounds for denial and make it public, and (5) leverage online platforms like *Regulations.gov* to implement the recommendations.

Better Markets agreed with the Commission's proposal to eliminate the rulemaking procedures codified in part 13, stating that they provide little value beyond that provided by the APA and applicable case law. Better Markets, however, recommended the Commission implement ACUS's Recommendation 2014–4 concerning ex parte communications.[10]

IV. Final Rule

The Commission has considered the comments by Better Markets and the ACUS and is adopting part 13, as proposed, with a few modifications.[11] The Commission is amending part 13 of its regulations to eliminate the provisions that set forth the process for issuing NPRMs. As noted in the Proposal, part 13 was originally intended to track the APA rulemaking process, but in its current form, part 13 does not fully conform to the APA, creating uncertainties about the procedures to be followed by the Commission in rulemakings. Because the APA governs the Commission's rulemaking process, it is unnecessary to codify the rulemaking process in a Commission regulation that would be duplicative of the APA.[12]

In response to ACUS's comment, the Commission notes that it has had procedures for filing rulemaking petitions since 1976 to ensure that the public is engaged in the rulemaking process at the Commission. Specifically, regulation § 13.1 provides instructions as to where the petition should be sent, what information should be included in the petition, and the manner in which the Commission must respond to such petition. The Commission believes that retaining this provision is necessary as the APA does not address this process. Furthermore, a formalized process for petitions would promote consistency and transparency in the way that the Commission handles petitions for rulemakings.

The Commission is adopting a change in proposed regulation § 13.1 to allow the electronic submission of petitions through the Commission's website, as recommended by the ACUS. Furthermore, it will be the Commission's policy to post the petitions for rulemaking on the Commission's website.[13] The electronic submissions of petitions will facilitate the submission of petitions for rulemaking and thereby the public's engagement in the Commission's rulemaking process.

The Commission will decide on a case-by-case basis whether to solicit public comment on petitions for rulemaking, *e.g.,* when the Commission seeks to obtain additional information or to corroborate the petitioner's information.[14] Providing the public with an opportunity to view and comment on petitions fosters the public's engagement in the rulemaking process, but this goal may be accomplished without a rule. Indeed, should the Commission initiate a rulemaking pursuant to a petition for rulemaking, the APA requires that it provide the public with an opportunity to participate in the rulemaking.[15] There are also many factors involved in posting petitions and requesting comments, *e.g.,* privacy concerns, trade secrets, and resources, that the Commission will need to consider on a case-by-case basis that are outside the scope of a rule. The Commission will therefore retain its discretion whether to request comments on the petitions. Also, given resource constraints that the Commission may face at any given time and the subject matters that may be involved, the Commission will not specify a period for responding to petitions for rulemaking and will retain its discretion when to respond to a petition.

Finally, regulation § 13.1 only requires that the petition set forth the text of the rule or amendment being proposed or the rule petitioner wishes to have repealed, and the nature of the petitioner's interest. It also provides that the petition may advance arguments in support of the petition. The Commission is of the view that providing a prescriptive approach to the petition's constructs may have the effect of constraining rather than aiding the presentation of data and arguments by petitioners. To be sure, the petitioner should provide sufficient information and data in order for the Commission to make a determination on the petition for rulemaking. In this regard, regulation § 13.1 provides that, except in affirming a prior denial or when the denial is self-explanatory, notice of a denial in whole or in part of a petition will be accompanied by a brief statement of the grounds of denial. Nevertheless, in the interest of transparency, the Commission will endeavor to include an explanation on a case-by-case basis when the petition merits it.

The Commission also considered whether to implement rules for ex parte communications in informal rulemaking, as suggested by Better Markets. As Better Markets notes, the APA does not prohibit such communications and indeed ''directs . . . agencies to provide the public an opportunity for meaningful public comment, which may occur through any type of interaction (*e.g.,* verbally in a meeting or in writing through a comment letter).'' [16] Thus, the Commission is not promulgating a rule on ex parte communications. In addition, the NPRM did not propose a rule regarding ex parte communications. However, it is the Commission's policy to make public on the Commission's website substantive ex parte communications, both written and oral, that provide significant, material information addressed to the merits of a proposed rule. It is also the Commission's practice to make public on its website all ex parte meetings held on proposed rules, including the names and affiliations of attendees. The Commission is committed to maintaining such transparency in ex parte communications in all informal rulemakings.

Accordingly, this final rulemaking removes regulation §§ 13.1, 13.3, 13.4, 13.5, and 13.6 from part 13 and retains former regulation § 13.2 as regulation § 13.1, as amended. In addition, the Commission is revising the authority citation for part 13. The authority cited for part 13, 7 U.S.C. 4a(j), was incorrect due to subsequent renumbering and it is being changed to 7 U.S.C. 2(a)(12).

[10] *See* Better Markets Letter at 5. Better Markets cites to the ACUS Report on Ex Parte Communications in Informal Rulemaking by Esa L. Sferra-Bonistalli, issued on May 1, 2014. ACUS did not comment on the elimination of the rulemaking procedures in part 13.

[11] Commission regulation § 13.2 is being renumbered § 13.1.

[12] NPRM, 84 FR 49490.

[13] The Commission will retain its discretion whether to post petitions that contain confidential information (*e.g.,* trade secrets, CEA section 8 material) and abusive or inappropriate language.

[14] In such cases, the Commission will consider the comments received on a petition for rulemaking.

[15] *See* 5 U.S.C. 553(c).

[16] Better Markets Letter at 2.

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act [17] requires Federal agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. This rule would remove unnecessary and potentially confusing provisions of part 13 and update the authority cited. As stated above, section 553 of the APA provides for the procedures to be followed by the Commission when promulgating formal and informal rulemakings.[18] Because the APA governs the Commission's rulemaking process, the final rule does not change how the Commission's rulemaking process is conducted. Likewise, the final rule will not have a significant economic impact on how small entities would conduct themselves in the promulgation of the Commission's rules. Part 13, as amended by the final rule will not affect how entities participate in the rulemaking process to submit data, views or arguments. Moreover, the final rule retains the current process for submitting petitions for rulemakings to the Commission. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the final regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') [19] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information. This final rule does not contain any new collection of information requirements within the meaning of the PRA. Accordingly, the requirements imposed by the PRA are not applicable to this rule.

C. Cost-Benefit Considerations

Section 15(a) of the CEA [20] requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of the futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

As discussed above, the final rule removes redundant and potentially confusing provisions. The final rule is a procedural rule that does not make any substantive change to the Commission rulemaking process. By simplifying the rules setting forth the procedures to be followed in rulemaking proceedings, the Commission eliminates any confusion about the rulemaking procedures that apply, and thus makes them more efficient and understandable to the public and market participants. Further, the final rule does not impose costs on the public since the amendments being finalized do not alter how the public participates in the rulemaking process to submit data, views or arguments.

Because the APA governs the Commission's rulemaking process, the changes to part 13 do not affect the protection of market participants and the public as they will continue to enjoy the ability to petition for rulemaking and otherwise participate in the Commission's rulemaking process. Further, as a procedural rule, the final rule will not impact the efficiency, competitiveness, and financial integrity of the futures markets, price discovery, or sound risk management practices. Finally, it is in the public interest to make the Commission's rulemaking procedures more efficient and understandable to the public and market participants.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the CEA, in issuing any order or adopting any Commission rule or regulation. The Commission has determined that the final amendments to part 13 have no anticompetitive effects. As the Commission stated in the NPRM, the final rule simply updates part 13 to remove unnecessary and potentially confusing provisions and makes technical changes. The final rule is procedural rule that will not cause a change in behavior that would alter the level playing fields of regulated entities.

List of Subjects in 17 CFR Part 13

Administrative practice and procedure, Rulemaking procedures.

For the reasons stated in the preamble, the Commodity Futures Trading Commission revises 17 CFR part 13 to read as follows:

PART 13—PROCEDURES FOR PETITIONS FOR RULEMAKING

Sec.
13.1 Petition for issuance, amendment, or repeal of a rule.
13.2 [Reserved]

Authority: 7 U.S.C. 2(a)(12).

§ 13.1 Petition for issuance, amendment, or repeal of a rule.

Any person may file a petition with the Secretariat of the Commission, by mail or electronically through the Commission website, for the issuance, amendment or repeal of a rule of general application. The petition shall be directed to Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581, and shall set forth the text of any final rule or amendment or shall specify the rule the repeal of which is sought. The petition shall further state the nature of the petitioner's interest and may state arguments in support of the issuance, amendment or repeal of the rule. The Secretariat shall acknowledge receipt of the petition, refer it to the Commission for such action as the Commission deems appropriate, and notify the petitioner of the action taken by the Commission. Except in affirming a prior denial or when the denial is self-explanatory, notice of a denial in whole or in part of a petition shall be accompanied by a brief statement of the grounds of denial.

§ 13.2 [Reserved]

Issued in Washington, DC, on December 11, 2019, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Public Rulemaking Procedures—Commission Voting Summary and Commissioner's Statement

Appendix 1—Commission Voting Summary

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

[17] 5 U.S.C. 601 *et seq.*

[18] *See* 5 U.S.C. 551 *et seq.;* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

[19] 5 U.S.C. 3501 *et seq.*

[20] 7 U.S.C. 19(a).

Appendix 2—Statement of Commissioner Dan M. Berkovitz

I support the final rule to eliminate the obsolete provisions in part 13 of the Commission's regulations that specify procedures for Commission rulemakings. Part 13, adopted by the Commission more than 40 years ago, does not conform fully to the rulemaking procedures required by the Administrative Procedure Act (''APA'') and followed today by the Commission. The repeal of these procedures will avoid potential confusion regarding the Commission's rulemaking process.

Notice and comment rulemaking pursuant to the APA relies on a transparent process and an informed public that is able to participate in agency rulemakings. In conjunction with today's final rule, the Commission is posting on its website a plain-English summary of its rulemaking process.

I am particularly pleased to see that in response to public comments, the preamble to the final rule affirms the Commission's commitment to transparency during the rulemaking process.[1] Specifically, the Commission affirms its policy to post on its website notice of all ex parte meetings held on proposed rules, as well as any significant material information received in such communications. I strongly support these policies, which promote transparency, and aid the public's understanding of, and participation in, the Commission's rulemakings.

In addition, the final rule also preserves the public's right to petition the Commission for the issuance, amendment, or repeal of a rule. It incorporates comments received in response to the proposed rule by allowing for the electronic submission of such petitions through the Commission's website. The preamble to the final rule also establishes a Commission policy of posting petitions for rulemaking on the Commission's website. Each of these measures is a valuable addition to the transparency and accessibility that the public deserves when interacting with the Commission.

[FR Doc. 2019–27103 Filed 12–16–19; 8:45 am]

BILLING CODE 6351–01–P

[1] *See* Letter from Better Markets to CFTC, Re: Public Comment on Public Rulemaking Procedures (RIN Number 3038–AE90), October 21, 2019.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9887]

RIN 1545–BN76

Dividend Equivalents From Sources Within the United States

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to certain financial products providing for payments that are contingent upon or determined by reference to U.S. source dividend payments.

DATES:

Effective date: These regulations are effective on December 17, 2019.

Applicability dates: For dates of applicability, see § 1.871–15(r).

FOR FURTHER INFORMATION CONTACT: D. Peter Merkel or Karen Walny at (202) 317–6938 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations under § 1.871–15 defining the term broker for purposes of section 871(m) of the Internal Revenue Code (the Code). In addition, the final regulations provide guidance relating to when the delta of an option that is listed on a foreign regulated exchange may be calculated based on the delta of that option at the close of business on the business day before the date of issuance. The final regulations also provide guidance identifying which party to a potential section 871(m) transaction is responsible for determining whether a transaction is a section 871(m) transaction when multiple brokers or dealers are involved in the transaction. Finally, this document withdraws temporary regulations under § 1.871–15T regarding these matters.

I. Background on Section 871(m) Regulations

On January 23, 2012, the **Federal Register** published temporary regulations (TD 9572) at 77 FR 3108 (2012 temporary regulations), and a notice of proposed rulemaking by cross-reference to the temporary regulations and notice of public hearing at 77 FR 3202 (2012 proposed regulations, and together with the 2012 temporary regulations, 2012 section 871(m) regulations) under section 871(m). The 2012 section 871(m) regulations related to dividend equivalents from sources within the United States paid to nonresident alien individuals and foreign corporations. Corrections to the 2012 temporary regulations were published on February 6, 2012, March 8, 2012, and August 31, 2012, in the **Federal Register** at 77 FR 5700, 77 FR 13968, and 77 FR 53141, respectively. The Department of the Treasury (Treasury Department) and the IRS received written comments on the 2012 proposed regulations, and a public hearing was held on April 27, 2012.

On December 5, 2013, the **Federal Register** published final regulations and removal of temporary regulations (TD 9648) at 78 FR 73079 (2013 final regulations), which finalized a portion of the 2012 section 871(m) regulations. On the same date, the **Federal Register** published a withdrawal of notice of proposed rulemaking, a notice of proposed rulemaking, and a notice of public hearing at 78 FR 73128 (2013 proposed regulations). In light of comments on the 2012 proposed regulations, the 2013 proposed regulations described a new approach for determining whether a payment made pursuant to a notional principal contract (NPC) or an equity-linked instrument (ELI) is a dividend equivalent based on the delta of the contract. In response to written comments on the 2013 proposed regulations, the Treasury Department and the IRS released Notice 2014–14, 2014–13 IRB 881, on March 24, 2014 (see § 601.601(d)(2)(ii)(*b*)), stating that the Treasury Department and the IRS anticipated limiting the application of the rules with respect to specified ELIs described in the 2013 proposed regulations to ELIs issued on or after 90 days after the date of publication of final regulations.

On September 18, 2015, the **Federal Register** published final regulations and temporary regulations (TD 9734), at 80 FR 56866, which finalized a portion of the 2013 proposed regulations and introduced new temporary regulations based on comments received with respect to the 2013 proposed regulations (2015 final regulations and 2015 temporary regulations, respectively, and together, the 2015 regulations). On the same date, the **Federal Register** published a notice of proposed rulemaking by cross-reference to temporary regulations and a notice of public hearing at 80 FR 56415 (2015 proposed regulations, and together with the 2015 final regulations, 2015 section 871(m) regulations). A correcting amendment to the 2015 final regulations and the 2015 proposed regulations was published on December 7, 2015, in the **Federal Register** at 80 FR 75946 and 80 FR 75956, respectively.

The Treasury Department and the IRS received written comments on the 2015 proposed regulations. The public hearing scheduled for January 15, 2016, was cancelled because no request to speak was received.

On July 1, 2016, the Treasury Department and the IRS released Notice 2016–42, 2016–29 IRB 67 (QI Notice), containing a proposed amended qualified intermediary agreement. The QI Notice included the requirements and obligations applicable to a QI that acts as a qualified derivatives dealer (QDD). The Treasury Department and the IRS received written comments on Notice 2016–42, which included comments on certain aspects of section 871(m) and QDDs. On December 30, 2016, the Treasury Department and the IRS released Revenue Procedure 2017–15, 2017–3 IRB 437 (2017 QI Agreement), which contains the final QI withholding agreement and the requirements and obligations applicable to QDDs.

On December 2, 2016, the Treasury Department and the IRS released Notice 2016–76, 2016–51 IRB 834, providing guidance for complying with the final and temporary regulations under sections 871(m), 1441, 1461, and 1473 in 2017 and 2018 and explaining how the IRS intends to administer those regulations in 2017 and 2018.

On January 24, 2017, the **Federal Register** published final and temporary regulations (TD 9815) at 82 FR 8144 (2017 final regulations and 2017 temporary regulations, respectively, and together, the 2017 regulations), which generally adopted the 2015 proposed regulations with certain changes. The 2017 regulations also included several technical amendments to the 2015 final regulations in response to comments on those regulations. Finally, the 2017 temporary regulations were based on comments received with respect to the 2015 proposed regulations. A notice of proposed rulemaking cross-referencing the 2017 temporary regulations was published in the **Federal Register** on January 24, 2017 (82 FR 8172), with correcting amendments published in the **Federal Register** on October 26, 2017 (82 FR 49508) (together, the 2017 proposed regulations). No public hearing was requested or held. On August 21, 2017, the Treasury Department and the IRS published Notice 2017–42, 2017–34 IRB 212, which extended certain transition relief with respect to certain portions of the 2017 final regulations.

On February 5, 2018, the Treasury Department and the IRS published Notice 2018–5, 2018–6 IRB 341, which permits withholding agents to apply the transition rules for securities loans to which section 871(m) applies from Notice 2010–46, 2010–24 IRB 757, in 2018 and 2019.

On September 20, 2018, the Treasury Department and the IRS published Notice 2018–72, 2018–40 IRB 522, which further extended certain transition relief and permitted withholding agents to apply the transition rules from Notice 2010–46 in 2020.

All written comments received in response to the 2012 proposed regulations, 2013 proposed regulations, 2015 proposed regulations, and 2017 proposed regulations are available at *www.regulations.gov* or upon request.

This Treasury decision finalizes the 2017 proposed regulations without any substantive change.

II. Executive Order 13789

Executive Order 13789 (82 FR 19317), issued on April 21, 2017, instructs the Secretary of the Treasury (the Secretary) to review all significant tax regulations issued on or after January 1, 2016, and to take concrete action to alleviate the burdens of regulations that (i) impose an undue financial burden on U.S. taxpayers; (ii) add undue complexity to the Federal tax laws; or (iii) exceed the statutory authority of the IRS. Executive Order 13789 further instructs the Secretary to submit to the President within 60 days an interim report that identifies regulations that meet these criteria. Notice 2017–38, 2017–30 I.R.B. 147, which was published on July 24, 2017, did not include regulations under section 871(m) in a list of eight regulations identified by the Secretary in the interim report as meeting at least one of the first two criteria specified in E.O. 13789 (no regulations were identified as meeting the third criterion).

E.O. 13789 further instructs the Secretary to submit to the President by September 18, 2017, a final report that recommends specific actions to mitigate the burden imposed by regulations identified in the interim report. On October 16, 2017, the Secretary published in the **Federal Register** that final report (82 FR 48013), which indicated, among other things, that the Treasury Department continues to analyze all recently issued significant regulations and is considering possible reforms of several recent regulations not identified in the earlier report, including the regulations under section 871(m).

Summary of Comments and Explanation of Provisions

The Treasury Department and the IRS received one comment regarding the 2017 proposed regulations. After consideration of the comment, the 2017 proposed regulations are adopted as final regulations without any substantive change. In addition, the regulations under § 1.871–15T are withdrawn. Comments on the section 871(m) regulations that were not specific to § 1.871–15T are beyond the scope of this rulemaking and are not addressed in this preamble.

The Treasury Department and the IRS are continuing to study and consider possible reforms to the other provisions of the section 871(m) regulations pursuant to E.O. 13789 that are not specifically addressed by this Treasury decision, including comments received that relate to those rules. The Treasury Department and the IRS will consider these comments in connection with any future guidance projects addressing the issues discussed in the comments.

I. Delta Calculation for Listed Options

Generally, section 1.871–15(g)(2) provides the delta of a potential section 871(m) transaction is calculated on the earlier of when the contract is priced and when the contract is issued. *See* § 1.871–15(a)(6) (providing that a contract is issued at the inception, original issuance, or issuance as a result of a deemed exchange pursuant to section 1001). With respect to options listed on a regulated exchange, § 1.871–15(g)(4)(i) provided that the delta for those options is determined based on the delta of the option at the close of business on the business day before the date of issuance. Section 1.871–15(g)(4)(ii)(A) defines a regulated exchange as any exchange defined in § 1.871–15(l)(3)(vii). The 2017 temporary regulations and the 2017 proposed regulations provide that the term regulated exchange also includes a foreign exchange that (A) is regulated by a government agency in the jurisdiction in which the market is located, (B) maintains certain requirements designed to protect investors and to prevent fraud and manipulation, (C) maintains rules to promote active trading of listed options, and (D) had trades for which the average trading volume exceeded $10 billion per day during the prior calendar year (the ''$10 billion threshold''). *See* § 1.871–15T(g)(4)(ii)(B). When a foreign securities exchange has more than one tier or market level on which listed options may be separately listed, the 2017 temporary regulations and the 2017 proposed regulations treat each tier or market level of the exchange as a separate exchange. *See* § 1.871–15T(g)(4)(ii)(B)(*4*).

A comment expressed concern that the $10 billion threshold would exclude from the definition of a regulated exchange many European exchanges that are treated as regulated markets by the European Securities and Markets Authorities (''ESMA'') for purposes of the Markets in Financial Instruments Directive 2004/39/EC. The comment requested that the final regulations eliminate the $10 billion threshold. Instead, the comment recommended that a foreign regulated exchange be defined to include an exchange treated as a regulated market by ESMA or a similar national authority and included in the respective ESMA register or similar national register (the ''ESMA requirement'').

The $10 billion threshold is intended to ensure that the exchange has a sufficient level of trading activity so that the pricing cannot be manipulated. The Treasury Department and the IRS have determined that the $10 billion threshold continues to serve this purpose. In addition, the ESMA requirement requested by the comment appears duplicative of § 1.871–15T(g)(4)(ii)(B)(*1*), which requires a foreign securities exchange to be regulated or supervised by a governmental authority of the country in which the market is located, because the ESMA register is compiled on the basis of notifications made to ESMA by the national competent authorities of member states. Further, a foreign exchange that does not qualify under § 1.871–15T(g)(4)(ii)(B) can qualify under § 1.871–15(g)(4)(ii)(A) if the option exchange is a qualified board or exchange as determined by the Secretary pursuant to section 1256(g)(7)(C) or has a staff no action letter from the CFTC permitting direct access from the United States. Therefore, the Treasury Department and the IRS have determined that it is not appropriate to remove the requirement. However, consistent with the preamble to the 2017 regulations, the Treasury Department and the IRS have clarified that the $10 billion threshold is determined based on the notional amount of the options, which is the number of shares referenced by the option multiplied by the stock price of those shares at the time of the computation. *See* § 1.871–15(g)(4)(ii)(B)(*1*)(*iv*).

The Treasury Department and the IRS, however, will continue to study this comment regarding the $10 billion threshold in connection with future guidance projects related to E.O. 13789. The Treasury Department and the IRS request comments regarding whether an alternative trading threshold for U.S. equity options would ensure that there is sufficient trading on the exchange to prevent price manipulation. For example, instead of establishing a threshold based on the average daily trading volume for an exchange as a whole, an alternative threshold may be based on only the average daily trading volume of equity options on the exchange or only the average daily trading volume of equity options for a specific stock or stock index on the exchange. Comments recommending an alternative threshold should include information supporting the suggestion, including information regarding the average daily trading volumes for the exchange with respect to equity options separated out by exchange (and stock or stock index, if applicable).

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.

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control numbers 1545–0096 and 1545–1597. The collection of information in these regulations is in § 1.871–15(p). There is no change to the total annual burden in the current regulations under §§ 1.1441–1 through 1.1441–9 as a result of these final regulations. Without these final regulations, however, the total annual burden in the current regulations under § 1.1441–1 through 1.1441–9 would increase because more than one taxpayer could be treated as a responsible party and be required to collect information regarding potential section 871(m) transactions.

The information is required to establish whether a payment is treated as a U.S. source dividend for purposes of section 871(m). This information will be used for audit and examination purposes. The IRS intends that these information collection requirements will be satisfied by persons complying with chapter 3 reporting requirements and the requirements of the applicable qualified intermediary (QI) revenue procedure, or alternative certification and documentation requirements set out in these regulations. 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.

The estimates for the number of impacted filers with respect to the collections of information described in this part II of the Special Analysis section are based on the distinct U.S. withholding agents who filed a form 1042–S reporting income code 34 (substitute payments—dividends) or income code 40 (Other dividend equivalents under IRS section 871(m) (formerly 871(l)) for calendar year 2017. The estimates for the number of impacted filers are also based on the number of U.S. withholding agents who filed a form 1042 and checked the box in section 3, indicating that the withholding agent made payments related to a potential section 871(m) transaction, for calendar year 2018. The IRS estimates the number of affected filers to be the following:

TAX FORMS IMPACTED

Collection of information	Number of respondents (estimated)	Number of filings (estimated)	Forms to which the information may be attached
§ 1.871–15(p)(ii) Transactions with multiple brokers	1,500	51,000	Form 1042, Form 1042–S, and Form 1042–T.
§ 1.871–15(p)(iii) Responsible party for transactions traded on an exchange and cleared by a clearing organization.	1,500	51,000	Form 1042, Form 1042–S, and Form 1042–T.
§ 1.871–15(p)(iv) Responsible party for certain structured notes, warrants, and convertible instruments.	1,500	51,000	Form 1042, Form 1042-s, and Form 1042–T.

The IRS does not have a reliable way of estimating the number of filings that will not need to be made as a result of these final regulations.

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 primarily will affect multinational financial institutions, which tend to be larger businesses, and foreign persons. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Pursuant to section 7805(f), the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses. No comments were received.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 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.

Statement of Availability of IRS Documents

IRS 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*.

Drafting Information

The principal authors of these final regulations are D. Peter Merkel and Karen Walny of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of 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 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

§ 1.871–15T [Removed]

■ **Par. 2.** Section 1.871–15T is removed.

■ **Par. 3.** Section 1.871–15 is amended by:

■ 1. Revising paragraphs (a)(1), (g)(4)(ii)(B), (p)(1)(ii) through (iv), and (p)(5);

■ 2. Removing the language ''(r)(2), (3), and (4)'' from paragraph (r)(1) and adding ''(r)(2) and (3)'' in its place; and

■ 3. Removing paragraph (r)(4).

The revisions read as follows:

§ 1.871–15 Treatment of dividend equivalents.

(a) * * *

(1) *Broker.* A *broker* is a broker within the meaning provided in section 6045(c), except that the term does not include any corporation that is a broker solely because it regularly redeems its own shares.

* * * * *

(g) * * *

(4) * * *

(ii) * * *

(B) *Foreign securities exchange*—(*1*) *In general.* A foreign securities exchange that:

(*i*) Is regulated or supervised by a governmental authority of the country in which the market is located;

(*ii*) Has trading volume, listing, financial disclosure, surveillance, and other requirements designed to prevent fraudulent and manipulative acts and practices, to remove impediments to and perfect the mechanism of a free and open, fair and orderly market, and to protect investors, and the laws of the country in which the exchange is located and the rules of the exchange ensure that those requirements are actually enforced;

(*iii*) Has rules that effectively promote active trading of listed options on the exchange; and

(*iv*) Has an average daily trading volume on the exchange exceeding $10 billion notional amount during the immediately preceding calendar year.

(*2*) *Application to an exchange with more than one tier or market.* If an exchange in a foreign country has more than one tier or market level on which listed options may be separately listed or traded, each tier or market level is treated as a separate exchange.

* * * * *

(p) * * *

(1) * * *

(ii) *Transactions with multiple brokers.* For a potential section 871(m) transaction in which both the short party and an agent or intermediary acting on behalf of the short party are a broker or dealer, the short party must determine whether the potential section 871(m) transaction is a section 871(m) transaction. For a potential section 871(m) transaction in which the short party is not a broker or dealer and more than one agent or intermediary acting on behalf of the short party is a broker or dealer, the broker or dealer that is a party to the transaction and closest to the short party in the payment chain must determine whether the potential section 871(m) transaction is a section 871(m) transaction. For a potential section 871(m) transaction in which neither the short party nor any agent or intermediary acting on behalf of the short party is a broker or dealer, and the long party and an agent or intermediary acting on behalf of the long party are a broker or dealer, or more than one agent or intermediary acting on behalf of the long party is a broker or dealer, the broker or dealer that is a party to the transaction and closest to the long party in the payment chain must determine whether the potential section 871(m) transaction is a section 871(m) transaction.

(iii) *Responsible party for transactions traded on an exchange and cleared by a clearing organization.* Except as provided in paragraph (p)(1)(iv) of this section, for a potential section 871(m) transaction that is traded on an exchange and cleared by a clearing organization, and for which more than one broker-dealer acts as an agent or intermediary between the short party and a foreign payee, the broker or dealer that has an ongoing customer relationship with the foreign payee with respect to that transaction (generally the clearing firm) must determine whether the potential section 871(m) transaction is a section 871(m) transaction.

(iv) *Responsible party for certain structured notes, warrants, and convertible instruments.* When a potential section 871(m) transaction is a structured note, warrant, convertible stock, or convertible debt, the issuer is the party responsible for determining whether a potential section 871(m) transaction is a section 871(m) transaction.

* * * * *

(5) *Example.* The following example illustrates the rules of paragraph (p) of this section.

(i) *Example 1: Responsible party for a transaction with multiple broker-dealers.* (A) *Facts.* CO is a domestic clearing organization and is not a broker as defined in paragraph (a)(1) of this section. CO serves as a central counterparty clearing and settlement service provider for derivatives exchanges in the United States. EB and CB are brokers organized in the United States and members of CO. FC, a foreign corporation, instructs EB to execute the purchase of a call option that is a specified ELI (as described in paragraph (e) of this section). EB effects the trade for FC on the exchange and then, as instructed by FC, transfers the option to CB to be cleared with CO. The exchange matches FC's order with an order for a written call option with the same terms and then sends the matched trade to CO, which clears the trade. CB and the clearing member representing the person who sold the call option settle the trade with CO. Upon receiving the matched trade, the option contracts are novated and CO becomes the counterparty to CB and the counterparty to the clearing member representing the person who sold the call option.

(B) *Analysis.* Both EB and CB are broker-dealers acting on behalf of FC for a potential section 871(m) transaction. Under paragraph (p)(1)(iii) of this section, however, only CB is required to make the determinations described in paragraph (p) of this section because CB has the ongoing customer relationship with FC with respect to the call option.

(ii) [Reserved]

* * * * *

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: November 14, 2019.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2019–26977 Filed 12–16–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Walking-Working Surfaces, Personal Protective Equipment (Fall Protection Systems), and Special Industries (Electric Power Generation, Transmission, and Distribution); Corrections

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule; corrections to standards.

SUMMARY: OSHA is issuing corrections to the Walking-Working Surfaces, Personal Protective Equipment, and Special Industries standards.

DATES: The effective date for the corrections to the standards is December 17, 2019.

FOR FURTHER INFORMATION CONTACT:

Press inquiries: Frank Meilinger, Director, OSHA Office of Communications; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Mark Hagemann, Director, Office of Safety Systems, OSHA Directorate of Standards and Guidance; telephone: (202) 693–2222; email: *hagemann.mark@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary and Explanation

Ladders (§ 1910.23)

Current § 1910.23(d)(4) requires employers to ensure that the side rails of through or side-step ladders extend 42 inches above the top of the access level or landing platform served by the ladder. As stated in the preamble to the final rule, the agency intended workers to have sufficient handholds ''at least 42 inches'' above the highest level on which they will step when reaching the access level (81 FR 82494, 82542). OSHA is correcting this error by revising § 1910.23(d)(4) to state that 42 inches is the minimum—not the exact—measurement for fixed ladder side rail extensions.

Stairways (§ 1910.25)

Current § 1910.25(a) sets forth the types of stairways covered under this section. These include all stairways except for stairs serving floating roof tanks, stairs on scaffolds, stairs designed into machines or equipment, and stairs on self-propelled motorized equipment. In this correction, OSHA is clarifying that articulated stairs, which were excluded from coverage by the rule adopted in 1971 (36 FR 10474), as well as by the rule proposed in 1990 (55 FR 13360, 13363), are not covered by the current standard. In the 2010 proposed rule and the 2016 final rule, OSHA referred to these stairs as ''stairs serving floating roof tanks'' but did not call them ''articulated stairs.'' (75 FR 28862, 28882; 81 FR at 82555). OSHA is now clarifying that all articulated stairs used in general industry, not just those serving floating roof tanks, remain excluded from coverage by § 1910.25. By not including this exception, the standard would require all articulated stairs that do not serve floating roof tanks, including those that were previously excluded, to meet the requirements set forth in § 1910.25. OSHA did not intend for any types of articulated stairs to be covered by the standard.

The figure at 29 CFR 1910.25(c) immediately after Table D–1 does not have a title even though it is referred to as Figure D–8 in § 1910.25(c)(4). The title of the figure was included in the proposed rule (75 FR at 29137) but mistakenly left out of the final rule (81 FR at 82989). This document adds the missing title to the figure: ''Figure D–8—Dimensions of Standard Stairs''.

Scaffolds and Rope Descent Systems (§ 1910.27)

In paragraph (b)(1)(i) of § 1910.27, OSHA is correcting a typographical error in the metric parenthetical for 5,000 pounds. The parenthetical currently states the metric equivalent to 5,000 pounds is 268 kg. The correct metric equivalent is 2,268 kg.

Fall Protection Systems and Falling Object Protection—Criteria and Practices (§ 1910.29)

OSHA is correcting Figure D–11 to include labels identifying the top rail and end post in the top diagram of the figure. The words ''top rail'' and ''end post'' were mistakenly omitted when the final rule was published in the **Federal Register** (81 FR at 82995).

Personal Fall Protection Systems (§ 1910.140)

Current § 1910.140(c)(8) requires D-rings, snaphooks, and carabiners to be proof tested to a minimum tensile load of 3,600 pounds without cracking, breaking, or incurring permanent deformation. The provision also requires the gate strength of snaphooks and carabiners to be proof tested to 3,600 pounds in all directions. In the November 18, 2016, final rule (81 FR at 82653), OSHA intended to be consistent with the ANSI/ASSE Z359.12–2009 consensus standard, *Connecting*

Components for Personal Fall Arrest Systems. That consensus standard requires snaphooks, carabiners, and D-rings (and other hardware) to be proof tested to 3,600 pounds (ANSI/ASSE Z359.12–2009, section 3.1.1.6) and requires the gate of snaphooks and carabiners to be capable of withstanding a minimum load of 3,600 pounds without the gate separating from the nose of the snaphook or carabiner body by more than 0.125 inches (ANSI/ASSE Z359.12–2009, section 3.1.1.3). OSHA correctly added the first requirement to the 2016 final rule—namely the requirement that snaphooks, carabiners, and D-rings be proof tested to 3,600 pounds. When it came to the gate strength requirement, OSHA mistakenly added the requirement that the gate strength of snaphooks and carabiners be proof tested to 3,600 pounds in all directions instead of adding the intended requirement that the gate of snaphooks and carabiners be *capable* of withstanding a minimum load of 3,600 pounds without the gate separating from the nose of the snaphook or carabiner body by more than 0.125 inches. It should also be noted that proof testing of the gates of snaphooks and carabiners could be destructive to the equipment, rendering them unsafe for workers in the field. In this document, OSHA is correcting the gate strength provision to be consistent with the national consensus standard, as originally intended, and as stated in letters of interpretation to the National Association of Tower Erectors (NATE) (see response to question 5 here: *https://www.osha.gov/laws-regs/standard interpretations/2017-08-18*) and the International Safety Equipment Association (ISEA) (see response to question 1 here: *https://www.osha.gov/laws-regs/standardinterpretations/2017-08-31*).

Electric Power Generation, Transmission, and Distribution (§ 1910.269)

Section 1910.269(h)(2) contains references to ladder standards (§§ 1910.25(d)(2)(i) and (iii) and 1910.26(c)(3)(iii)) that are not the correct references. OSHA is revising § 1910.269(h)(2) by replacing the incorrect references with the correct references, which are § 1910.23(c)(4) and (9).

II. Exemption From Notice-and-Comment Procedures

OSHA determined that this rulemaking is not subject to the procedures for public notice and comment specified in Section 4 of the Administrative Procedures Act (5 U.S.C. 553), Section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)), and 29 CFR 1911.5. This rulemaking only corrects typographical, formatting, and clerical errors, and provides more information about the requirements of some provisions. As it does not affect or change any existing rights or obligations, no stakeholder is likely to object to these corrections. Therefore, the agency finds good cause that public notice and comment are unnecessary within the meaning of 5 U.S.C. 553(b)(3)(B), 29 U.S.C. 655(b), and 29 CFR 1911.5.

List of Subjects in 29 CFR Part 1910

Special industries, Walking-working surfaces.

Authority and Signature

This document was prepared under the direction of Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health. This action is taken pursuant to 29 U.S.C. 653, 655, 657; Secretary of Labor's Order 1–2012 (77 FR 3912 (1/25/2012)), and 29 CFR part 1911.

Signed at Washington, DC.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

Final Regulatory Text

For the reasons set forth in the preamble, OSHA amends part 1910 of title 29 of the Code of Federal Regulations as follows:

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

Subpart D—Walking-Working Surfaces

■ 1. The authority citation for part 1910, subpart D, continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), and 1–2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

■ 2. Amend § 1910.23 by revising paragraph (d)(4) to read as follows:

§ 1910.23 Ladders.

* * * * *

(d) * * *

(4) The side rails of through or side-step ladders extend at least 42 inches (1.1 m) above the top of the access level or landing platform served by the ladder. For parapet ladders, the access level is:

(i) The roof, if the parapet is cut to permit passage through the parapet; or

(ii) The top of the parapet, if the parapet is continuous;

* * * * *

■ 3. Amend § 1910.25 by revising paragraph (a) and the figure following Table D–1 in paragraph (c)(5) to read as follows:

§ 1910.25 Stairways.

(a) *Application.* This section covers all stairways (including standard, spiral, ship, and alternating tread-type stairs), except for articulated stairs (stairs that change pitch due to change in height at the point of attachment) such as those serving floating roof tanks, stairs on scaffolds, stairs designed into machines or equipment, and stairs on self-propelled motorized equipment.

* * * * *

(c) * * *

(5) * * *

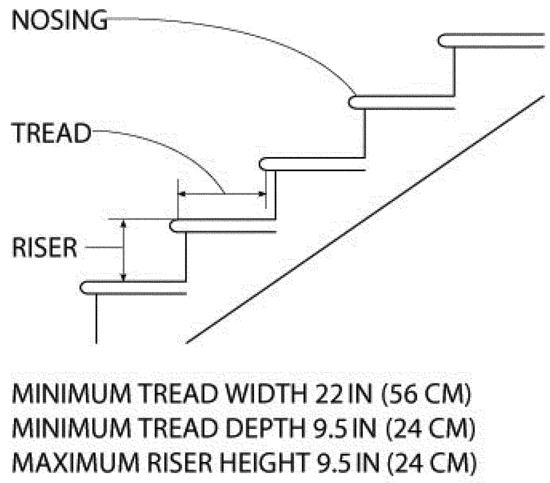

Figure D-8 – Dimensions of Standard Stairs

■ 4. Amend § 1910.27 by revising paragraph (b)(1)(i) to read as follows:

§ 1910.27 Scaffolds and rope descent systems.

* * * * *

(b) * * *

(1) * * *

(i) Before any rope descent system is used, the building owner must inform the employer, in writing that the building owner has identified, tested, certified, and maintained each anchorage so it is capable of supporting at least 5,000 pounds (2,268 kg), in any direction, for each employee attached. The information must be based on an annual inspection by a qualified person and certification of each anchorage by a qualified person, as necessary, and at least every 10 years.

* * * * *

■ 5. Amend § 1910.29 by revising paragraph (b)(1) and Figure D–11 to read as follows:

§ 1910.29 Fall protection systems and falling object protection—criteria and practices.

* * * * *

(b) * * *

(1) The top edge height of top rails, or equivalent guardrail system members, are 42 inches (107 cm), plus or minus 3 inches (8 cm), above the walking-working surface. The top edge height may exceed 45 inches (114 cm), provided the guardrail system meets all other criteria of paragraph (b) of this section (see Figure D–11 of this section).

* * * * *

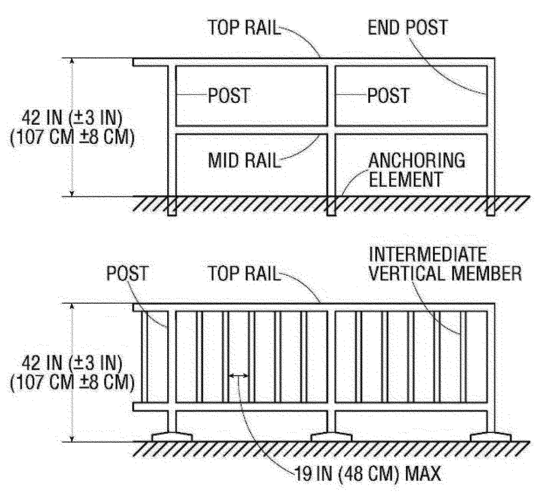

Figure D-11 Guardrail Systems

* * * * *

Subpart I—Personal Protective Equipment

■ 6. The authority citation for part 1910, subpart I, continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), 4–2010 (75 FR 55355), or 1–2012 (77 FR 3912), as applicable, and 29 CFR part 1911.

■ 7. Amend § 1910.140 by revising paragraph (c)(8) to read as follows:

§ 1910.140 Personal fall protection systems.

* * * * *

(c) * * *

(8) D-rings, snaphooks, and carabiners must be proof tested to a minimum tensile load of 3,600 pounds (16 kN) without cracking, breaking, or incurring permanent deformation. The gate strength of snaphooks and carabiners must be capable of withstanding a minimum load of 3,600 pounds (16 kN) without the gate separating from the nose of the snaphook or carabiner body by more than 0.125 inches (3.175 mm).

* * * * *

Subpart R—Special Industries

■ 8. The authority citation for part 1910, subpart R, continues to read as follows:

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 5–2007 (72 FR 31159), 4–2010 (75 FR 55355), or 1–2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

■ 9. Amend § 1910.269 by revising paragraph (h)(2) introductory text to read as follows:

§ 1910.269 Electric power generation, transmission, and distribution.

* * * * *

(h) * * *

(2) *Special ladders and platforms.* Portable ladders used on structures or conductors in conjunction with overhead line work need not meet § 1910.23(c)(4) and (9). Portable ladders and platforms used on structures or conductors in conjunction with overhead line work shall meet the following requirements:

* * * * *

[FR Doc. 2019–27114 Filed 12–16–19; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 151211999–6343–02; RTID 0648–XX021]

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Closure of the Regular B Days-at-Sea Program for the Remainder of Fishing Year 2019

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

ACTION: Temporary rule; inseason closure.

SUMMARY: This action closes the Regular B Days-at-Sea Program and prohibits the use of Regular B Days-at-Sea for all Northeast multispecies vessels for the remainder of fishing year 2019, through April 30, 2020. This action is being taken because the common pool fishery is projected to have caught 77 percent of the Incidental Catch Total Allowable Catch for Gulf of Maine Cod. We have projected that continuation of the program would undermine the achievements of the objectives of the Northeast Multispecies Fishery Management Plan and the Regular B Days-at-Sea Program.

DATES: This action is effective December 16, 2019, through April 30, 2020.

FOR FURTHER INFORMATION CONTACT: Spencer Talmage, Fishery Management Specialist, (978) 281–9232.

SUPPLEMENTARY INFORMATION: Federal regulations at 50 CFR 648.85(b)(6)(vi) authorize the Regional Administrator to close the Regular B Days-at-Sea (DAS) program by prohibiting the use of Regular B DAS when the continuation of the program would undermine the achievement of the objectives of the Northeast Multispecies Fishery Management Plan (FMP) or the Regular B DAS Program.

Framework Adjustment 58 to the Northeast Multispecies FMP (84 FR 34799, July 19, 2019) implemented Common Pool Incidental Catch Total Allowable Catches (TAC) for the Regular B DAS Program for the 2019 and 2020 fishing years, listed in Table 1 below. The Incidental Catch TAC for Gulf of Maine (GOM) Cod is very small, at 242.5 lb (110 kg).

TABLE 1—FISHING YEARS 2019–2020 INCIDENTAL CATCH TACS FOR THE REGULAR B DAS PROGRAM

[mt, live weight]

Stock	2019	2020
Georges Bank (GB) Cod	0.54 (1,190.5 lb)	0.67 (1477.1 lb)
GOM Cod	0.11 (242.5 lb)	0.11 (242.5 lb)
GB Yellowtail Flounder	0.02 (44.1 lb)	0.04 (88.2 lb)
Cape Cod/GOM Yellowtail Flounder	0.21 (463.0 lb)	0.21 (463.0 lb)
American Plaice	1.57 (3,461.3 lb)	1.46 (3,218.7 lb)
Witch Flounder	1.15 (2,535.3 lb)	1.15 (2,535.3 lb)
Southern New England/Mid-Atlantic Winter Flounder	0.74 (1,631.4 lb)	0.74 (1,631.4 lb)

Based on information reported through October 12, 2019, the common pool fishery is projected to have caught approximately 186 lb (84.4 kg), or 77 percent of the 242.5-lb (110-kg) Incidental Catch Total Allowable Catch (TAC) for GOM cod.

The trip limit for GOM cod for common pool vessels participating in the Regular B DAS Program is 25 lb per trip. At this trip limit, the common pool fishing has only two trips remaining before it achieves the Incidental Catch TAC.

Given the current trip limit, and past fishing behavior, the common pool may achieve or exceed the GOM Cod Incidental Catch TAC in a very short amount of time. Additionally, this may happen sooner if effort in the Regular B DAS Program increases. Even at the current low level of effort in the Regular B DAS Program, we may not be able to close the program in time to prevent the common pool from exceeding the GOM Cod Incidental Catch TAC, which would be detrimental to the fishery.

As a result, it is unlikely that we can effectively limit catch to the GOM Cod Incidental Catch TAC during the remainder of fishing year 2019. We project that continuation of the Regular B DAS program would undermine the achievement of the objectives of the Northeast Multispecies FMP and the Regular B DAS Program. Effective December 16, 2019, the Regular B DAS Program is closed and use of Regular B DAS is prohibited for the remainder of the 2019 fishing year, through April 30, 2020. This applies to all vessels issued a limited access Northeast multispecies permit.

If a vessel declared its trip under a Regular B DAS through the Vessel Monitoring System (VMS) or the interactive voice response system, and crossed the VMS demarcation line prior to December 16, 2019, it may complete its trip.

Weekly quota monitoring reports for the Northeast Multispecies fishery are on our website at: *https://www.greateratlantic.fisheries.noaa.gov/ro/fso/reports/h/nemultispecies.html.* We will continue to monitor catch through vessel trip reports, dealer-reported landings, VMS catch reports, and other available information and, if necessary, we will make additional adjustments to common pool management measures.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA, finds good cause pursuant to 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3) to waive prior notice and the opportunity for public comment and the 30-day delayed effectiveness period because it would be impracticable and contrary to the public interest.

The regulations authorize the Regional Administrator to close the Regular B DAS Program when the continuation of the program would undermine the achievement of the objectives of the Northeast Multispecies Fishery Management Plan (FMP) or the Regular B DAS Program. The public had prior notice and opportunity to comment on these regulations and the potential for in-season closures. Updated catch information only recently became available indicating that the common pool fishery is projected to have caught 77 percent of the Incidental Catch TAC for GOM cod as of October 12, 2019. This action prevents or limits the overage of the Incidental Catch TAC for this stock. A delay in effectiveness would provide vessel owners an opportunity to continue to participate in the Regular B DAS Program, but any additional participation and catch in the program could cause the allocation to be exceeded. The time necessary to provide for prior notice and comment, and a 30-day delay in effectiveness, would prevent NMFS from implementing the Regular B DAS program closure in a timely manner, contrary to the purpose of the regulations. This could undermine conservation objectives of the Northeast Multispecies Fishery Management Plan and Regular B DAS Program, and cause negative economic impacts to the Northeast multispecies fishery.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 12, 2019.

Alan D. Risenhoover,

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

[FR Doc. 2019–27131 Filed 12–16–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 191212–0110]

RIN 0648–BJ45

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Essential Fish Habitat

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

ACTION: Final rule.

SUMMARY: This implements the prohibition of gillnet fishing in the Nantucket Lightship and Closed Area I Closure Areas as ordered by a Federal Court. Until further notice, gillnet fishing will be prohibited in the Nantucket Lightship and Closed Area I Groundfish Closure Areas.

DATES: Effective on December 17, 2019.

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Senior Fishery Program Specialist, Greater Atlantic Regional Fisheries Office, *Moira.Kelly@noaa.gov,* (978) 281–9218.

SUPPLEMENTARY INFORMATION: On January 3, 2018, NOAA's National Marine Fisheries Service (NMFS) partially approved the New England Fishery Management Council's Omnibus Essential Fish Habitat Amendment 2. The Omnibus Amendment updated essential fish habitat designations for all Council-managed species and implemented changes to the spatial management of Council-managed fisheries throughout the Gulf of Maine, Georges Bank, and Southern New England. On April 9, 2018, a final rule implemented the approved measures (83 FR 15240). The final rule opened, modified, and maintained various closed areas, as well as established new closures to implement approved measures of the Amendment. The Nantucket Lightship and Closed Area I Groundfish Closure Areas were opened to fishing by gears capable of catching groundfish, including gillnets and bottom-trawls, throughout the areas in this final rule. (Note, scallop fishing was still prohibited in these areas for a brief time after the Amendment was in effect, pending a subsequent scallop action that incorporated the newly opened areas into the Scallop Fishery Management Plan's rotational management program.) Directed groundfish fishing had been prohibited in these general areas consistently since the 1980s and early 1990s.

The Conservation Law Foundation filed suit against NMFS arguing that the opening of the Nantucket Lightship and Closed Area I Groundfish Closure Areas to gears capable of catching groundfish, including gillnet gear, was not done in compliance with the Endangered Species Act consultation requirements as it pertains to North Atlantic right whales.

On October 28, 2019, Federal District Court Judge James E. Boasberg (see *Conservation Law Found.* v. *Ross, No. CV 18–1087 (JEB), 2019 WL 5549814 (D.D.C. Oct. 28, 2019)*) enjoined NMFS from allowing gillnet fishing in those previously closed areas until it fully complies with the requirements of the Endangered Species Act and the Magnuson-Stevens Fishery Conservation and Management Act.

To comply with this Order, this rule suspends the Amendment's opening of the Nantucket Lightship and Closed Area I Groundfish Closures to gillnet fishing and restores prior regulations that prohibit gillnet gear from fishing in these areas until further notice, which will be provided consistent with the Administrative Procedure Act.

Classification

The NMFS Assistant Administrator has determined that under section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act, these regulations are necessary to discharge the Secretary's responsibility to ensure the Omnibus Habitat Amendment complies with the provisions of the Act and other applicable law, consistent with the Court's Order.

NMFS has good cause under the Administrative Procedure Act (5 U.S.C. 553(b)(B)) to waive prior notice and comment for this final rule. The Court Order requires NMFS to prohibit gillnet fishing in the areas. Delaying this rule to allow time for notice and comment would be contrary to the Court's Order.

Because NMFS has no discretion to revise and implement the gillnet restrictions under the Court Order, no meaningful purpose will be served by public comment, and so providing prior notice and comment of this rule would be impracticable and contrary to public interest. The NMFS Assistant Administrator also finds that there is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delayed effective date requirement. In addition to the reasons above, on November 1, 2019, NMFS notified all vessels that had fished with gillnets in the area since the opening (11 vessels), as well as any vessel issued permits for which gillnet is a common gear (groundfish, monkfish, skate, and spiny dogfish), that all gillnet gear needed to be removed from the areas as soon as it was safe to do so in order to facilitate compliance with the Court's Order. This advance notice provided time for gillnet vessels to remove their gear in a safe manner. Therefore, additional time is not necessary for vessel operators to comply with the forthcoming regulations.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 12, 2019.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 648.81, add paragraph (a)(6) to read as follows:

§ 648.81 NE multispecies year-round and seasonal closed areas.

(a) * * *

(6) *Gillnet Closure Areas.* No fishing vessel using gillnet gear or person on a fishing vessel using gillnet gear may enter, fish, or be in the Closed Area I and Nantucket Lightship Closure Areas. Charts of the areas described in this section are available from the Regional Administrator upon request.

(i) *Closed Area I Closure Area.* The Closed Area I Closure Area is defined by straight lines, unless otherwise noted, connecting the following points in the order stated:

TABLE 4 TO PARAGRAPH (a)(6)(i)—CLOSED AREA I

Point	N lat.	W long.
CI1	41°30′	69°23′
CI2	40°45′	68°45′
CI3	40°45′	68°30′
CI4	41°30′	68°30′
CI1	41°30′	69°23′

(ii) *Nantucket Lightship Closure Area.* The Nantucket Lightship Closure Area is defined by straight lines, unless otherwise noted, connecting the following points in the order stated:

TABLE 5 TO PARAGRAPH (a)(6)(ii)—NANTUCKET LIGHTSHIP CLOSED AREA

Point	N lat.	W long.
G10	40°50′	69°00′
CN1	40°20′	69°00′
CN2	40°20′	70°20′
CN3	40°50′	70°20′
G10	40°50′	69°00′

* * * * *

[FR Doc. 2019–27143 Filed 12–16–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 191211–0107]

RIN 0648–BI35

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Pacific Whiting; Pacific Coast Groundfish Fishery Management Plan; Amendment 21–4; Catch Share Program, 5-Year Review, Follow-On Actions

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

ACTION: Final rule.

SUMMARY: This rule implements changes to the Pacific Coast Groundfish Trawl Catch Share Program identified during the Catch Share Program 5-Year Review. This action is intended to modify outdated regulations, complete outstanding program elements, and respond to problems identified following implementation of the Catch Share Program. This action revises regulations consistent with Amendment 21–4 to the Pacific Coast Groundfish Fishery Management Plan, and revises elements in four areas of the Catch Share Program.

DATES: This final rule is effective January 16, 2020.

ADDRESSES: Electronic copies of supporting documents referenced in this final rule, including the Categorical Exclusions (CE) and final regulatory flexibility analysis (FRFA), are available from *www.regulations.gov* or from the NMFS West Coast Region Groundfish Fisheries website at *http://www.westcoast.fisheries.noaa.gov/fisheries/groundfish/index.html.*

FOR FURTHER INFORMATION CONTACT: Colin Sayre, phone: 206–526–4656, or email: *colin.sayre@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

On January 1, 2011, NMFS implemented the Pacific Coast Groundfish Trawl Catch Share Program (Catch Share Program) through Amendment 20 and Amendment 21 (75 FR 60867; October 1, 2010) to the Pacific Coast Groundfish Fishery Management Plan (FMP). Amendment 20 established a limited entry Individual Fishing Quota (IFQ) system for shorebased trawl vessels and cooperatives for the at-sea Pacific whiting mothership (MS) and catcher-processor (C/P) sectors. The Catch Share Program was intended to increase net economic benefits and create individual economic stability for trawl fishery participants, provide full utilization of the trawl sector allocation, and achieve individual accountability for catch and bycatch in the Pacific Coast groundfish fishery. Amendment 21 established fixed allocations for limited entry trawl participants. These allocations were intended to improve fishery management under the Catch Share Program by streamlining its administration, providing stability to the fishery, and addressing bycatch.

After implementation in 2011, NMFS collected both baseline and annual socioeconomic data to judge the effectiveness of the Catch Share Program for the 5-Year Review, and collected data annually thereafter, as required under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). To aid in reviewing and refining the Catch Share Program, the Council appointed the Community Advisory Board (CAB) to provide the perspective of fishing communities on Catch Share Program performance, potential improvements, and other advice at the Council's request to inform the program review and develop follow-on actions.

Socioeconomic data collections and input from the CAB helped to inform the 5-Year Review of the Catch Share Program, which the Council approved in November 2017. From the findings of the 5-Year Review, the Council identified a range of potential follow-on actions in four areas of the Catch Share Program to refine and enhance the program. These follow-on actions are being implemented through Amendment 21–4, which includes an FMP amendment as well as the regulatory changes in this final rule.

Additional discussion of the background and rationale for the Council's development of Amendment 21–4 and the Catch Share Program 5-Year Review is included in the proposed rule for this action (84 FR 54561; October 10, 2019) and is not repeated here. Detailed information, including the supporting documentation the Council considered while developing these recommendations, is available at the Council's website, *www.pcouncil.org.*

The measures in this final rule will: Allow the at-sea whiting sector to more fully and efficiently harvest its allocation through flexible set-aside management of constraining bycatch species; improve utilization of individual fishing quota (IFQ) and overall economic efficiency for the shorebased IFQ trawl sector; ensure fair and equitable access to resources in the event of failure or voluntary dissolution of the at-sea Pacific whiting catcher-processor (C/P) cooperative agreement; and provide a more robust evaluation of Catch Share Program performance. This action also includes clarifying non-substantive changes to the regulatory language for the Catch Share Cost Recovery Program.

Concurrent with these regulatory changes, an amendment to the Pacific Coast Groundfish FMP is required to implement Amendment 21–4 as recommended by the Council. The FMP amendment will implement at-sea set-aside bycatch management by removing from the FMP fixed formulas used to determine (1) bycatch allocations of widow rockfish, and (2) set-aside amounts of darkblotched rockfish and Pacific Ocean perch (POP). Set-aside amounts would instead be determined through the biennial harvest specifications process. On August 30, 2019, NMFS published a Notice of Availability (NOA) in the **Federal Register** (84 FR 45706) to solicit public comment on the proposed FMP amendment. No public comments on the proposed amendment were received during the comment period. NMFS is approving the FMP amendment concurrent with this final rule.

II. Summary of Regulations

A. At-Sea Whiting Fishery Set-Aside Bycatch Management

This final rule changes management for bycatch of four species in the at-sea Pacific whiting C/P and MS sectors: Canary rockfish, widow rockfish, darkblotched rockfish and POP. Instead of being managed through the use of capped bycatch allocations, canary rockfish and widow rockfish bycatch will be managed as ''set-asides,'' which are an expected amount of bycatch deducted from the total trawl sector allocations for these species. At-sea bycatch of darkblotched rockfish and POP were previously converted from bycatch allocations to set-asides in Amendment 21–3 (83 FR 757; January 8, 2018). The Council will recommend set-aside amounts for darkblotched rockfish, POP, canary rockfish, and widow rockfish during the biennial harvest specifications and management measures process.

These changes provide NMFS and the Council increased flexibility to determine set-asides amounts during the biennial harvest specifications. NMFS is not required to take action to close the at-sea sectors if catch exceeds the set-aside amounts for these four bycatch species. However, the Council and NMFS retain authority to implement a routine inseason action (*e.g.,* a time or area closure) if catch of any species exceeds its set-aside amount with the risk of exceeding harvest specifications, having unforeseen impact on another fishery, or causing other conservation concerns. This final rule will provide the at-sea sectors greater economic opportunity, even in the event bycatch of these rockfish species exceeds expected levels. This action would help ensure the at-sea sectors can fully attain their Pacific whiting allocations by establishing bycatch set-asides which, when reached, do not require automatic fishery closure. This action would also allow the Council to adjust at-sea bycatch set-asides for the whiting fishery on a biennial basis to match expected bycatch levels with prevailing fishery conditions.

B. Shorebased IFQ Trawl Sector Quota Transfers

This final rule provides participants in the shorebased IFQ sector a post-season transfer period to cover quota pound (QP) deficits from the prior year with unused or surplus QP remaining from the same year. Unused QP will be transferable only for the purpose of covering a deficit remaining from the previous year. Each year, post-season QP transfers will be permitted from January 1 until March 14, and NMFS will provide advance public notice announcing the ending date of the post-season transfer period. At the end of the post-season transfer period, NMFS will complete end-of-the-year Quota Share (QS) account reconciliation, and issue remaining surplus QP as carryover QP. Quota issued for the current year may also be used to cover any prior-year deficits which remain following the post-season transfer period.

In covering a previous year's deficit, participants in the shorebased IFQ sector will not be restricted by annual vessel QP limits under this final rule. These limits restrict the total amount of QP a vessel may acquire in a single year. Removing the annual vessel QP limit restriction during the post-season transfer period provides relief to vessels that experience unexpected large bycatch events, known as ''lightning-strikes,'' which have, in the past, exceeded annual vessel QP limits. Under this action, vessels with deficit amounts over annual vessel QP limits could acquire sufficient QP to cover the entire deficit through post-season trading, or by using QP issued in the following year. This action will remove the annual vessel QP limits only when covering deficits in the following year. While Catch Share Program participants would no longer be limited by the annual vessel QP limits in curing deficits, they would violate the carryover regulations if the deficit exceeds the deficit carryover limit. The deficit carryover limit is the amount of deficit QP that a vessel may carry into the following fishing year without violating QP carryover regulations. Under this action, vessel owners may experience regulatory consequences for a QP deficit, but will avoid economic hardship as a result of not fishing for multiple years while covering a large deficit under annual vessel QP limits.

This final rule also eliminates the September 1 deadline to transfer QP from QS account to a vessel account. Under this action, QP will remain in a QS account and available for transfer to a vessel account for fishing until December 31 of each year for which the QP was issued. The QP that remains in a QS account will be available for post-season trading once transferred to a vessel account after January 1 in the following year, and will not expire until the end of the post-season transfer period.

This action will reduce the overall costs of participation in the Shorebased IFQ sector by ensuring the maximum amount of annual IFQ allocations are used to harvest fish, rather than to cover previous year's QP deficits.

This action would allow fishery participants to cover the previous year's quota deficits with unused quota from the previous year. This would ensure that, each year, newly issued quota is used to cover catch rather than to cover outstanding deficits, which should maximize the value of quota and its efficient utilization.

C. Catcher-Processor Permit Accumulation Limits

This final rule establishes a permit accumulation limit of five at-sea Pacific whiting C/P-endorsed permits that any one person or entity may own or control, and includes regulations that define ''own and control'' as it relates to C/P-endorsed permits. The five-permit accumulation limit will take effect only in the event the current at-sea Pacific whiting C/P cooperative fails. When the Catch Share Program was implemented, the Council included a provision that would establish an IFQ program for the at-sea C/P sector should the cooperative agreement fail. This final action includes procedures for determining cooperative failure, and for divestiture of excess permits preceding conversion to an IFQ system.

In the event the C/P-cooperative voluntarily dissolves, or NMFS determines the cooperative agreement has failed, NMFS will announce a divestiture period starting on the date cooperative failure has been determined, and ending on the date an IFQ program is implemented for the at-sea C/P sector or another date specified in the IFQ program implementing regulations. During the divestiture period any individual or entity that owns or controls more than five permits may divest of those permits by sale or trade, or voluntarily abandon permits and allow redistribution of associated QS. After an IFQ-based C/P fishery is implemented, no individual or entity may own or control more than five C/P-endorsed permits, and no person or entity may own or control any quota associated with permits in excess of the five-permit limit. Following implementation of an at-sea C/P IFQ program, NMFS may revoke any C/P-endorsed permits in excess of the accumulation limit and may redistribute associated QS to other C/P-endorsed permit owners. The current C/P cooperative agreement ensures no individual acquires excessive access privileges to at-sea Pacific whiting resources. However, this action is necessary to ensure fair and equitable access to fishery resources in the absence of the cooperative agreement in the event it voluntarily dissolves or fails.

D. New Data Collections

1. C/P Endorsed Permit Ownership Interest

This final rule establishes an information collection for C/P-endorsed permit owners. The Catch Share Program requires mandatory submission of permit ownership interest information from catcher-vessels and motherships. During annual permit application and renewal, C/P-endorsed permit owners in those sectors are required to submit a Trawl Identification of Ownership Interest form. NMFS collects this information to enforce catcher-vessel accumulation limits and mothership sector accumulation limits that ensure no individual, or entity, obtain excessive limited access privileges. This action establishes the requirement that at-sea C/P-endorsed permit owners also complete the Trawl Identification of Ownership Interest form annually during permit renewal. The form is used to collect basic trawl vessel or permit owner information, such as vessel name, permit number, owner name and legal address, and the names and addresses of other individuals and entities that have an ownership interest and percentage of ownership for the vessel or permit. The information on the C/P sector collected in this form will support future Council decisions in the event accumulation limits take effect for the at-sea C/P sector as described in section II, part C of this preamble.

2. Quota Share Permit Owner Participation and Economic Data

This final rule requires all QS permit owners to submit annual information to the NMFS Northwest Fisheries Science Center West Coast Economic Data Collection (EDC) Program through a Quota Share Permit Owner survey. All QS permit owners, including those QS permit owners that do not also own, lease, or charter a vessel, shorebased processor, or first/receiver site, must submit information on annual participation in the fishery, as well as costs and earnings related to QS permit ownership. This survey will be collected electronically via web-form during the online QS permit application and renewal process. The deadline for submitting this information will be November 30 of each year, to align with timing of submission for QS permit application and renewals. Information collected through this survey will provide NMFS and the Council with a better understanding of economic costs and benefits conferred to fishery dependent communities through QS permit ownership, and of overall Catch Share Program performance. Improved evaluation of Catch Share Program performance will support sustained fishing community participation in the program, and help minimize adverse economic impacts on fishing communities. This action accomplishes these objectives by collecting information on economic benefits tied to QS ownership and community linkage of QS permit owners. This information will be used to ensure the Catch Share Program provides maximum economic benefits to participating communities.

E. Clarifications to Cost Recovery Regulatory Text

On March 20, 2014, NMFS published a Public Notice (NMFS–SEA–14–12) discussing two clarifications to the Pacific Coast Groundfish Trawl Rationalization Cost Recovery Program that went into effect in January 2014 (78 FR 75268; December 11, 2013). This final rule implements regulatory language necessary to reflect these two program clarifications. The first adjustment clarifies that the deposit principal may be used to refund cost recovery payments made by credit card through *Pay.gov.* The second clarification specifies that in the C/P sector retained fish only, and not discards, are used in calculating ex-vessel revenue as it relates to determining cost recovery fees.

F. Technical Corrections

In addition to necessary regulatory changes to implement the Council's recommendations, this final rule also includes minor technical corrections. Specifically, these minor technical corrections remove obsolete baseline dates included during implementation of the Catch Share Program, such as the years when initial trawl allocations were issued, the first date on which quota transfers were permitted, and the dates when economic data collections were initiated.

III. Comments and Responses

NMFS solicited public comment on the proposed rule implementing the Amendment 21–4 follow-on actions on October 10, 2019 (84 FR 54561). The comment period ended October 29, 2019. NMFS received one public comment letter on behalf of the Pacific Whiting Conservation Cooperative during the comment period for the proposed rule. The four unique comments within that comment letter are summarized and addressed below. Public comment letters, and attached documents, can be viewed, along with the proposed and final rules for this action at *www.regulations.gov*.

Comment 1: NMFS received one comment of support for various aspects of the proposed rule, including the proposed changes for at-sea set-aside bycatch management, C/P-endorsed permit ownership interest information collection, and cost recovery program clarifications.

Response: NMFS notes this support.

Comment 2: The language of the proposed rule mischaracterized Community Advisory Board (CAB) and Groundfish Advisory Panel (GAP) opposition to the C/P permit accumulation limits during development.

Response: In the proposed rule, NMFS did not intend to imply the CAB or GAP suggested or supported the decision to set C/P permit accumulation limits. The background information presented in the proposed rule is a generalized overview of the timeline and issues selected for development under this action. The proposed rule did not elaborate on the stance of Council advisory bodies, and only stated that these advisory bodies provided input and recommendations. The Council included C/P-permit accumulation limits as part of the follow-on actions. The full record of decision making during the Council process is publicly available on the Council's website *www.pcouncil.org/council-operations/council-meetings/past-meetings/*.

Comment 3: The proposed rule should not set C/P permit accumulation limits, as the current C/P cooperative structure fulfills Magnuson-Stevens Act requirements that no individual obtain excessive access privileges to fishery resources.

Response: This action does not set accumulation limits for the current cooperatively managed C/P sector, restrict permit transfer between C/P cooperative members, or limit permit ownership under the present cooperative structure of the C/P sector. NMFS acknowledges that the current cooperative structure of the C/P sector fulfills requirements under section 303A(c)(5)(D) of the Magnuson-Stevens Act that limited access privilege holders do not acquire an excessive share of the total limited access shares in the groundfish program. However, a limit would be required in the event the C/P cooperative agreement does not form in a given year, the cooperative voluntarily dissolves, or the cooperative structure fails. The Council determined that, if the current cooperative structure fails or dissolves, limiting permit ownership to five C/P-endorsed permits an individual or entity may own or control will result in an equitable concentration of limited access privileges for Pacific whiting resources.

Comment 4: The proposed rule lacks clarification on the process and information the NMFS Regional Administrator (RA) would use to make an independent determination of C/P cooperative failure. The proposed rule lacks a specific appeals process in the event NMFS makes an independent determination of cooperative failure.

Response: Under existing regulations, the NFMS RA already has authority to make an independent determination of C/P cooperative failure based on factual information. The language for this provision was first discussed during the Council meetings in March and April 2010. The language for this provision was included in the proposed rule for Amendments 20 and 21 to the Pacific Coast Groundfish FMP (75 FR 53380; August 31, 2010) and implemented through the final rule for Amendment 20 and 21 (75 FR 78344; December 15, 2010).

Under these existing regulations at § 660.160(h)(1)(i) through (iv), NMFS has the authority to make an independent determination of C/P cooperative failure in the event any of the following occurs: (i) Any current C/P-endorsed limited entry trawl permit is not identified as a C/P cooperative (coop) member in the coop agreement submitted to NMFS during the C/P coop permit application process; (ii) Any current C/P-endorsed permit withdraws from the C/P coop agreement; (iii) The coop members voluntarily dissolve the coop; or (iv) The coop agreement is no longer valid. This final rule implementing Amendment 21–4 does not make any changes to the conditions necessary for determining cooperative failure as already included in the regulations. If NMFS were to determine cooperative failure, the C/P cooperative permit would no longer be considered valid. Prior to making a final determination of cooperative failure, and the C/P cooperative permit becoming no longer valid, NMFS would use the Initial Administrative Determination (IAD) process to provide an explanation for this determination, consistent with the regulations at § 660.25(b)(1)(v). The IAD is a formal written determination that is subject to an appeal within NMFS. Although the C/P cooperative permit is not considered a limited entry permit, regulations at § 660.160(d)(2) state that the IAD for a C/P cooperative permit follows the same process as specified for limited entry permits at § 660.25(g). This existing process includes procedures for appeals in the case that NMFS makes an independent determination of cooperative failure. NMFS notes that each year since the implementation of Amendment 20 and 21, the C/P cooperative manager has consistently submitted a complete cooperative application and agreement, and has notified NMFS of the C/P cooperative's intentions and any material changes to the cooperative agreement.

NMFS acknowledges the utility of an appeals process specific to the determination of C/P cooperative failure. However, establishing such a provision through this action is outside the scope of the Council recommendation, and beyond the scope of this action. We suggest the appropriate forum to address establishment of a specific appeals process is through the Council process, or in discussion for the next Catch Share Program 5-Year Review, which will begin in 2022.

IV. Changes From Proposed Rule

NMFS did not make any changes from the proposed rule. As such, the regulations provided in this final rule are unchanged from those published in the proposed rule.

V. Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this action is consistent with the Pacific Coast Groundfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

The Office of Management and Budget has determined that this final rule is not significant for purposes of Executive Order 12866.

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

This final rule does not contain policies with Federalism or ''takings'' implications as those terms are defined in Executive Order 13132 and Executive Order 12630, respectively.

This action is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement in accordance with section 4 of NOAA's Policies and Procedures for Compliance with the National Environmental Policy Act (NEPA) and Related Authorities (Companion Manual for NAO 216–6A). Per section 4B of the Manual, a categorical exclusion (CE) evaluation document has been prepared that evaluates the applicability of the CE.

NMFS prepared a final regulatory flexibility analysis (FRFA) under section 604 of the Regulatory Flexibility Act (RFA), which incorporates the initial regulatory flexibility analysis (IRFA) prepared during the proposed rule stage. A copy of the FRFA and CE memo are available from NMFS (see **ADDRESSES**), and, as per the requirements of 5 U.S.C. 604(a), the text of the FRFA follows.

Final Regulatory Flexibility Analysis

For any rule subject to notice and comment rulemaking, the RFA requires Federal agencies to prepare, and make available for public comment, both an initial and final regulatory flexibility analysis, unless the agency can certify that the proposed and/or final rule would not have a significant economic impact on a substantial number of small entities. These analyses describe the impact on small businesses, non-profit enterprises, local governments, and other small entities as defined by the RFA (5 U.S.C. 603). This analysis is to inform the agency and the public of the expected economic effects of the alternatives, and aid the agency in considering any significant regulatory alternatives that would accomplish the applicable objectives and minimize the economic impact on affected small entities. The RFA does not require that the alternative with the least cost or with the least adverse effect on small entities be chosen as the preferred alternative.

The need for and objective of this final rule is described above in section I ''Background'' of this preamble and not repeated here.

A Statement of the Significant Issues Raised by the Public Comments in Response to the IRFA

No public comments were received in response to the IRFA.

The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy in Response to the Final Rule

No agency response was required, as no comments were received.

A Description and, Where Feasible, Estimate of the Number of Small Entities to Which the Final Rule Will Apply

The RFA (5 U.S.C. 601 *et seq.*) requires government agencies to assess the effects that regulatory alternatives would have on small entities, defined as any business/organization independently owned and operated, not dominant in its field of operation (including its affiliates). A small *harvesting business* has combined annual receipts of $11 million or less for all affiliated operations worldwide (50 CFR 200.2).

A small *fish-processing business* is one that employs 750 or fewer persons for all affiliated operations worldwide. NMFS is applying this standard to C/Ps for the purposes of this rulemaking, because these vessels earn the majority of their revenue from selling processed fish.

For *marinas and charter/party boats,* a small business is one that has annual receipts not in excess of $7.5 million. A *wholesale business* servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

For the purposes of this rulemaking, a *nonprofit organization* is determined to be not dominant in its field of operation if it is considered small under one of the following SBA size standards: *Environmental, conservation, or professional organizations.* These organizations are considered small if they have combined annual receipts of $15 million or less, and *other organizations* are considered small if they have combined annual receipts of $7.5 million or less. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

This rule will impact quota share owners. 22 non-whiting quota share permit owners are estimated, based on holdings of first receiver permit affiliation in the non-public West Coast Region permits database, to be primarily engaged in seafood product preparation and packaging. According to the size standard defined above, three of the entities that own three of these permits are considered small. These small processing entities were issued 1.7 percent of the non-whiting quota pounds issued in 2018, the most recent year available. Some of these small processing entities also own groundfish permits, required on both catcher vessels and catcher processors, which would be regulated by the final rule; three small entities primarily engaged in seafood processing own two groundfish permits. 30 groundfish vessel permits are owned by seven entities that are considered large, as estimated using the definition above, as well as self-reported on groundfish permits and first receiver site license permits (self-reported using the definition above). Six of these seven large processing entities were issued 10.2 percent of the non-whiting quota pounds issued in 2018 across sixteen quota share permits.

Entities that are not registered as trusts, estates, governments, or non-profits are assumed to earn the majority of their revenue from commercial fishing. The definition above is thus used for 124 quota share permit owners, who collectively received 76.5 percent of the quota pounds issued in 2018. Limited entry groundfish vessels are required to self-report size across all affiliated entities; of the businesses who earn the majority of their revenue from commercial fishing, one self-reported as large. This entity owns four groundfish permits and one quota share permit. 118 trawl permits are owned by 117 commercial fishing entities in 2019; 5 of these entities self-reported as large. Although many groundfish trawl permit owners also own quota share, it is not possible with available data to tabulate unique ownership across quota share and groundfish permits, so the numbers provided here likely overestimate the number of entities impacted.

According to the public IFQ Account database, as of June 19, 2018, the City of Monterey owns quota shares of ten species. The U.S. Census estimates the population to be 28,454 as of July 1, 2017, so the City of Monterey would be considered a small governmental jurisdiction by the RFA standard described above. The City of Monterey received 0.5 percent of the quota pounds issued for 2018, according to the public IFQ Account database.

According to the public IFQ Account database, six not-for-profit organizations own quota share in the Catch Share Program and would thus be impacted by the trawl sector allocation under this proposed rule. Five of these would be considered small by the definition above (having 2016 annual receipts as reported on IRS form 990 of $120–500 thousand dollars), and one would be considered large (having self-reported fiscal year 2017 receipts of $1.1 billion). Collectively, the five small not-for-profit organizations received 7.2 percent of the non-whiting [1] quota pounds issued in 2018, and the large not-for-profit organization received 0.5 percent. The large not-for-profit organization owned two limited entry trawl permits which would be impacted by the management measures of the rule. The small not-for-profits owned 3 such permits.

11 personal or family trusts/estates own quota share permits and would thus potentially be impacted by the trawl sector allocation under this proposed rule. All of these are assumed to be smaller than the small entity size standard described above. Collectively, these eight small entities received 4.2 percent of the non-whiting quota pounds issued for 2018. Five of these entities owned five groundfish permits.

Reporting and Recordkeeping Requirements

This action changes two information collection requirements.

C/P Endorsed Permit Ownership Interest Form

The modifications include requiring C/P endorsed permit owners to complete Trawl Owner Identification of Interest forms during annual permit renewal under OMB Control Number 0648–0620.

Currently there are 10 C/P endorsed permits approved by NMS in the Catch Share Program. These permits are held by three companies with no single company owning more than five permits. As each company is a controlling entity, three is the minimum number of affected entities that would be expected to submit one Trawl Identification of Ownership Interest form for each C/P endorsed permit. The public reporting burden is expected to require approximately 3.5 minutes for each respondent to complete one form for each permit once per year during C/P endorsed permit renewal. Each form is estimated to cost $0.35 to copy, and is included when mailed with other application forms. The 10 new respondents would add a total of $3.50 annual burden costs.

Economic Data Collection From Quota Share Permit Owners

The action would require changes to the Catch Share Program West Coast Economic Data Collection OMB Control Number 0648–0618. The proposed rule would change reporting requirements for owners of Quota Share permits to submit appropriate forms to the West Coast Economic Data Collection. The EDC currently does not require submission of forms from owners of Quota Share permits who do not also own, lease or charter vessels. The final rule would add a requirement for submission of EDC forms from all participants who own a Quota Share permit, including those who do not otherwise participate in the fishery other than owning a Quota Share permit.

Based on EDC response data and the public permit database, the public reporting burden for this requirement is expected to include approximately 178 Quota Share permit owners, of which approximately 158 currently complete EDC forms because they own, lease or charter vessels. The new requirement would include in the EDC collection an additional 20 respondents who are QS permit owners but are not owners, charterers, or lessees of vessels, shorebased processors, or first receiver sites and as a result do not complete any EDC forms. The new QS Permit owner survey is expected to take approximately 1 hour per year for all respondents to complete.178 respondents will each require approximately 1 hour once a year to complete QS permit owner survey questions. As a result 178 hours will be added to the current EDC burden of 2,224 hours, the new public burden will be a total of 2,402. (158 participants across the three vessel groups [catcher vessels, catcher processers and motherships] each need 8 hours to complete the EDC forms, for a total of 1,264 hours, and 20 hours is estimated for the 48 first receiver/shorebased processor form, for a total of 960 hours. 178 QS permit owners across all categories will require 1 hour, for a total of 178 hours. As a result, one year of data collection will require a total of 2,224 hours to complete the forms.) Costs associated with this reporting requirements are related to making copies of EDC documents (survey respondents are requested to retain a copy of the completed EDC form) and mailing the surveys. The annual cost associated with these activities is assumed to be $0.20 per respondent, assuming that the form is sent via certified mail. Total annual costs for all respondents is currently $4,120 (206 × $20). 22 new respondents will add an additional cost of $36.0, for a new total annual cost of $4,156 [(206 × $20) + (178 × $0.20)] for all respondents.

Description of Significant Alternatives to This Final Rule That Minimize Economic Impacts on Small Entities

This rule is not expected to result in adverse impacts to small entities. Thus, there are no significant alternatives to the proposed rule that would minimize adverse economic impacts on small entities.

The Council did consider alternatives to the final rule which would have had a lower level of benefits to small entities. The Council did not consider alternatives that would have had greater benefits to small entities, as these would not have been consistent with other applicable laws.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the West Coast Regional Office (see **ADDRESSES**), and the guide will be included in a notice sent to all members of the groundfish email group. To sign-up for the groundfish email group, click on the ''subscribe'' link on the following website: *http://www.westcoast.fisheries.noaa.gov/publications/fishery_management/groundfish/public_notices/recent_public_notices.html.* The guide and this final rule will also be available on the West Coast Region's website (see **ADDRESSES**) and upon request.

Paperwork Reduction Act (PRA) Recordkeeping and Reporting Requirements

This action contains changes to two information collection requirements, described in section II, part D of this final rule, which have been approved by the Office of Management and Budget (OMB). The first change, under OMB Control Number 0648–0618, West Coast Groundfish Trawl Economic Data Collection, requires any owner of a QS permit to submit annual economic information related to QS ownership. This is a change from previous regulations that required collection of economic information only from QS

[1] Whiting allocations are issued annually through a separate rulemaking process resulting from international treaty negotiations. See 83 FR 22401, May 15, 2018, for more information and 2018 allocations.

permit owners that also own, lease, or charter, vessels, shorebased processors, or first receiver sites. This change will affect an estimated 178 QS permit owners, and require 1 hour per year for each respondent. Costs associated with this collection are $0.20 per survey for respondents to retain a copy of the survey for their records, which will increase the total cost to public by $35.60.

The second change in collection requirements, under OMB Control Number 0648–0620, Pacific Coast Groundfish Trawl Rationalization Program Permit and License Information Collection, requires C/P endorsed permit owners to submit Trawl Interest of Ownership forms during annual permit renewal. This is a change from previous requirements for the collection of annual ownership interest information from only mothership and catcher-vessel permit owners. This change will affect three fishing companies that own the ten existing C/P endorsed permits. Respondents will require approximately 45 minutes per permit to complete the form in the first year, and 3 minutes per permit in subsequent years. Mailing and copy costs of $0.35 per form will increase the total cost to public by $3.50.

Executive Order 13175

Pursuant to Executive Order 13175, this final rule was developed after meaningful collaboration with tribal officials from the area covered by the FMP. Consistent with the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Council is a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, and Indians.

Dated: December 11, 2019.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is to be amended as follows:

PART 660—-FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C 7001 *et seq.*

■ 2. In § 660.55:

■ a. Revise paragraphs (a), (c)(1), (d), and (j), and

■ b. Remove and reserve paragraph (f)(2).

The revisions read as follows:

§ 660.55 Allocations.

(a) *General.* The opportunity to harvest Pacific Coast groundfish is allocated among participants in the fishery when the ACLs for a given year are established in the biennial harvest specifications. For any stock that has been declared overfished, any formal allocation may be temporarily revised for the duration of the rebuilding period. For certain species, primarily trawl-dominant species, separate allocations for the trawl and nontrawl fishery (which for this purpose includes limited entry fixed gear, directed open access, and recreational fisheries) will be established biennially or annually using the standards and procedures described in Chapter 6 of the PCGFMP. Chapter 6 of the PCGFMP provides the allocation structure and percentages for species allocated between the trawl and nontrawl fisheries. Also, for those species not subject to the trawl and nontrawl allocations specified under Amendment 21 and in paragraph (c)(1) of this section, separate allocations for the limited entry and open access fisheries may be established using the procedures described in Chapters 6 and 11 of the PCGFMP and this subpart. Allocation of sablefish north of 36° N lat. is described in paragraph (h) of this section and in the PCGFMP. Allocation of Pacific whiting is described in paragraph (i) of this section and in the PCGFMP. Allocation of black rockfish is described in paragraph (l) of this section. Allocation of Pacific halibut bycatch is described in paragraph (m) of this section. Allocations not specified in the PCGFMP are established in regulation through the biennial harvest specifications and are listed in Tables 1 a through d and Tables 2 a through d of this subpart.

* * * * *

(c) * * *

(1) Species/species groups and areas allocated between the trawl and non-trawl fisheries are allocated based on the amounts and percentages in the table below. IFQ species not listed in the table below are allocated between the trawl and nontrawl fisheries through the biennial harvest specifications process.

TABLE 1 TO PARAGRAPH (c)(1)—ALLOCATION AMOUNTS AND PERCENTAGES FOR LIMITED ENTRY TRAWL AND NON-TRAWL SECTORS SPECIFIED FOR FMP GROUNDFISH STOCKS AND STOCK COMPLEXES

Stock or complex	All non-treaty LE trawl sectors (%)	All non-treaty non-trawl sectors (%)
Lingcod	45	55
Pacific Cod	95	5
Sablefish S of 36° N lat	42	58
PACIFIC OCEAN PERCH	95	5
WIDOW	91	9
Chilipepper S of 40°10′ N lat	75	25
Splitnose S of 40°10′ N lat	95	5
Yellowtail N of 40°10′ N lat	88	12
Shortspine N of 34°27′ N lat	95	5
Shortspine S of 34°27′ N lat	(*)	(**)
Longspine N of 34°27′ N lat	95	5
DARKBLOTCHED	95	5
Minor Slope RF North of 40°10′ N lat	81	18
Minor Slope RF South of 40°10′ N lat	63	37
Dover Sole	95	5
English Sole	95	5
Petrale Sole	95	5
Arrowtooth Flounder	95	5
Starry Flounder	50	50

TABLE 1 TO PARAGRAPH (c)(1)—ALLOCATION AMOUNTS AND PERCENTAGES FOR LIMITED ENTRY TRAWL AND NON-TRAWL SECTORS SPECIFIED FOR FMP GROUNDFISH STOCKS AND STOCK COMPLEXES—Continued

Stock or complex	All non-treaty LE trawl sectors (%)	All non-treaty non-trawl sectors (%)
Other Flatfish	90	10

*50 mt.
**Remaining Yield.

(i) *Trawl fishery allocation.* The allocation for the limited entry trawl fishery is derived by applying the trawl allocation amounts and percentages as specified in paragraph (c) of this section and as specified during the biennial harvest specifications process to the fishery harvest guideline for species/species groups and areas. For IFQ species the trawl allocation is further subdivided within each of the trawl sectors (MS, C/P, and IFQ) as specified in § 660.140, 660.150, and 660.160 of subpart D. The whiting allocation is further subdivided among the trawl sectors as specified in paragraph (c)(1)(i) of this section.

(ii) *Nontrawl fishery allocation.* For each species/species group and area, the nontrawl fishery allocation is derived by subtracting from the corresponding harvest guideline the trawl allocations specified in paragraph (c) of this section and during the biennial harvest specifications. The nontrawl allocation will be shared between the limited entry fixed gear, open access, and recreational fisheries as specified through the biennial harvest specifications process and consistent with allocations in the PCGFMP.

* * * * *

(d) *Commercial harvest guidelines.* To derive the commercial harvest guideline, the fishery harvest guideline is further reduced by the recreational set-asides. The commercial harvest guideline is then allocated between the limited entry fishery (both trawl and fixed gear) and the directed open access fishery, as appropriate.

* * * * *

(j) *Fishery set-asides.* Annual set-asides are not formal allocations but they are amounts which are not available to the other fisheries during the fishing year. For Pacific Coast treaty Indian fisheries, set-asides will be deducted from the TAC, OY, ACL, or ACT when specified. For the catcher/processor and mothership sectors of the at-sea Pacific whiting fishery, set-asides will be deducted from the limited entry trawl fishery allocation. Set-aside amounts may be adjusted through the biennial harvest specifications and management measures process.

* * * * *

■ 3. In § 660.60:

■ a. Revise paragraph (d) introductory text, paragraph (d)(1) introductory text, and paragraph (d)(1)(i);

■ b. Remove paragraph (d)(1)(iii);

■ c. Redesignate paragraphs (d)(1)(iv) through (vii) as (d)(1)(iii) through (vi), respectively.

The revisions read as follows:

§ 660.60 Specifications and management measures.

* * * * *

(d) *Automatic actions.* The NMFS Regional Administrator or designee will initiate automatic management actions without prior public notice, opportunity to comment, or a Council meeting. These actions are nondiscretionary, and the impacts must have been taken into account prior to the action. Unless otherwise stated, a single notice will be published in the **Federal Register** making the action effective if good cause exists under the APA to waive notice and comment.

(1) Automatic actions will be initiated in the following circumstances:

(i) Close the MS or C/P sector when that sector's Pacific whiting allocation is reached, or is projected to be reached. The MS sector non-coop fishery will be closed by automatic action when the Pacific whiting or non-whiting allocation to the non-coop fishery has been reached or is projected to be reached.

* * * * *

■ 4. In Table 1b to Part 660, Subpart C—2019, Allocations by Species or Species Group, Remove footnotes 'c' through 'f', and redesignate footnote 'g' as 'c'.

■ 5. Remove Table 1d to Part 660, Subpart C—At-Sea Whiting Fishery Annual Set-Asides, 2019, and footnotes

■ 6. Redesignate Table 1e to Part 660, Subpart C—Whiting and non-whiting initial issuance allocation percentage for IFQ decided through the harvest specifications, 2011 as Table 1d to part 660, Subpart C—Whiting and non-whiting initial issuance allocation percentage for IFQ decided through the harvest specifications, 2011.

■ 7. Remove Table 2d to Part 660, Subpart C—At-Sea Whiting Fishery Annual Set-Asides, 2020 and Beyond and footnotes

■ 8. In § 660.111, amend the definition of *Ex-vessel value* by revising paragraph (3) to read as follows:

§ 660.111 Trawl fishery—definitions.

* * * * *

Ex-vessel value * * *

(3) For the C/P Coop Program, the value as determined by the aggregate pounds of all groundfish species catch (as defined in § 660.11) retained on board, by the vessel registered to a C/P-endorsed limited entry trawl permit, multiplied by the MS Coop Program average price per pound as announced pursuant to § 660.115(b)(2).

* * * * *

■ 9. In § 660.113, add paragraph (b)(1)(iv), and revise paragraphs (d)(5)(ii)(A)(*2*), (d)(5)(ii)(A)(*4*) and (*5*) to read as follows:

§ 660.113 Trawl fishery—recordkeeping and reporting.

* * * * *

(b) * * *

(1) * * *

(iv) All owners of a quota share (QS) permit as defined at § 660.25(c).

* * * * *

(d) * * *

(5) * * *

(ii) * * *

(A) * * *

(*2*) The weight of each species of groundfish retained on board,

* * * * *

(*4*) The ex-vessel value of each species of groundfish retained on board,

(*5*) The net ex-vessel value of each species of groundfish retained on board,

* * * * *

■ 10. In § 660.114, revise paragraphs (a), (b), and (c) to read as follows:

§ 660.114 Trawl fishery—economic data collection program.

(a) *General.* The economic data collection (EDC) program collects mandatory economic data from participants in the trawl rationalization program. NMFS requires submission of EDC forms to gather ongoing, annual economic data, including, but not limited to the following categories of information related to participation in the trawl rationalization program:

(1) Annual data related to QS permit owner activity and characteristics of participation in the fishery, costs and earnings from quota trades, and quota leasing.

(2) Annual data related to costs, earnings, value, labor, operations, physical characteristics, ownership and leasing information for vessels, first receiver sites, or shorebased processors.

(b) *Economic data collection program requirements.* The following fishery participants in the limited entry groundfish trawl fisheries are required to comply with the following EDC program requirements:

Fishery participant	Economic data collection	Who is required to submit an EDC?	Consequence for failure to submit (In addition to consequences listed below, failure to submit an EDC may be a violation of the MSA.)
(1) Limited entry trawl catcher vessels.	(i) Annual/ongoing economic data.	(A) All owners, lessees, and charterers of a catcher vessel registered to a limited entry trawl endorsed permit.	(*1*) For permit owner, a limited entry trawl permit application (including MS/CV-endorsed limited entry trawl permit) will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i). (*2*) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration, vessel account actions, or if own QS permit, issuance of annual QP or IBQ pounds) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(vi) and § 660.140(e). (*3*) For a vessel lessee or charterer, participation in the groundfish fishery (including, but not limited to, issuance of annual QP or IBQ pounds if own QS or IBQ) will not be authorized, until the required EDC for their operation of that vessel is submitted.
		(B) [Reserved]	
(2) Motherships	(i) Annual/ongoing economic data.	(A) All owners, lessees, and charterers of a mothership vessel registered to an MS permit.	(*1*) For permit owner, an MS permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i). (*2*) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(vi). (*3*) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.
		(B) [Reserved]	
(3) Catcher processors	(i) Annual/ongoing economic data.	(A) All owners, lessees, and charterers of a catcher processor vessel registered to a C/P-endorsed limited entry trawl permit.	(*1*) For permit owner, a C/P-endorsed limited entry trawl permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i). (*2*) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(vi). (*3*) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.
		(B) [Reserved]	
(4) First receivers/shorebased processors.	(i) Annual/ongoing economic data.	(A) All owners of a first receiver site license.	(*1*) A first receiver site license application will not be considered complete until the required EDC for that license owner associated with that license is submitted, as specified at § 660.140(f)(3). See paragraph (b)(4)(i)(A) of this table. (*2*) [Reserved]
		(B) All owners and lessees of a shorebased processor (as defined under "processor" at § 660.11, for purposes of EDC) that received round or headed-and-gutted IFQ species groundfish or whiting from a first receiver.	
(5) Quota Share Permit Owners.	(i) Annual/ongoing economic data.	(A) All owners of a Quota Share permit and account (as defined under § 660.25 (c)).	(*1*) A Quota Share permit application or permit renewal package will not be considered complete until the required EDC for that permit is submitted, as specified at § 660.140, subpart D. (*2*) [Reserved]
		(B) [Reserved]	

(c) *Submission of the EDC forms, and deadline*—(1) *Submission of the EDC form.* The complete, certified EDC forms must contain valid responses for all data fields, and must be submitted either by paper or web form submission as follows:

(i) *Paper form submission.* Paper forms must be submitted to ATTN: Economic Data Collection Program (FRAM Division), NMFS, Northwest Fisheries Science Center, 2725 Montlake Boulevard East, Seattle, WA 98112.

(ii) *Web form submission.* Completed EDC web forms must be submitted electronically via the Economic Data Collection Program Web Form portal through *NOAA.gov/fisheries* and the signature page faxed, mailed, or hand-delivered to NWFSC.

(2) *Deadline.* Complete, certified EDC forms must be mailed and postmarked by or hand-delivered to NMFS NWFSC no later than September 1 each year for the prior year's data.

(3) *Quota Share Permit Owner Survey Submissions and Deadline.* Quota Share Permit Owner survey forms are submitted by webform only during the quota account application and renewal process specified at § 660.140 (d)(2). The complete certified Quota Share Permit Owner survey must be submitted no later than November 30 of each year.

* * * * *

■ 11. In § 660.115, revise paragraphs (d)(1)(ii)(B) and (C) to read as follows:

§ 660.115 Trawl fishery—cost recovery program.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(B) *Fee collection deposits.* Each fish buyer, no less frequently than at the end of each month, shall deposit, in the deposit account established under paragraph (d)(1)(ii)(A) of this section, all fees collected, not previously deposited, that the fish buyer collects through a date not more than two calendar days before the date of deposit. The deposit principal may not be pledged, assigned, or used for any purpose other than aggregating collected fee revenue for disbursement to the Fund in accordance with paragraph (d)(1)(ii)(C) of this section. The fish buyer is entitled, at any time, to withdraw deposit interest, if any, but never deposit principal, from the deposit account for the fish buyer's own use and purposes. If the fish buyer has used a credit card to pay the cost recovery fee, the deposit principal may be used to reimburse the credit card in the same amount as the fee payment.

(C) *Deposit principal disbursement.* Not later than the 14th calendar day after the last calendar day of each month, or more frequently if the amount in the account exceeds the account limit for insurance purposes, the fish buyer shall disburse to NMFS the full deposit principal then in the deposit account. The fish buyer shall disburse deposit principal by electronic payment to the Fund subaccount to which the deposit principal relates. If the fish buyer has used a credit card to pay the cost recovery fee, the deposit principal may be used to reimburse the credit card in the same amount as the fee payment. NMFS will announce information about how to make an electronic payment to the Fund subaccount in the notification on fee percentage specified in paragraph (b)(2) of this section. Each disbursement must be accompanied by a cost recovery form provided by NMFS. Recordkeeping and reporting requirements are specified in paragraph (d)(4) of this section and at § 660.113(b)(5) for the Shorebased IFQ Program and § 660.113(c)(5) for the MS Coop Program. The cost recovery form will be available on the *pay.gov* website.

* * * * *

■ 12. In § 660.140, revise paragraph (d)(1)(ii) introductory text, paragraph (d)(2)(iii) introductory text, paragraphs (d)(3)(i)(D), (d)(3)(ii)(B)(*2*), (d)(3)(ii)(B)(*3*), (e)(3)(iii)(A) and (B), paragraph (e)(4)(i) introductory text, and paragraphs (e)(4)(ii), and (e)(5) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(d) * * *

(1) * * *

(ii) *Annual QP and IBQ pound allocations.* QP and IBQ pounds will be deposited into QS accounts annually. QS permit owners will be notified of QP deposits via the IFQ website and their QS account. QP and IBQ pounds will be issued to the nearest whole pound using standard rounding rules (*i.e.,* decimal amounts less than 0.5 round down and 0.5 and greater round up). NMFS will distribute such allocations to the maximum extent practicable, not to exceed the total allocation. QS permit owners must transfer their QP and IBQ pounds from their QS account to a vessel account in order for those QP and IBQ pounds to be fished. QP and IBQ pounds must be transferred in whole pounds (*i.e.,* no fraction of a QP or IBQ pound can be transferred). All QP and IBQ pounds in a QS account must be transferred to a vessel account between January 1 and December 31 of the year for which they were issued in order to be fished.

* * * * *

(2) * * *

(iii) *QS permit application process.* NMFS will accept a QS permit application from January 1 to November 30 of each calendar year. QS permit applications received between December 1 and December 31 will be processed by NMFS in the following calendar year. NMFS will issue only one QS permit to each unique person, as defined at § 660.11 subject to the eligibility requirements at paragraph (d)(2)(i) of this section. Each applicant must submit a complete application. A complete application includes a QS permit application form, payment of required fees, complete documentation of QS permit ownership on the Trawl Identification of Ownership Interest Form as required under paragraph (d)(4)(iv) of this section, and a complete economic data collection form as required under § 660.114. NMFS may require additional documentation as it deems necessary to make a determination on the application. The QS permit application will be considered incomplete until the required information is submitted.

* * * * *

(3) * * *

(i) * * *

(D) QS permits will not be renewed until SFD has received a complete application for a QS permit renewal, which includes payment of required fees, complete documentation of QS permit ownership on the Trawl Identification of Ownership Interest Form as required under paragraph (d)(4)(iv) of this section, a complete economic data collection form as required under § 660.114. The QS permit renewal will be considered incomplete until the required information is submitted.

* * * * *

(ii) * * *

(B) * * *

(*2*) *Transfer of QS or IBQ between QS accounts.* QS permit owners may transfer QS or IBQ to another owner of a QS permit, subject to accumulation limits and approval by NMFS. QS or IBQ is transferred as a percent, divisible to one-thousandth of a percent (*i.e.,* greater than or equal to 0.001 percent). QS or IBQ cannot be transferred to a vessel account. Owners of non-renewed QS permits may not transfer QS. QP in QS accounts cannot be transferred between QS accounts. NMFS will allocate QP based on the QS percentages as listed on a QS permit that was renewed during the previous October 1 through November 30 renewal period. QS transfers will be recorded in the QS account but will not become effective for purposes of allocating QPs until the following year. QS or IBQ may not be transferred between December 1 through December 31 each year. Any QS transaction that is pending as of December 1 will be administratively retracted. NMFS will allocate QP for the following year based on the QS percentages as of December 1 of each year.

(*3*) *Transfer of QP or IBQ pounds from a QS account to a vessel account.* QP or IBQ pounds must be transferred in whole pounds (*i.e.,* no fraction of a QP can be transferred). QP or IBQ pounds must be transferred to a vessel account in order to be used. Transfers of QP or IBQ pounds from a QS account to a vessel account are subject to annual vessel accumulation limits and NMFS' approval. Once QP or IBQ pounds are transferred from a QS account to a vessel account (accepted by the transferee/vessel owner), they cannot be transferred back to a QS account and may only be transferred to another vessel account. QP or IBQ pounds may not be transferred from one QS account to another QS account. All QP or IBQ pounds from a QS account must be transferred to one or more vessel accounts by December 31 each year in order to be fished. All QP or IBQ pounds expire at the end of the post-season transfer period of the year after which they were issued. If, in any year, the Regional Administrator makes a decision to reapportion Pacific whiting from the tribal to the non-tribal fishery or NMFS releases additional QP consistent with § 660.60(c) and paragraph (d)(1)(ii) of this section, NMFS will credit QS accounts with additional QP proportionally, based on the QS percent for a particular QS permit owner and the increase in the shorebased trawl allocation specified at paragraph (d)(1)(ii)(D) of this section.

* * * * *

(e) * * *

(3) * * *

(iii) * * *

(A) *General.* QP or IBQ pounds may only be transferred from a QS account to a vessel account or between vessel accounts. QP or IBQ pounds cannot be transferred from a vessel account to a QS account. Transfers of QP or IBQ pounds are subject to annual vessel accumulation limits. QP or IBQ pounds must be transferred in whole pounds (*i.e.,* no fraction of a QP or IBQ pound can be transferred). During the year there may be situations where NMFS deems it necessary to prohibit transfers (*i.e.,* account reconciliation, system maintenance, or for emergency fishery management reasons).

(B) *Transfer procedures.* QP or IBQ pound transfers from one vessel account to another vessel account must be accomplished via the online vessel account. To make a transfer, a vessel account owner must initiate a transfer request by logging onto the online vessel account. Following the instructions provided on the website, the vessel account owner must enter pertinent information regarding the transfer request including, but not limited to: IFQ species, amount of QP or IBQ pounds to be transferred for each IFQ species (in whole pound increments); name and any other identifier of the eligible transferee (*e.g.,* USCG documentation number or state registration number, as applicable) of the eligible vessel account receiving the transfer; and the value of the transferred QP or IBQ pounds. The online system will verify whether all information has been entered and whether the transfer complies with vessel limits, as applicable. If the information is not accepted, an electronic message will record as much in the transferor's vessel account explaining the reason(s). If the information is accepted, the online system will record the pending transfer in both the transferor's and the transferee's vessel accounts. The transferee must approve the transfer by electronic signature. If the transferee accepts the transfer, the online system will record the transfer and confirm the transaction in both accounts through a transaction confirmation notice. Once the transferee accepts the transaction, the transaction is final and permanent. QP or IBQ pounds may be transferred between vessel accounts at any time during January 1 through December 31 each year unless otherwise notified by NMFS. Unused QP from the previous fishing year (base year) may be transferred for the purpose of covering end-of-the-year vessel account deficits through the end of the post-season transfer period described at paragraph (e)(5)(iv) of this section.

(4) * * *

(i) *Vessel limits.* For each IFQ species or species group specified in this paragraph, vessel accounts may not have QP or IBQ pounds in excess of the annual QP vessel limit in any year, except as allowed by paragraph (e)(5)(iii) of this section. The annual QP vessel limit is calculated as all QPs transferred in minus all QPs transferred out of the vessel account.

* * * * *

(ii) *Trawl identification of ownership interest form.* Any person that owns a vessel registered to a limited entry trawl permit and that is applying for or renewing a vessel account shall document those persons that have an ownership interest in the vessel greater than or equal to 2 percent. This ownership interest must be documented with the SFD via the Trawl Identification of Ownership Interest Form. SFD will not generate and issue a vessel account unless the Trawl Identification of Ownership Interest Form has been completed. NMFS may request additional information of the applicant as necessary to verify compliance with accumulation limits.

(5) *Carryover of Surplus and Deficit QP or IBQ.* The carryover provision allows a limited amount of surplus QP or IBQ pounds in a vessel account to be carried over from one year (the base year) to the next immediately following year or allows a deficit in a vessel account from fishing during the base year to be covered in the immediately following year with QP or IBQ pounds from the base year or the a immediately following year, up to a carryover limit without violating the provisions of this section.

(i) *Surplus QP or IBQ pounds.* A vessel account with a surplus of QP or IBQ (unused QP or IBQ pounds) for any IFQ species following the post-season transfer period specified at paragraph (e)(5)(iv) of this section, may carryover for use in the year immediately following the base year amounts of unused QP or IBQ pounds up to its carryover limit specified at (e)(5)(ii) of this section, and subject to the limitations of this paragraph. After the post-season transfer period is concluded, NMFS will complete determination of surplus QP or IBQ pound amounts that may be carried over into the following year up to the surplus carryover limit specified at paragraph (e)(5)(ii) of this section. The amount of surplus QP or IBQ pounds issued as carryover will be reduced in proportion to any reduction in the ACL-between the base year and the immediately following year. At the end of the post-season transfer period, any base year QP or IBQ pounds remaining in vessel accounts will be suspended from use while NMFS calculates annual surplus carryover amounts. NMFS will consult with the Council in making its final determination of the IFQ species and total QP or IBQ amounts to be issued as annual surplus carryover. After NMFS completes determination of the annual surplus carryover amounts for each vessel account, suspended QP or IBQ pounds in excess of the annual surplus carryover amount will expire. NMFS will subsequently release any remaining suspended QP or IBQ pounds for issuance as surplus carryover to vessel accounts from which they were suspended, and notify vessel account owners of the issuance. Surplus carryover QP or IBQ pounds are valid for the year in which they are issued (*i.e.,* the year immediately following the base year). Surplus carryover amounts that would place a vessel above the annual QP vessel limits for the immediately following year (specified at paragraph (e)(4) of this section) will not be issued. Amounts issued as surplus QP or IBQ pounds do not change the shorebased trawl allocation in the year in which the carryover was issued. Surplus QP or IBQ pounds may not be carried over for more than one year.

(ii) *Surplus Carryover Limit.* The limit for the surplus carryover is calculated by multiplying 10 percent by the cumulative total QP or IBQ pounds (used and unused) transferred into a vessel account for the base year, less any transfers out of the vessel account, QP resulting from reapportionment of whiting specified at § 660.60(d), additional QP issued to the account during the year (as specified at § 660.60(c)(3)(ii)), and previous carryover amounts. The percentage used for the carryover surplus limit may be changed by Council recommendation during the biennial specifications and management measures process or by routine management measures as specified in § 660.60(c).

(iii) *Deficit QP or IBQ pounds.* After the end of the base year, a vessel account may cover the full amount of any deficit (negative balance) of QP or IBQ pounds using QP or IBQ from the following year, base year QP or IBQ pounds, through the post-season transfer period, or a combination, without restriction by annual QP vessel limits. A vessel account acquiring QP or IBQ after the base year to cover a deficit resulting from catch in excess of the base year annual QP vessel limits may still be in violation of annual vessel QP limit provisions specified at paragraph (e)(4)(i) of this section, or other provisions of this section, if the deficit exceeds the deficit carryover limit specified at paragraph (e)(5)(iii)(B) of this section. If an IFQ species is reallocated between the base year and the following year due to changes in management areas or subdivision of a species group as specified at paragraph (c)(3)(vii) of this section, a vessel account will not carryover the deficit for that IFQ species into the following year. A vessel account with a deficit for any IFQ species in the base year may cover that deficit during the post-season transfer period or with QP or IBQ pounds from the following year without violating the provisions of this section if all of the following conditions are met:

(A) The vessel account owner declares out of the Shorebased IFQ Program for the remainder of the year in which the deficit occurred. The vessel account owner must submit a signed, dated, and notarized letter to OLE, declaring out of the Shorebased IFQ Program for the remainder of the year and invoking the carryover provision to cover the deficit. Signed, dated, and notarized letters may be submitted to NMFS, West Coast Region, Office of Law Enforcement, ATTN VMS, Bldg. 1, 7600 Sand Point Way NE, Seattle, WA 98115. If the vessel account owner covers the deficit later within the same calendar year, the vessel may re-enter the Shorebased IFQ Program. If the deficit is documented less than 30 days before the end of the calendar year, exiting out of the Shorebased IFQ Program for the remainder of the year is not required.

(B) The amount of QP or IBQ pounds required to cover the deficit from the current fishing year is less than or equal to the vessel's carryover limit for a deficit. The carryover limit for a deficit is calculated as 10 percent of the total cumulative QP or IBQ pounds (used and unused, less any transfers out of the vessel account, and any previous carryover amounts) in the vessel account 30 days after the date the deficit is documented;

(C) Sufficient QP or IBQ pounds are transferred into the vessel account to cure the deficit within 30 days of NMFS' issuance of QP or IBQ pounds to QS accounts in the following year or the date the deficit is documented (whichever is later) but not later than the end of the post-season transfer period; and

(D) The total QP required to cover the vessel's total catch from the base year is not greater than the annual QP vessel limit for the base year.

(iv) *Post-Season QP or IBQ transfers.* A vessel account with a deficit (negative balance) of QP or IBQ pounds after December 31 for any IFQ species may conduct post-season transfers to cure the deficit by obtaining available unused QP or IBQ pounds remaining in other vessel accounts from the base fishing year. Vessel account owners may conduct post-season transfers of QP and IBQ pounds according to transfer procedures specified in paragraph (e)(3)(iii) of this section, and subject to the following conditions:

(A) Post-season transfers may be conducted during a period starting January 1 and ending 14 calendar days after NMFS has completed its determination of the total base year IFQ catch for all vessels for end-of-the-year account reconciliation. NMFS will issue a public notice when end-of-the-year account reconciliation has been completed, on or about March 1 of each year.

(B) QP or IBQ pounds from the base fishing year transferred during the post-season transfer period may not be fished in any way, and may only be transferred for the purpose of covering deficits carried into the immediately following fishing year from the base fishing year.

(C) After the post-season transfer period, remaining QP and IBQ pounds surplus and deficits from the base fishing year are subject to carryover provisions specified at paragraphs (e)(5)(ii) and (e)(5)(iii) of this section.

* * * * *

■ 13. In § 660.150 revise paragraphs (c) and (d)(1)(iii)(A)(*1*)(*v*) to read as follows:

§ 660.150 Mothership (MS) Coop Program.

* * * * *

(c) *MS Coop Program species and allocations*—(1) *MS Coop Program species.* All species other than Pacific whiting are managed with set-asides for the MS and C/P Coop Programs, as described in Table 1d to subpart C of this part.

(2) *Annual mothership sector sub-allocations.* Annual allocation amount(s) will be determined using the following procedure:

(i) *MS/CV catch history assignments.* Catch history assignments will be based on catch history using the following methodology:

(A) *Pacific whiting catch history assignment.* Each MS/CV endorsement's associated catch history assignment of Pacific whiting will be annually allocated to a single permitted MS coop or to the non-coop fishery. If multiple MS/CV endorsements and their associated CHAs are registered to a limited entry permit, that permit may be simultaneously registered to more than one MS coop or to both a coop(s) and non-coop fishery. Once assigned to a permitted MS coop or to the non-coop fishery, each MS/CV endorsement's catch history assignment remains with that permitted MS coop or non-coop fishery for that calendar year. When the mothership sector allocation is established, the information for the conversion of catch history assignment to pounds will be made available to the public through a **Federal Register** announcement and/or public notice and/or the NMFS website. The amount of whiting from the catch history assignment will be issued to the nearest whole pound using standard rounding rules (*i.e.,* less than 0.5 rounds down and 0.5 and greater rounds up).

(*1*) In years where the Pacific whiting harvest specification is known by the start of the mothership sector primary whiting season specified at § 660.131(b)(2)(iii)(B), allocation for Pacific whiting will be made by the start of the season.

(*2*) In years where the Pacific whiting harvest specification is not known by the start of the mothership sector primary whiting season specified at § 660.131(b)(2)(iii)(B), NMFS will issue Pacific whiting allocations in two parts. Before the start of the primary whiting season, NMFS will allocate Pacific whiting based on the MS Coop Program allocation percent multiplied by the lower end of the range of potential harvest specifications for Pacific whiting for that year. After the final Pacific whiting harvest specifications are established, NMFS will allocate any additional amounts of Pacific whiting to the MS Coop Program.

(B) *Non-whiting groundfish species catch*—(*1*) At-sea set-asides of non-whiting groundfish species will be managed on an annual basis unless there is a risk of a harvest specification being exceeded, unforeseen impact on other fisheries, or conservation concerns, in which case inseason action may be taken. Set asides may be adjusted through the biennial specifications and management measures process as necessary.

(2) Groundfish species not addressed in paragraph (c)(2)(i)(B)(*1*) of this section, will be managed on an annual basis unless there is a risk of a harvest specification being exceeded, unforeseen impact on other fisheries, or conservation concerns, in which case inseason action may be taken.

(*3*) Annually a specified amount of the Pacific halibut will be held in reserve as a shared set-aside for bycatch in the at-sea Pacific whiting fisheries and the shorebased trawl sector south of 40°10′ N lat.

(C) *Rounding rules and MS/CV allocations.* Rounding rules may affect distribution of the MS Coop Program allocations among the catch history assignments for individual MS/CV-endorsed permits. NMFS will distribute such allocations to the maximum extent practicable, not to exceed the total allocation.

(ii) *Annual coop allocations*—(A) *Pacific whiting.* Each permitted MS coop is authorized to harvest a quantity of Pacific whiting that is based on the sum of the catch history assignments for each member MS/CV-endorsed permit identified in the NMFS-accepted coop agreement for a given calendar year. Other limited entry permits registered to vessels that will fish for the coop do not bring catch allocation to a permitted MS coop.

(B) *Single MS/CV Coop Fishery.* If all MS/CV-endorsed permits are members of a single coop in a given year and there is not a non-coop fishery, then NMFS will allocate 100 percent of the MS Coop Program allocation to that coop.

(iii) *Annual non-coop allocation*—(A) *Pacific whiting.* The non-coop whiting fishery is authorized to harvest a quantity of Pacific whiting that is remaining in the mothership sector annual allocation after the deduction of all coop allocations.

(B) *Announcement of the non-coop fishery allocations.* Information on the amount of Pacific whiting and non-whiting groundfish with allocations that will be made available to the non-coop fishery when the final Pacific whiting specifications for the mothership sector is established and will be announced to the public through a **Federal Register** announcement and/or public notice and/or the NMFS website.

(3) *Reaching an allocation or sub-allocation.* When the mothership sector Pacific whiting allocation, or Pacific whiting sub-allocation is reached or is projected to be reached, the following action may be taken:

(i) Further harvesting, receiving or at-sea processing by a mothership or catcher vessel in the mothership sector is prohibited when the mothership sector Pacific whiting allocation is projected to be reached. No additional unprocessed groundfish may be brought on board after at-sea processing is prohibited, but a mothership may continue to process catch that was on board before at-sea processing was prohibited. Pacific whiting may not be taken and retained, possessed, or landed by a catcher vessel participating in the mothership sector.

(ii) When a permitted MS coop sub-allocation of Pacific whiting-is reached, further harvesting or receiving of groundfish by vessels fishing in the permitted MS coop must cease, unless the permitted MS coop is operating under an NMFS-accepted inter-coop agreement.

(iii) When the non-coop fishery sub-allocation of Pacific whiting is projected to be reached, further harvesting or receiving of groundfish by vessels fishing in the non-coop fishery must cease.

(4) [Reserved]

(5) *Announcements.* The Regional Administrator will announce in the **Federal Register** when the mothership sector allocation of Pacific whiting is reached, or is projected to be reached, and specify the appropriate action. In order to prevent exceeding an allocation and to avoid underutilizing the resource, prohibitions against further taking and retaining, receiving, or at-sea processing of Pacific whiting may be made effective immediately by actual notice to fishers and processors, by email, internet, phone, fax, letter, press release, and/or USCG Notice to Mariners (monitor channel 16 VHF), followed by publication in the **Federal Register**, in which instance public comment will be sought for a reasonable period of time thereafter.

(6) *Redistribution of annual allocation*—(i) *Between permitted MS coops (inter-coop).* (A) Through an inter-coop agreement, the designated coop managers of permitted MS coops may distribute Pacific whiting allocations among one or more permitted MS coops, provided the processor obligations at paragraph (c)(7) of this section have been met or a mutual agreement exception at paragraph (c)(7)(iv) of this section has been submitted to NMFS.

(B) In the case of a MS coop failure during the Pacific whiting primary season for the mothership sector, unused allocation associated with the catch history will not be available for harvest by the coop that failed, by any former members of the coop that failed, or any other MS coop for the remainder of that calendar year.

(*1*) *Between the MS coop and non-coop fisheries.* Pacific whiting may not be redistributed between the coop and non-coop fisheries.

(*2*) *Between Pacific whiting sectors.* Pacific whiting may not be redistributed between the mothership sector and catcher/processor sector. Whiting may not be redistributed to the Shorebased IFQ Program.

(7) *Processor obligation and mutual agreement exceptions*—(i) *Processor obligation.* Through the annual MS/CV-endorsed limited entry permit renewal process, the MS/CV-endorsed permit owner must identify to NMFS to which MS permit the MS/CV permit owner intends to obligate the catch history assignment associated with that permit if they are participating in the MS coop fishery. Only one MS permit may be designated for each MS/CV endorsement and associated catch history assignment.

(ii) *Expiration of a processor obligation.* Processor obligations expire at the end of each calendar year when the MS Coop Permit expires.

(iii) *Processor obligation when MS coop allocation is redistributed.* When a permitted MS coop redistributes Pacific whiting allocation within the permitted MS coop or from one permitted MS coop to another permitted MS coop through an inter-coop agreement, such allocations must be delivered to the mothership registered to the MS permit to which the allocation was obligated under the processor obligation submitted to NMFS, unless a mutual agreement exception has been submitted to NMFS.

(iv) *Mutual agreement exception.* An MS/CV-endorsed permit's catch history assignment can be released from a processor obligation through a mutual agreement exception. The MS/CV-endorsed permit owner must submit a copy to NMFS of the written agreement that includes the initial MS permit owner's acknowledgment of the release of the MS/CV-endorsed permit owner's processor obligation and the MS/CV-endorsed permit owner must identify a processor obligation for a new MS permit.

(v) *MS permit withdrawal.* If an MS permit withdraws from the mothership fishery before the resulting amounts of catch history assignment have been announced by NMFS, any MS/CV-endorsed permit obligated to the MS permit may elect to participate in the coop or non-coop fishery. In such an event, the MS permit owner must provide written notification of its withdrawal to NMFS and all MS/CV-endorsed permits that are obligated to the MS permit, and the owner of each MS/CV-endorsed permit obligated to the MS permit must provide written notification to NMFS of their intent to either participate in the non-coop fishery or the coop fishery, and if participating in the coop fishery must identify a processor obligation for a new MS permit.

(vi) *Submission of a mutual agreement exception or MS permit withdrawal.* Written notification of a mutual exception agreement or MS permit withdrawal must be submitted to NMFS, Northwest Region, Permits Office, Bldg. 1, 7600 Sand Point Way NE, Seattle, WA 98115.

(d) * * *

(1) * * *

(iii) * * *

(A) * * *

(*1*) * * *

(*v*) A description of the coop's plan to adequately monitor and account for the catch of Pacific whiting and non-whiting groundfish, and to monitor and account for the catch of prohibited species.

* * * * *

■ 14. In § 660.160:

■ a. Revise paragraph (c)(1) introductory text, paragraphs (c)(1)(i), (c)(3)(i) and (ii);

■ b. Remove paragraph (c)(3)(iii);

■ c. Remove and reserve paragraph (c)(5);

■ d. Revise paragraphs (c)(6), (c)(7), and (d)(1)(iii)(A)(1)(*iii*), and paragraph (e)(1) introductory text;

■ e. Add paragraph (e)(1)(iv);

■ f. Revise paragraph (h)(1) introductory text, and paragraphs (h)(2) through (4);

■ g. Add paragraph (h)(5).

The revisions and additions read as follows:

§ 660.160 Catcher/processor (C/P) Coop Program.

* * * * *

(c) * * *

(1) *C/P Coop Program species.* All species other than Pacific whiting are managed with set-asides for the MS and C/P Coop Programs.

(i) Species with formal allocations to the C/P Coop Program: Pacific whiting.

* * * * *

(3) * * *

(i) At-sea sector set-asides of non-whiting groundfish species will be managed on an annual basis unless there is a risk of a harvest specification being exceeded, unforeseen impact on other fisheries, or conservation concerns, in which case inseason action may be taken. Set asides may be adjusted through the biennial specifications and management measures process as necessary.

(ii) Groundfish species not addressed in paragraph (c)(3)(i) of this section, will be managed on an annual basis unless there is a risk of a harvest specification being exceeded, unforeseen impact on other fisheries, or conservation concerns, in which case inseason action may be taken.

* * * * *

(5) [Reserved]

(6) *Reaching the catcher/processor sector allocation.* When the catcher/processor sector allocation of Pacific whiting is reached or is projected to be reached, further taking and retaining, receiving, or at-sea processing by a catcher/processor is prohibited. No additional unprocessed groundfish may be brought on board after at-sea processing is prohibited, but a catcher/processor may continue to process catch that was on board before at-sea processing was prohibited. The catcher/processor sector will close when the allocation of any one species is reached or projected to be reached.

(7) *Announcements.* The Regional Administrator will announce in the **Federal Register** when the catcher/processor sector allocation of Pacific whiting is reached, or is projected to be reached, and specify the appropriate action. In order to prevent exceeding an allocation and to avoid underutilizing the resource, prohibitions against further taking and retaining, receiving, or at-sea processing of Pacific whiting may be made effective immediately by actual notice to fishers and processors, by email, internet, phone, fax, letter, press release, and/or USCG Notice to Mariners (monitor channel 16 VHF), followed by publication in the **Federal Register**, in which instance public comment will be sought for a reasonable period of time thereafter.

(d) * * *

(1) * * *

(iii) * * *

(A) * * *

(*1*) * * *

(*iii*) A description of the coop's plan to adequately monitor and account for the catch of Pacific whiting and non-whiting groundfish, and to monitor and account for the catch of prohibited species.

* * * * *

(e) * * *

(1) *General.* Any vessel participating in the C/P sector of the non-tribal primary Pacific whiting fishery-must be registered to a valid limited entry permit with a C/P endorsement—subject to the limited entry permit provisions given at § 660.25(b).

* * * * *

(iv) *Trawl identification of ownership interest form.* Any person that is applying for or renewing a C/P-endorsed permit shall document those persons that have an ownership interest in the permit greater than or equal to 2 percent. This ownership interest must be documented with the SFD via the Trawl Identification of Ownership Interest Form. SFD will not issue a C/P-endorsed permit unless the Trawl Identification of Ownership Interest Form has been completed.

* * * * *

(h) * * *

(1) *Conditions for determination of coop failure.* The Regional Administrator will determine that a permitted C/P coop has failed if any one of the following occurs:

* * * * *

(2) *Notification of coop failure.* If the permitted C/P coop dissolves, the designated coop manager must notify NMFS SFD in writing of the dissolution of the coop to allow the Regional Administrator to make a determination of coop failure. The Regional Administrator may also make an independent determination of a coop failure based on factual information collected by or provided to NMFS. NMFS will notify the designated coop manager in writing in the event the Regional Administrator determines the coop has failed.

(3) *Coop permit no longer in effect.* Upon determination of a coop failure, the C/P coop permit will no longer be in effect.

(4) *Conversion to IFQ Fishery.* The C/P sector will convert to an IFQ-based fishery beginning the following calendar

year after a determination of a coop failure, or as soon as practicable thereafter. NMFS will develop additional regulations, as necessary to implement an IFQ-based fishery for the C/P sector. Each C/P-endorsed permit will receive an equal amount of QS from the total C/P sector allocation. That QS will not be transferable separate from the C/P-endorsed permit until a determination is made to allow such transfers, necessary regulations are implemented, and public notice is provided. Any use of QP or IBQ pounds associated with C/P endorsed permits is prohibited until the regulations for a C/P sector IFQ system are implemented.

(5) *Accumulation Limits.* C/P Sector accumulation limits will take effect in the event that the C/P coop fails and converts to an IFQ-based fishery. If an IFQ fishery is implemented, any individual or entity may own or control a maximum of five C/P endorsed permits and QS allocations associated with those permits, as described in paragraph (e)(5)(iv) of this section. C/P endorsed permit accumulation limits will only take effect after determination of a coop failure is made and the following administrative process occurs:

(i) *Divestiture Period.* Upon determination of a coop failure, a divestiture period will occur starting with the date that co-op failure has been determined and running through the date on which an IFQ program is implemented for the C/P sector or another date specified in the IFQ program implementing regulations. During the divestiture period, an individual or entity may not acquire ownership or control over a total of more than five C/P-endorsed permits. Any entity that already owns or controls more than five C/P-endorsed permits may not acquire additional permits. During the divestiture period any entity who owns or controls C/P-endorsed permits may sell or trade any permits it owns. C/P-endorsed permits may be voluntarily abandoned to NMFS using the procedures provided under paragraph (h)(5)(iii) of this section.

(ii) *Divestiture and redistribution process.* After conversion to an IFQ fishery and completion of the divestiture period, any person owning or controlling C/P-endorsed permits must be in compliance with accumulation limits, even if that ownership is not reflected in the ownership records available to NMFS as specified at § 660.140(e)(1)(iv). Permit owners found to exceed the five permit accumulation limit for C/P-endorsed permits after the divestiture period are in violation of the accumulation limits and required to completely divest of ownership or control of C/P-endorsed permits that exceed the accumulation limit. C/P-endorsed permits may be voluntarily abandoned to NMFS using the procedures provided under paragraph (h)(5)(iii) of this section. If NMFS finds that any entity owns or controls more than five C/P-endorsed permits, NMFS will make an Initial Administrative Determination (IAD) that the entity must divest of control or ownership of permits that exceed the accumulation limit within 30 days or NMFS will revoke the excess permits in accordance with § 660.25(h)(2)(ii). The permit owner will have the opportunity to appeal the IAD through the National Appeals Office under the provisions established at 15 CFR part 906. All QS associated with revoked permits will be redistributed to all other C/P-endorsed permit owners in proportion to their QS holdings, based on current ownership records, on or about January 1 of the calendar year following the year in which the permits are revoked. This redistribution process will not allow any entity to receive more than 50 percent of the total QS allocations for the C/P sector.

(iii) *Abandonment of C/P-endorsed permits.* C/P-endorsed permits owners that own or control more than the five permit accumulation limit may voluntarily abandon C/P-endorsed permits if they notify NMFS in writing during the divestiture period specified at paragraph (h)(5)(i) of this section or within 30 days of conversion to an IFQ fishery. The written abandonment request must include the C/P endorsed permit number and the associated QS allocation percentage that will be abandoned. Either the C/P-endorsed permit owner or an authorized representative of the C/P-endorsed permit owner must sign the request. C/P-endorsed permit owners choosing to utilize the abandonment option will permanently relinquish to NMFS any right to the abandoned C/P-endorsed permit, and the QS associated with that permit will be redistributed as described under paragraph (h)(5)(ii) of this section. No compensation will be due for any abandoned permit, or associated QS or QP.

(iv) *Review of C/P-permit ownership interest and accumulation limits.* NMFS may request additional information from C/P-permit owners as necessary to verify compliance with accumulation limits in the event of C/P coop failure and conversion to IFQ fishery. If NMFS discovers through review of the Trawl Identification of Ownership Interest Form that a person is not in compliance with accumulation limits, the person will be subject to divestiture provisions specified in paragraph (h)(5)(ii) of this section.

(v) *Definition of Ownership or Control.* For the purpose of determining ownership or control a person or entity has over a C/P endorsed permit, all of the following criteria apply:

(A) The person or entity has the right to direct, or does direct, in whole or in part, the business of the entity to which the permits are registered, with the exception of those activities allowed under paragraphs (h)(5)(v)(C) and (G) of this section.

(B) The person or entity has the right to limit the actions of or replace, or does limit the actions of or replace, the chief executive officer, a majority of the board of directors, any general partner, or any person serving in a management capacity of the entity to which the C/P permits are registered, with the exception of those activities allowed under paragraphs (h)(5)(v)(C) and (G) of this section.

(C) With the exception of banks and other financial institutions that rely on permits as collateral for loans as described under paragraphs (h)(5)(v)(G) of this section, the person or entity has the right to direct, or does direct, and/or the right to prevent or delay, or does prevent or delay, the transfer of the C/P permit associated QS, or the resulting QP.

(D) The person or entity, through loan covenants or any other means, has the right to restrict, or does restrict, and/or has a controlling influence over the day to day business activities or management policies of the entity to which the permits are registered, with the exception of those activities allowed under paragraphs (h)(5)(v)(C) and (G) of this section.

(E) The person or entity has the right to restrict, or does restrict, any activity related to the C/P permit, associated QS or the resulting QP, including, but not limited to, use of permits, or associated QS, or disposition of fish harvested and processed under the resulting QP, with the exception of those activities allowed under paragraphs (h)(5)(v)(C) and (G) of this section.

(F) The person or entity has the right to control, or does control, the management of, or to be a controlling factor in, the entity to which the C/P permit, associated QS, or the resulting QP, are registered, with the exception of those activities allowed under paragraphs (h)(5)(v)(C) and (G) of this section.

(G) With the exception of banks and other financial institutions that rely on permits as collateral for loans, the person or entity has the right to cause or prevent, or does cause or prevent, the sale, lease or other disposition of C/P permits, associated QS, or the resulting QP.

(*1*) To qualify for this exception for banks and other financial institutions that rely on permits as collateral for loans, a bank or other financial institution must be regularly or primarily engaged in the business of lending, and must not be engaged in business with, or be controlled by, entities whose primary business is the harvesting, processing, or distribution of fish or fish products.

(*2*) Any state or federally chartered bank or financial institution that meets the requirement of paragraph (h)(5)(v)(G)(1) of this section does not need to submit additional information to NMFS.

(*3*) Any entity that is not a state or federally chartered bank or financial institution must submit a letter requesting the exception and disclose the identity and interest share of any shareholder with a 2 percent or more ownership interest in the lender through submission of the Trawl Identification of Ownership Interest Form (see paragraph (e)(1)(iv) of this section). The lender must make subsequent annual submissions of the letter and Trawl Identification of Ownership Interest Form to maintain the exception. Letters requesting the exception and complete Trawl Identification of Ownership Interest Forms may be submitted to NMFS, West Coast Region, Permits Office, ATTN: Fisheries Permit Office, Bldg. 1, 7600 Sand Point Way NE, Seattle, WA 98115. NMFS will only accept complete applications.

(H) The person or entity has the ability through any means whatsoever to control or have a controlling influence over the entity to which a permit associated QS is registered, with the exception of those activities allowed under paragraphs (h)(5)(v)(C) and (G) of this section.

[FR Doc. 2019–27074 Filed 12–16–19; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 84, No. 242

Tuesday, December 17, 2019

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Parts 1630, 1632 and 1650

Cost-of-Living Adjustments and Identity Verification

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Proposed rule.

SUMMARY: The Federal Retirement Thrift Investment Board (''FRTIB'') is proposing to amend its regulations to change the cost-of-living adjustment rate used to calculate the annual increase for annuities with an increasing payment option, effective January 18, 2020, and to clarify its requirements regarding identification verification and availability of announcements of meetings open to public observation.

DATES: Comments must be received on or before January 16, 2020.

ADDRESSES: You may send comments, identified by Docket ID number FRTIB–2019–0004, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 942–1676.
- *Mail or Hand Deliver/Courier:* Office of General Counsel, Attn: Megan G. Grumbine, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Austen Townsend, (202) 864–8647.

SUPPLEMENTARY INFORMATION: The FRTIB administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401–79. The TSP is a tax-deferred retirement savings plan for federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

Cost-of Living Adjustment

A TSP participant has a variety of withdrawal options to choose from when electing to receive a post-separation withdrawal of some or all of his or her account balance. One such option is an annuity with an increasing payment option based on an annual cost-of-living adjustment (COLA) calculation. Under this increasing payment option, the amount of the monthly annuity payment can increase each year on the anniversary date of the first payment.

Current Cost-of-Living Adjustment

Currently, when a TSP participant elects to receive an annuity with an increasing payment option, the increase in the amount of his or her monthly annuity payment each year is based on the annual change in inflation, as measured by the Consumer Price Index (CPI). Increases cannot exceed 3 percent per year.

When a TSP participant elects to receive some or all of his or her account balance in the form of an annuity with an increasing payment option, the TSP purchases the annuity for the participant from its annuity vendor. Although the actual change in inflation varies from year to year, the annuity vendor's pricing for this variable increase rate assumes an annual increase of 3 percent when calculating monthly annuity payments even when the calculated COLA turns out to be below 3 percent.

Proposed Cost-of-Living Adjustment

The FRTIB is proposing to change its COLA from the variable rate described above to a fixed rate of 2 percent per year. The Federal Open Market Committee (FOMC) has set an inflation target of 2 percent and implements that target over the medium term. Indeed, over the last 20 years, inflation, as measured by the CPI, has averaged 1.95 percent annually, which is the expected result given the FOMC inflation target.

Using a fixed rate of 2 percent offers two benefits. First, the FRTIB anticipates that fixing the rate at 2 percent will result in a higher initial monthly annuity payment on average. Assuming an inflation rate of 2 percent, a participant's initial monthly annuity payment will, on average, likely be 10 to 15 percent higher than it would have been under the variable rate. Although this increase comes at the expense of a smaller amount of inflation protection (*i.e.,* protection only up to 2 percent per year as opposed to 3 percent), using a fixed rate makes it less likely that participants will pay for more inflation protection than they need.

Second, a fixed rate produces a predictable rate of increase allowing participants to have a predictable pattern of income. Annual changes in a COLA based on the annual change in inflation can vary from year-to-year. This volatility can lead to participant uncertainty about how much, if any, their benefit will increase each year. However, the fixed rate has the added benefit of producing a predictable pattern of income.

As with all contract provisions, the FRTIB will regularly review the COLA to ensure that it continues to be beneficial for TSP participants.

Identity Verification

The FRTIB is proposing to amend its rules promulgated under the Privacy Act of 1974, as amended, to clarify that TSP participants may be required to provide identifying particulars in order to access their account information.

Announcement of Public Meetings

The FRTIB is proposing to amend its rule regarding access to announcements of meetings open to public observation to reflect its existing practice of maintaining the annual Board meeting schedule online at *frtib.gov* and publishing announcements of meetings open to public observation in the **Federal Register**.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees, members of the uniformed services who participate in the TSP, and beneficiary participants.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, and 1501–1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under 2 U.S.C. 1532 is not required.

List of Subjects

5 CFR Part 1630

Privacy.

5 CFR Part 1632

Sunshine Act.

5 CFR Part 1650

Alimony, Claims, Government employees, Pensions, Retirement.

Ravindra Deo,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons stated in the preamble, the FRTIB proposes to amend 5 CFR Chapter VI as follows:

PART 1630—PRIVACY ACT REGULATIONS

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

Authority: 5 U.S.C. 552a.

■ 2. Amend § 1630.4 by revising paragraph (a)(2) to read as follows:

§ 1630.4 Request for notification and access.

(a) * * *

(2) Participants may also inquire whether this system contains records about them and access certain records through the account access section of the TSP website and the ThriftLine (the TSP's automated telephone system). The TSP website is *www.tsp.gov.* To use the TSP ThriftLine, the participant must have a touch-tone telephone and call (877) 968–3778. Information such as account balance and transaction status is available on the TSP website and the ThriftLine. To access these features, the participant may be required to verify his or her identity by providing identifying particulars.

* * * * *

■ 3. Amend § 1630.7 by revising paragraph (c)(3) to read as follows:

§ 1630.7 Identification requirements.

* * * * *

(c) * * *

(3) A participant may also access the TSP website or call the TSP ThriftLine to obtain account information. These systems may require identity and account verification information and may require the participant to verify his or her identity by providing identifying particulars.

PART 1632—RULES REGARDING PUBLIC OBSERVATION OF MEETINGS

■ 4. The authority for this citation continues to read as follows:

Authority: 5 U.S.C. 552b and 8474.

■ 5. Amend § 1632.4 by revising paragraph (c) to read as follows:

§ 1632.4 Meetings open to public observation.

* * * * *

(c) The annual Board meeting schedule will be maintained on *frtib.gov.* In addition, agency announcements of meetings open to public observation will be published in the **Federal Register**. Requests for announcements may be made by telephoning or by writing to the Office of External Affairs, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.

PART 1650—METHODS OF WITHDRAWING FUNDS FROM THE THRIFT SAVINGS PLAN

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

Authority: 5 U.S.C. 8351, 8432d, 8433, 8434, 8435, 8474(b)(5) and 8474(c)(1).

■ 7. Amend § 1650.14 by revising paragraph (g)(4) to read as follows:

§ 1650.14 Annuities.

* * * * *

(g) * * *

(4) *Either a single life or joint (with spouse) life annuity with increasing payments.* This annuity provides monthly payments to the participant only, or to the participant and spouse, as applicable. The monthly payments are increased once each year on the anniversary of the first payment by a fixed rate of 2 percent. If the participant chooses a joint life annuity, the annual 2 percent increase also applies to benefits received by the survivor.

* * * * *

[FR Doc. 2019–27068 Filed 12–16–19; 8:45 am]

BILLING CODE 6760–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 66

[Document No. AMS–FTPP–19–0104]

National Bioengineered Food Disclosure Standard; Validation of Refining Processes

ACTION: Request for comments.

SUMMARY: The Agricultural Marketing Service (AMS) of the Department of Agriculture (USDA) is soliciting comments and feedback on draft instructions for validation of refining processes as it pertains to the National Bioengineered Food Disclosure Standard (Standard).

DATES: Comments are due by January 16, 2020.

ADDRESSES: We invite you to submit written comments via the internet at *http://www.regulations.gov.* All comments should refer to the date and page number of this issue of the **Federal Register**. All comments submitted in response to this notice, including the identity of individuals or entities submitting comments, will be made available to the public on the internet via *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Trevor Findley, Deputy Director, Food Disclosure and Labeling Division, Fair Trade Practices Program, Agricultural Marketing Service, U.S. Department of Agriculture, telephone (202) 690–3460, email *trevor.findley@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

On July 29, 2016, Public Law 114–216 amended the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et. seq.*) (amended Act) to require USDA to establish a national, mandatory standard for disclosing any food that is or may be bioengineered. In accordance with the amended Act, USDA published final regulations to implement the Standard on December 21, 2018 (83 FR 65843). The regulations became effective on February 19, 2019, with a mandatory compliance date of January 1, 2022.

Foods that do not contain detectable modified genetic material are not bioengineered foods and do not require disclosure under the Standard. Under the definition of *bioengineered food* at 7 CFR 66.1, food does not contain modified genetic material if the genetic material is not detectable pursuant to § 66.9. The recordkeeping requirements for detectability at 7 CFR 66.9 specify the requirements for validating that a refining process renders modified genetic material in a food undetectable. A refining process is validated through analytical testing that meets the standards described in paragraph (c) of 7 CFR 66.9. Paragraph (c) requires that analytical testing meet the following standard: (1) Laboratory quality assurance must ensure the validity and reliability of test results; (2) analytical method selection, validation, and verification must ensure that the testing method used is appropriate (fit for purpose) and that the laboratory can successfully perform the testing; (3) the demonstration of testing validity must ensure consistent accurate analytical performance; and (4) method performance specifications must ensure analytical tests are sufficiently sensitive for the purposes of the detectability requirements of this part.

In the preamble to the final regulations, USDA indicated it would provide instructions to the industry to explain how they can ensure acceptable validation of refining processes in accordance with AMS standards (83 FR 65843). A draft of those instructions is now available on the AMS bioengineered food disclosure website at *https://www.ams.usda.gov/rules-regulations/be.* With this notice, AMS is seeking comments on these draft instructions. USDA will provide further instructions on testing method selection at a later date. At this time, we are only seeking feedback on the validation instructions referenced in this notice. Any comments not directly related to these draft instructions will not be considered.

After reviewing the comments on these draft instructions, AMS will publish final instructions on its website. The final instructions will be maintained and available on the AMS website. These final instructions pertain to the requirements of the existing regulations, which can be found at *https://www.federalregister.gov/documents/2018/12/21/2018-27283/national-bioengineered-food-disclosure-standard.*

Authority: 7 U.S.C. 1639.

Dated: December 10, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–26911 Filed 12–16–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–1053; Product Identifier 2018–SW–037–AD]

RIN 2120–AA64

Airworthiness Directives; Robinson Helicopter Company Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Robinson Helicopter Company Model R44 and R44 II helicopters with an agricultural spray system installed by Supplemental Type Certificate (STC) SR00286BO (spray system). This spray system is also known as a Simplex Manufacturing Company (Simplex) Model 244 spray system. This proposed AD was prompted by a report of an in-flight failure of the spray system elbow pump fitting (pump fitting). This proposed AD would require repetitive inspections of the spray system pump fitting, corrective action if necessary, replacement of the spray system pump fitting, and installation of hose supports and a pump outlet cover. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 31, 2020.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Simplex Manufacturing Company, 13340 NE Whitaker Way, Portland, OR 97230; phone 503–257–3511; fax 503–257–8556; internet *www.simplex.aero.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110.

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–2019–1053; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Chris Bonar, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3521; email: *Christopher.Bonar@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–1053; Product Identifier 2018–SW–037–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

Discussion

The FAA proposes to adopt a new AD for Robinson Helicopter Company Model R44 and R44 II helicopters with an agricultural spray system installed by STC SR00286BO with spray systems serial-numbered 0045 through 0178 inclusive. STC SR00286BO approves the installation of a Simplex spray system. This proposed AD would require a repetitive inspection until the pump fitting is modified.

This proposed AD is prompted by a report of an in-flight failure of the spray system pump fitting. Following the issuance of a Simplex service letter, five additional reports of failed fittings were received. Failure of the pump fitting causes uncontrolled discharge of the spray liquid exiting the system pump. The pump output port is in direct alignment with the engine air intake, allowing the engine to ingest the spray liquid. This condition, if not addressed, could result in an in-flight engine shutdown.

Related Service Information Under 1 CFR Part 51

The FAA reviewed the following service information:

- Simplex Mfg Alert Service Bulletin ASB2017–001, Initial Release, dated March 28, 2017. This service information describes procedures for inspecting the spray system pump fitting to detect damage, including signs of stress, cracking, fatigue, and evidence of leaking.
- Simplex Mfg Service Letter SL2017–017, Revision B, dated March 14, 2018. This service information describes procedures for replacing the spray system pump fitting with an improved pump fitting and installing hose supports.
- Simplex Mfg Service Letter SL2017–030, Initial Release, dated March 12, 2018. This service information describes procedures for installing a pump outlet cover.

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

Other Related Service Information

The FAA reviewed Simplex Mfg, Installation Manual, Simplex Manufacturing Co. HPR44 III Spray System for the Robinson R44 Series Helicopter, Installation Manual PM001–HPR44III–25–008, Revision 7, dated May 2, 2017. This service information specifies unpacking, installation, and system function test procedures.

The FAA also reviewed Simplex Mfg, Instructions for Continued Airworthiness (ICA), Simplex Manufacturing Co. HPR44 III Spray System for the Robinson R44 Series Helicopter, PM011–HPR44III–25–007 ICA, Revision 9, dated April 20, 2018. This service information specifies general, airworthiness limitation, inspection and maintenance, dimension and access, lifting and shoring, leveling and weighing, towing and taxiing, storing, placard and marking, servicing and lubricating, standard practice, and equipment and furnishing information.

FAA's Determination

The FAA is proposing this AD after evaluating all the relevant information and determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require, before each flight, visually inspecting the spray system pump fitting for signs of stress, cracking, fatigue, and evidence of leaking. If there is any sign of stress, cracking, fatigue, or evidence of leaking, this proposed AD would require replacing pump fitting P/N P–58–0752–40 with pump fitting P/N 000-123847-000, and installing cushion clamp P/N 000–115571–000, cable tie hose supports, and pump outlet cover P/N 244–302056–001 before further flight. If there is no sign of stress, cracking, fatigue, or evidence of leaking, this proposed AD would require replacing the pump fitting with fitting P/N 000-123847-000, and installing cushion clamp P/N 000–115571–000, cable tie hose supports, and pump outlet cover P/N 244–302056–001 within 3 months. This proposed AD would also require pressurizing and inspecting the spray system with fitting P/N 000-123847-000, the cushion clamp, the cable tie hose supports, and the pump outlet cover installed, and depending on the outcome of this inspection, replacing the parts and repeating the inspection again.

Differences Between This Proposed AD and the Service Information

The Simplex Mfg alert service bulletin and service letter service information identify the spray system as the R44III spray system. The Simplex Mfg installation manual and ICA service information identify the spray system as the HPR44 III spray system. However, this proposed AD identifies this modification as an agricultural spray system installed by STC SR00286BO and acknowledges the marketing designation of Simplex Model 244 spray system. The Simplex Mfg alert service bulletin service information specifies contacting Simplex if there is evidence of damage. This proposed AD would instead require replacing the spray system pump fitting, and installing a cushion clamp, cable tie hose supports, and a pump outlet cover if there is any sign of stress, cracking, fatigue, or evidence of leaking.

Costs of Compliance

The FAA estimates that this proposed AD affects 75 helicopters of U.S. registry. Labor costs are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this proposed AD.

Inspecting the fitting would take about 0.1 work-hour for an estimated cost of $9 per helicopter and $675 for the U.S. fleet per inspection cycle. Replacing the fitting and installing the cushion clamp and hose supports would take about 1 work-hour with a nominal parts costs for an estimated cost of $85 per helicopter and $6,375 for the U.S. fleet. Installing the pump outlet cover would take about 1 work-hour and parts would cost about $300 for an estimated cost of $385 per helicopter and $28,875 for the U.S. fleet.

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, all costs are included in this cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Robinson Helicopter Company: Docket No. FAA–2019–1053; Product Identifier 2018–SW–037–AD.

(a) Comments Due Date

The FAA must receive comments by January 31, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Robinson Helicopter Company Model R44 and R44 II helicopters, certificated in any category, with an agricultural spray system installed by Supplemental Type Certificate (STC) SR00286BO with spray systems serial-numbered 0045 through 0178 inclusive, installed.

Note 1 to paragraph (c) of this AD: STC SR00286BO approves the installation of Simplex Manufacturing Company Model 244 spray system (spray system). Earlier models of this system have a metal flanged fitting that is not affected by this AD.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 2551, Agricultural Spray System.

(e) Unsafe Condition

This AD was prompted by a report of an in-flight failure of the spray system elbow pump fitting (pump fitting). The FAA is issuing this AD to prevent failure of the pump fitting, which could result in an in-flight engine shutdown.

(f) Compliance

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

(g) Required Actions

(1) Before further flight, and thereafter before each flight, visually inspect the spray system pump fitting for signs of stress, cracking, fatigue, and evidence of leaking by following the Accomplishment Instructions, paragraphs 1. through 4., of Simplex Mfg Alert Service Bulletin ASB2017–001, Initial Release, dated March 28, 2017 (ASB2017–001). If there is any sign of stress, cracking, fatigue, or evidence of leaking, before further flight, accomplish paragraph (g)(2) of this AD.

(2) Within 3 months, unless required before further flight by paragraph (g)(1) of this AD:

(i) Replace spray system pump fitting P/N P–58–0752–40 with fitting P/N 000–123847–000 and install cushion clamp P/N 000–115571–000 and cable tie hose supports by following the Accomplishment Instructions, paragraphs 1. through 6., of Simplex Mfg Service Letter SL2017–017, Revision B, dated March 14, 2018.

(ii) Install pump outlet cover P/N 244–302056–001 by following the Accomplishments Instructions, paragraphs 1. through 7., of Simplex Mfg Service Letter SL2017–030, Initial Release, dated March 12, 2018 (SL2017–030), except refer to Figure 2 when instructed to refer to Figure 1.

Note 2 to paragraph (g)(2)(ii) of this AD: SL2017–030 includes instructions that refer to a Figure 1; however, there is no Figure 1.

(iii) Pressurize the system and determine if the new fitting is functioning correctly by visually inspecting the spray system pump fitting for signs of stress, cracking, fatigue, and evidence of leaking by following the Accomplishment Instructions, paragraphs 1. through 4. of ASB2017–001. If there is any sign of stress, cracking, fatigue, or evidence of leaking, before further flight, remove from service the fitting, cushion clamp, cable tie hose supports, and pump outlet cover and replace with a new fitting, new cushion clamp, new cable tie hose supports, and new pump outlet cover, and repeat the actions required by this paragraph.

(3) After the effective date of this AD, do not install a Simplex Model 244 spray system approved under STC SR00286BO with pump fitting P/N P–58–0752–40 on any Robinson Helicopter Company Model R44 or R44 II helicopter.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

(i) Related Information

(1) For more information about this AD, contact Chris Bonar, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3521; email: *Christopher.Bonar@faa.gov.*

(2) For service information identified in this AD, contact Simplex Manufacturing Company, 13340 NE Whitaker Way, Portland, OR 97230; phone 503–257–3511; fax 503–257–8556; internet *www.simplex.aero.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110.

Issued in Fort Worth, Texas, on December 11, 2019.

Gaetano A. Sciortino,

Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2019–27117 Filed 12–16–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0975; Product Identifier 2019–NM–176–AD]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Embraer S.A. Model ERJ 170 airplanes. This proposed AD was prompted by a report of erroneous indications of certain engine parameters and reports of ''pitch up'' and ''pitch down'' uncommanded attitudes with autopilot engaged in cruise flight. This proposed AD would require installing updated PRIMUS EPIC LOAD software, as specified in an Agência Nacional de Aviação Civil (ANAC) Brazilian AD, which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 31, 2020.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For the material identified in this proposed AD that will be incorporated by reference (IBR), contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, n° 209, Jardim Esplanada, CEP 12242–431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203–6600; email *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.* You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0975.

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–2019–0975; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–0975; Product Identifier 2019–NM–176–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM based on those comments.

The FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

Discussion

The ANAC, which is the aviation authority for Brazil, has issued Brazilian AD 2019–10–02, effective October 21, 2019 (''Brazilian AD 2019–10–02'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Embraer S.A. Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, –200 STD, and –200 LL airplanes.

This AD was prompted by a report of erroneous indications of the engine parameters N1, N2, and ITT from both engines due to the design of data communication of the full authority digital engine control (FADEC) 1 and 2 with the engine indicating and crew alerting system (EICAS) display, which could result in interference with decisions that must be taken by the flight crew during takeoff. This AD was also prompted by reports of ''pitch up'' and ''pitch down'' uncommanded attitudes with autopilot engaged in cruise flight, which could occur in ''Autoland'' mode during landing. The FAA is proposing this AD to address these conditions, which could interfere with the decisions taken by the flight crew during takeoff and landing and possibly result in reduced controllability of the airplane. See the MCAI for additional background information.

Related IBR Material Under 1 CFR Part 51

Brazilian AD 2019–10–02 describes procedures for installing updated PRIMUS EPIC LOAD software. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to a bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because the agency evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in Brazilian AD 2019–10–02 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, Brazilian AD 2019–10–02 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with Brazilian AD 2019–10–02 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information specified in Brazilian AD 2019–10–02 that is required for compliance with Brazilian AD 2019–10–02 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0975 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this proposed AD affects 540 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
9 work-hours × $85 per hour = $765	$0	$765	$413,100

Authority for This Rulemaking

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Embraer S.A.: Docket No. FAA–2019–0975; Product Identifier 2019–NM–176–AD.

(a) Comments Due Date

The FAA must receive comments by January 31, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Embraer S.A. Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, –200 STD, and –200 LL airplanes; certificated in any category, as identified in Agência Nacional de Aviação Civil (ANAC) Brazilian AD 2019–10–02, effective October 21, 2019 (''Brazilian AD 2019–10–02'').

(d) Subject

Air Transport Association (ATA) of America Code 31, Indicating/recording systems.

(e) Reason

This AD was prompted by a report of erroneous indications of the engine parameters N1, N2, and ITT from both engines due to the design of data communication of the full authority digital engine control (FADEC) 1 and 2 with the engine indicating and crew alerting system (EICAS) display, which could result in interference with decisions that must be taken by the flight crew during takeoff. This AD was also prompted by reports of ''pitch up'' and ''pitch down'' uncommanded attitudes with autopilot engaged in cruise flight, which could occur in ''Autoland'' mode during landing. The FAA is proposing this AD to address these conditions, which could interfere with the decisions taken by the flight crew during takeoff and landing and possibly result in reduced controllability of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Brazilian AD 2019–10–02.

(h) Exceptions to Brazilian AD 2019–10–02

(1) Where Brazilian AD 2019–10–02 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Alternative method of compliance (AMOC)'' section of Brazilian AD 2019–10–02 does not apply to this AD.

(3) Where paragraph (d) of Brazilian AD 2019–10–02 specifies you must use certain service information for software installation, this AD specifies to use that service information as applicable, except as provided in paragraphs (a)(1) through (3) of Brazilian AD 2019–10–02.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or ANAC; or ANAC's authorized Designee. If approved by the ANAC Designee, the approval must include the Designee's authorized signature.

(j) Related Information

(1) For information about Brazilian AD 2019–10–02, contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, n° 209,

Jardim Esplanada, CEP 12242–431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203–6600; email *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.* You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0975.

(2) For more information about this AD, contact Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221.

Issued in Des Moines, Washington, on December 5, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–27062 Filed 12–16–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0984; Product Identifier 2019–NM–161–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2018–16–05, which applies to all The Boeing Company Model 757–200, –200PF, –200CB, and –300 series airplanes. AD 2018–16–05 requires repetitive inspections for skin cracking and shim migration at the upper link drag fittings, diagonal brace cracking, and fastener looseness; and applicable on-condition actions. Since the FAA issued AD 2018–16–05, an operator reported finding multiple cracks in the drag fitting at fastener holes while inspecting for cracking as required by AD 2018–16–05. This proposed AD would retain the actions required by AD 2018–16–05, reduce the compliance times for certain inspections, and add repetitive inspections at certain fastener hole locations and applicable on-condition actions. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 31, 2020.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0984.

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–2019–0984; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Chandra Ramdoss, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5239; fax: 562–627–5210; email: *chandraduth.ramdoss@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–0984; Product Identifier 2019–NM–161–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact the agency receives about this proposed AD.

Discussion

The FAA issued AD 2018–16–05, Amendment 39–19345 (83 FR 38250, August 6, 2018) (''AD 2018–16–05''), for all The Boeing Company Model 757–200, –200PF, –200CB, and –300 series airplanes. AD 2018–16–05 requires repetitive inspections for skin cracking and shim migration at the upper link drag fittings, diagonal brace cracking, and fastener looseness; and applicable on-condition actions. AD 2018–16–05 resulted from reports of bolt rotation in the engine drag fitting joint and fastener heads; an inspection of the fastener holes revealed that cracks were found in the skin on two airplanes. The FAA issued AD 2018–16–05 to address cracking in the wing upper skin and forward drag fittings, which could lead to a compromised upper link and reduced structural integrity of the engine strut.

Actions Since AD 2018–16–05 Was Issued

Since the FAA issued AD 2018–16–05, an operator reported finding multiple cracks in the drag fitting at the fastener holes while inspecting for cracking as required by AD 2018–16–05. Subsequent analysis determined that additional repetitive open-hole high frequency eddy current (HFEC) inspections for cracking are necessary at the forward rows of fastener holes. Based on findings, it was also determined that more frequent inspections for cracking in the diagonal brace and diagonal brace fittings are necessary.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 757–57A0073 RB, Revision 1, dated August 1, 2019. This service information describes procedures for repetitive inspections, including general visual, detailed, and HFEC inspections, for loose fasteners, skin cracking, and shim migration at the upper link drag fittings and for cracking in the diagonal brace and diagonal brace fittings and applicable on-condition actions. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

Although this proposed AD does not explicitly restate the requirements of AD 2018–16–05, this proposed AD would retain all of the requirements of AD 2018–16–05. Those requirements are referenced in the service information identified previously, which, in turn, is referenced in paragraph (g) of this proposed AD. This proposed AD would also require accomplishment of the actions identified in the Accomplishment Instructions of Boeing Alert Requirements Bulletin 757–57A0073 RB, Revision 1, dated August 1, 2019, described previously.

For information on the procedures and compliance times, see this service information at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0984.

Explanation of Requirements Bulletin

The FAA worked in conjunction with industry, under the Airworthiness Directive Implementation Aviation Rulemaking Committee (AD ARC), to enhance the AD system. One enhancement is a process for annotating which steps in the service information are ''required for compliance'' (RC) with an AD. Boeing has implemented this RC concept into Boeing service bulletins.

In an effort to further improve the quality of ADs and AD-related Boeing service information, a joint process improvement initiative was worked between the FAA and Boeing. The initiative resulted in the development of a new process in which the service information more clearly identifies the actions needed to address the unsafe condition in the ''Accomplishment Instructions.'' The new process results in a Boeing Requirements Bulletin, which contains only the actions needed to address the unsafe condition (*i.e.,* only the RC actions).

Costs of Compliance

The FAA estimates that this proposed AD affects 561 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Repetitive inspections (retained actions from AD 2018–16–05).	83 work-hours × $85 per hour = $7,055 per inspection cycle.	$0	$7,055 per inspection cycle.	$3,957,855 per inspection cycle.
Repetitive HFEC inspections (new proposed action).	2 work-hours × $85 per hour = $170 per inspection cycle.	0	$170 per inspection cycle.	$95,370 per inspection cycle.

The FAA has received no definitive data that would enable the FAA to provide cost estimates for the on-condition actions specified in this proposed AD.

Authority for This Rulemaking

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

For the reasons discussed above, I certify that the proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2018–16–05, Amendment 39–19345 (83 FR 38250, August 6, 2018), and adding the following new AD:

The Boeing Company: Docket No. FAA–2019–0984; Product Identifier 2019–NM–161–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by January 31, 2020.

(b) Affected ADs

This AD replaces AD 2018–16–05, Amendment 39–19345 (83 FR 38250, August 6, 2018) (''AD 2018–16–05'').

(c) Applicability

This AD applies to all The Boeing Company Model 757–200, –200PF, –200CB, and –300 series airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of bolt rotation in the engine drag fitting joint and fastener heads; an inspection of the fastener holes revealed that cracks were found in the skin. This AD was also prompted by a report of multiple cracks found in the drag fitting at fastener holes during inspections required by AD 2018–16–05. The FAA is issuing this AD to address cracking in the wing upper skin and forward drag fittings, which could lead to a compromised upper link and reduced structural integrity of the engine strut.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 757–57A0073 RB, Revision 1, dated August 1, 2019, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 757–57A0073 RB, Revision 1, dated August 1, 2019.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 757–57A0073, Revision 1, dated August 1, 2019, which is referred to in Boeing Alert Requirements Bulletin 757–57A0073 RB, Revision 1, dated August 1, 2019.

(h) Exceptions to Service Information Specifications

(1) Where Boeing Alert Requirements Bulletin 757–57A0073 RB, Revision 1, dated August 1, 2019, uses the phrase ''the Revision 1 date of Requirements Bulletin 757–57A0073 RB'' this AD requires using ''the effective date of this AD.''

(2) Where Boeing Alert Requirements Bulletin 757–57A0073 RB, Revision 1, dated August 1, 2019, specifies contacting Boeing for repair instructions: This AD requires doing the repair and applicable on-condition actions before further flight using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to: *9-ANM-LAACO-AMOC-Requests@faa.gov.*

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously for AD 2018–16–05 are not approved as AMOCs for this AD.

(j) Related Information

(1) For more information about this AD, contact Chandra Ramdoss, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5239; fax: 562–627–5210; email: *chandraduth.ramdoss@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued in Des Moines, Washington, on December 5, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–27061 Filed 12–16–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0976; Product Identifier 2019–NM–177–AD]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. This proposed AD was prompted by a report of erroneous indications of certain engine parameters and reports of ''pitch up'' and ''pitch down'' uncommanded attitudes with autopilot engaged in cruise flight. This proposed AD would require installing updated PRIMUS EPIC LOAD software, as specified in an Agência Nacional de Aviação Civil (ANAC) Brazilian AD, which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 31, 2020.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For the material identified in this proposed AD that will be incorporated by reference (IBR), contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, n° 209, Jardim Esplanada, CEP 12242–431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203–6600; email *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/*

certificacao/DA/DAE.asp. You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0976.

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–2019–0976; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–0976; Product Identifier 2019–NM–177–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM based on those comments.

The FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

Discussion

The ANAC, which is the aviation authority for Brazil, has issued Brazilian AD 2019–10–01, effective October 21, 2019 (''Brazilian AD 2019–10–01'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –100 SR, –200 STD, –200 LR, and –200 IGW airplanes. Model ERJ 190–100 SR airplanes are not certified by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

This AD was prompted by a report of erroneous indications of the engine parameters N1, N2, and ITT from both engines due to the design of data communication of the full authority digital engine control (FADEC) 1 and 2 with the engine indicating and crew alerting system (EICAS) display, which could result in interference with decisions that must be taken by the flight crew during takeoff. This AD was also prompted by reports of ''pitch up'' and ''pitch down'' uncommanded attitudes with autopilot engaged in cruise flight, which could occur in ''Autoland'' mode during landing. The FAA is proposing this AD to address these conditions, which could interfere with the decisions taken by the flight crew during takeoff and landing and possibly result in reduced controllability of the airplane. See the MCAI for additional background information.

Related IBR Material Under 1 CFR Part 51

Brazilian AD 2019–10–01 describes procedures for installing updated PRIMUS EPIC LOAD software. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to a bilateral agreement with the State of Design Authority, the agency has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because the agency evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in Brazilian AD 2019–10–01 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, Brazilian AD 2019–10–01 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with Brazilian AD 2019–10–01 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information specified in Brazilian AD 2019–10–01 that is required for compliance with Brazilian AD 2019–10–01 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0976 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this proposed AD affects 107 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
9 work-hours × $85 per hour = $765	$0	$765	$81,855

Authority for This Rulemaking

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Embraer S.A.: Docket No. FAA–2019–0976; Product Identifier 2019–NM–177–AD.

(a) Comments Due Date

The FAA must receive comments by January 31, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes, as identified in Agência Nacional de Aviação Civil (ANAC) Brazilian AD 2019–10–01, effective October 21, 2019 (''Brazilian AD 2019–10–01'').

(d) Subject

Air Transport Association (ATA) of America Code 31, Indicating/recording systems.

(e) Reason

This AD was prompted by a case of erroneous indications of the engine parameters N1, N2, and ITT from both engines due to the design of data communication of the full authority digital engine control (FADEC) 1 and 2 with the engine indicating and crew alerting system (EICAS) display, which could result in interference with decisions that must be taken by the flight crew during takeoff. This AD was also prompted by reports of ''pitch up'' and ''pitch down'' uncommanded attitudes with autopilot engaged in cruise flight, which could occur in ''Autoland'' mode during landing. The FAA is proposing this AD to address these conditions, which could interfere with the decisions taken by the flight crew during takeoff and landing and possibly result in reduced controllability of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Brazilian AD 2019–10–01.

(h) Exceptions to Brazilian AD 2019–10–01

(1) Where Brazilian AD 2019–10–01 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Alternative method of compliance (AMOC)'' section of Brazilian AD 2019–10–01 does not apply to this AD.

(3) Where paragraph (d) of Brazilian AD 2019–10–01 specifies you must use certain service information for software installation, this AD specifies to use that service information as applicable, except as provided in paragraphs (a)(1) through (6) of Brazilian AD 2019–10–01.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or ANAC; or ANAC's authorized Designee. If approved by the ANAC Designee, the approval must include the Designee's authorized signature.

(j) Related Information

(1) Brazilian AD 2019–10–01, contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, n° 209, Jardim Esplanada, CEP 12242–431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203–6600; email *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.* You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0976.

(2) For more information about this AD, contact Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221.

Issued in Des Moines, Washington, on December 6, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–27076 Filed 12–16–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2019–0315; Airspace Docket No. 18–ANM–3]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Astoria, OR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace area, designated as a surface area, at Astoria Regional Airport, Astoria, OR by reducing the size of the Class E surface airspace. Also, this action proposes to amend the Class E airspace by adding two Class E airspace areas, designated as an extension to a Class D or Class E surface area, at the airport. Additionally, this action proposes to amend the Class E airspace areas extending upward from 700 feet or more above the surface of the earth, by reducing the dimensions of the area and sizing it to properly contain IFR arrivals and departures. Further, this action proposes to make several administrative corrections to the airport's legal descriptions. This action would ensure the safety and management of IFR operations at the airport.

DATES: Comments must be received on or before January 31, 2020.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1–800–647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2019–0315; Airspace Docket No. 18–ANM–3, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.com.*

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

FOR FURTHER INFORMATION CONTACT: Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–3695.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would amend the Class E airspace at Astoria Regional Airport, Astoria, Oregon to support instrument flight rules (IFR) operations at the airport.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2019–0315; Airspace Docket No. 18–ANM–3''. The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending the Class E airspace area, designated as a surface area, at Astoria Regional Airport, Astoria, OR to properly contain IFR aircraft as follows; That airspace extending upward from the surface within a 4-mile radius of the airport beginning at the 350° bearing from the airport clockwise to the 239° bearing from the airport, thence along the 239° bearing to a 5-miles radius clockwise to the 350° bearing from the airport, thence along the 350° bearing to the 4-miles radius of the Astoria Regional Airport, excluding that airspace within a 1-mile radius of the Camp Rilea Army Heliport.

Also, this action proposes to amend the Class E airspace by adding two Class E airspace areas, designated as an extension to a Class D or Class E surface area. These areas would properly contain IFR arrivals descending below 1,000 feet above the surface of the earth as follows; That airspace extending upward from the surface within 1.1 miles each side of the 095° bearing from the airport extending from the 4-mile radius to 9.3 miles east of the airport, and within 2.4 miles each side of the 267° bearing from the airport extending from the 5-mile radius to 7.1 miles west of the Astoria Regional Airport.

Additionally, this action proposes to amend the Class E airspace areas extending upward from 700 feet or more above the surface of the earth at the airport. The proposal would reduce the overall dimensions of the area and properly size it to contain IFR departures and arrivals as follows; That airspace extending from 700 feet above the surface within an 8-mile radius of the airport, and within 4 miles each side of the 095° bearing from the airport extending from the 8-mile radius to 18.8 miles east of the airport, and 4.3 miles north and 7.8 miles south of the 265° bearing from the airport extending from the 8-mile radius to 16.1 miles west of the Astoria Regional Airport.

Further, this action proposes to make administrative corrections to the airport's Class E2 Class E5 legal descriptions. The Class E2 airspace should be full time; the following two sentences do not accurately represent the time of use for the Class E2 airspace and need to be removed: ''This Class E airspace area is effective during specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.'' The action also proposes to remove the Seaside Municipal Airport from the Class E5 legal description because the Class E5 700 foot airspace no longer overlies the Seaside Municipal Airport.

Class E2, Class E4 and Class E5 airspace designations are published in paragraphs 6002, 6004, and 6005, respectively, of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order. FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

Paragraph 6002 Class E Airspace Areas Designated as Surface Areas.

* * * * *

ANM OR E2 Astoria, OR [Amended]

Astoria Regional Airport, Astoria, OR
(Lat. 46°09′29″ N, long. 123°52′43″ W)
Camp Rilea Army Heliport
(Lat. 46°06′59″ N, long. 123°55′54″ W)

That airspace extending upward from the surface within a 4-mile radius of the airport beginning at the 350° bearing from the airport clockwise to the 239° bearing from the airport, thence along the 239° bearing to a 5-miles radius clockwise to the 350° bearing from the airport, thence along the 350° bearing to the 4-miles radius of the Astoria Regional Airport, excluding that airspace within a 1-mile radius of the Camp Rilea Army Heliport.

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D or Class E Surface Area.

* * * * *

ANM OR E4 Astoria, OR [New]

Astoria Regional Airport, Astoria, OR
(Lat. 46°09′29″ N, long. 123°52′43″ W)

That airspace extending upward from the surface within 1.1 miles each side of the 095° bearing from the airport extending from the 4-mile radius to 9.3 miles east of the airport, and within 2.4 miles each side of the 267° bearing from the airport extending from the 5-mile radius to 7.1 miles west of the Astoria Regional Airport.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANM OR E5 Astoria, OR [Amended]

Astoria Regional Airport, Astoria, OR
(Lat. 46°09′29″ N, long. 123°52′43″ W)

That airspace extending from 700 feet above the surface within an 8-mile radius of the airport, and within 4 miles each side of the 095° bearing from the airport extending from the 8-mile radius to 18.8 miles east of the airport, and 4.3 miles north and 7.8 miles south of the 265° bearing from the airport extending from the 8-mile radius to 16.1 miles west of the Astoria Regional Airport.

Issued in Seattle, Washington, on December 11, 2019.

Tom Clark,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2019–27151 Filed 12–16–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 814

[Docket No. FDA–2019–N–3101]

Revised Procedures for the Announcement of Approvals and Denials of Premarket Approval Applications and Humanitarian Device Exemption Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is proposing to amend the medical device regulations regarding the procedures for the announcement of approvals and denials of premarket approval applications (PMAs) and humanitarian device exemption applications (HDEs). We are proposing to discontinue publishing in the **Federal Register** after each quarter a list of PMA and HDE approvals and denials announced in that quarter. We will continue to post approval and denial notices for PMAs and HDEs on FDA's home page on the internet and will also continue to make available on the internet and place on public display summaries of safety and effectiveness data (SSED) for PMAs and summaries of safety and probable benefit (SSPB) for HDEs. FDA is proposing to take this action to improve the efficiency of announcing approvals and denials of PMAs and HDEs and to eliminate duplication in the current process for announcing this information. We are also proposing to update Agency contact information and statutory references in certain sections of the PMA and HDE regulations for purposes of accuracy, clarity, and consistency.

DATES: Submit either electronic or written comments on the proposed rule by March 2, 2020.

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 March 2, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 2, 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–N–3101 for ''Revised Procedures for the Announcement of Approvals and Denials of Premarket Approval Applications and Humanitarian Device Exemption Applications.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov*. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/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:

For information concerning the proposed rule as it relates to devices regulated by the Center for Biologics Evaluation and Research: Jessica Walker Udechukwu, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

For information concerning the proposed rule as it relates to devices regulated by the Center for Devices and Radiological Health: Joshua Nipper, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1650, Silver Spring, MD 20993–0002, 301–796–6524.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

A. Purpose of the Proposed Rule

FDA is proposing to amend its medical device regulations regarding the procedures for the announcement of approvals and denials of PMAs and HDEs to discontinue the quarterly publication in the **Federal Register** of a list of approvals and denials of both PMAs and HDEs. FDA will continue to post approval and denial notices for PMAs and HDEs on FDA's home page on the internet (*https://www.fda.gov*) and will also continue to make available on the internet and place on public display SSED for PMAs and SSPB for HDEs. FDA is proposing to take this action to improve the efficiency of announcing approvals and denials of PMAs and HDEs and eliminate duplication in the current process for announcing this information. We are also proposing to update Agency contact information and statutory references in certain of the PMA and HDE regulations for purposes of accuracy, clarity, and consistency.

B. Summary of the Major Provisions of the Proposed Rule

FDA is proposing to amend its regulations regarding the announcement procedures for the approval and denial of PMAs and HDEs. FDA is proposing to discontinue publishing in the **Federal Register** after each quarter a list of PMA and HDE approvals and denials announced for that quarter. We will continue to post approval and denial notices for PMAs and HDEs on FDA's home page on the internet, and we will also continue to make SSED for PMAs and SSPB for HDEs available on the internet and place them on public display.

C. Legal Authority

FDA is issuing this proposed rule under sections 515, 520(h), 520(m), and 701(a) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360e, 360j(h), 360j(m), and 371(a)).

D. Costs and Benefits

The benefit of this proposed rule, if finalized, is that it would result in cost savings to FDA from discontinuing publishing in the **Federal Register** on a quarterly basis, a list of medical device PMA and HDE approvals and denials. Annualized over 10 years, the estimated benefits (*i.e.,* cost savings) to FDA would range from $0.008 million to $0.013 million at both 3 and 7 percent discount rate, with a primary estimate of $0.010 million. This proposed rule, if finalized, would result in no costs to industry because the rule would not require performance of any additional tasks and, therefore, would not impose any additional regulatory burden on the industry.

II. Background

A. Need for the Regulation

FDA is proposing to amend its medical device regulations regarding the procedures for the announcement of approvals and denials of PMAs and HDEs to discontinue the quarterly publication in the **Federal Register** of a list of approvals and denials of both PMAs and HDEs. FDA is proposing to take this action to improve the efficiency of announcing approvals and denials of PMAs and HDEs and eliminate duplication in announcing this information. The proposed rule, if finalized, would allow FDA staff to focus on other Agency priorities and utilize FDA staff resources more efficiently. FDA is also proposing to revise § 814.44(d)(2) (21 CFR 814.44(d)(2)) to be consistent with § 814.45(d)(2) (21 CFR 814.45(d)(2)), which states that requests for copies of the current PMA approvals and denials document and copies of SSED must be sent in writing to FDA's Freedom of Information Staff. In addition, FDA is proposing to update outdated references to section 515(d)(3) of the FD&C Act in the PMA (§§ 814.40 (21 CFR 814.40), 814.44, and 814.45) and HDE (§ 814.118 (21 CFR 814.118)) regulations.

B. History of the Rulemaking

Section 515(d)(4) of the FD&C Act permits an interested person to obtain review of an order approving a PMA in accordance with section 515(g) of the FD&C Act. The statute does not require the Agency to publish the approval of a PMA in the **Federal Register**; however, FDA issued in the **Federal Register** of July 22, 1986 (51 FR 26342) a final rule that provided, among other things, that notice of approval of a PMA, notice of an order denying approval of a PMA, and notice of an order withdrawing approval of a PMA will be published in the **Federal Register**. In the **Federal Register** of June 26, 1996 (61 FR 33232), FDA issued a final rule prescribing, among other things, the procedures for submitting HDEs, HDE amendments, and HDE supplements, and the criteria for FDA review and approval of HDEs. Furthermore, the final rule of June 26, 1996, provided that the notice of approval of an HDE be published in the **Federal Register** in accordance with the rules and policies applicable to PMAs submitted under 21 CFR 814.20. That final rule also provided that, if FDA issues an order denying approval of an HDE, FDA will comply with the same notice and disclosure provisions required for PMAs under § 814.45(b) and (d), as applicable.

In the **Federal Register** of January 30, 1998 (63 FR 4571), FDA issued a final rule discontinuing the publication of individual PMA approvals and denials in the **Federal Register**. The final rule provided that FDA would notify the public of PMA approvals and denials by posting them on FDA's home page on the internet, by placing SSED on the internet and in FDA's Dockets Management Branch, and by publishing in the **Federal Register** after each quarter a list of the PMA approvals and denials announced in that quarter. FDA stated that it believed that this procedure would expedite public notification of these actions because announcements could be placed on the internet more quickly than they could be published in the **Federal Register**, and FDA believed that the internet would be accessible to more people than the **Federal Register**.

III. Legal Authority

We are issuing this proposed rule under the authority of sections 515, 520(h), and 520(m) of the FD&C Act, which set forth requirements for device premarket approval, release of detailed summaries of information respecting the safety and effectiveness of devices, and humanitarian device exemptions, and under section 701(a) of the FD&C Act, which provides FDA the authority to issue regulations for the efficient enforcement of the FD&C Act.

IV. Description of the Proposed Rule

We are proposing to amend 21 CFR part 814 to revise the PMA and HDE approval and denial announcement procedures.

FDA would discontinue publishing in the **Federal Register** after each quarter a list of PMA and HDE approvals and denials announced in that quarter (see proposed revisions to §§ 814.44, 814.45, and 814.116). FDA will continue to give the public notice of PMA and HDE approvals and denials by placing notices of approval and denial on FDA's home page on the internet. Notices of PMA and HDE approval will continue to include a notice of opportunity for interested persons to request review. FDA considers the 30-day period for requesting reconsideration of an FDA action under § 10.33(b) (21 CFR 10.33(b)) for notices of PMA and HDE approval to begin on the day the notice is placed on the internet. Section 10.33(b) provides that FDA may, for good cause, extend this 30-day filing period. In addition, we will continue to make available on the internet and place on public display SSED and SSPB.

We are also proposing to revise § 814.44(d)(2), regarding requests for copies of the current PMA approvals and denials document and copies of SSED, to state that such requests must be sent to the Freedom of Information Staff, rather than to the Division of Dockets Management. We are proposing this revision because these requests are currently handled by the Freedom of Information Staff. Revised § 814.44(d)(2) would be consistent with current § 814.45(d)(2).

In addition, FDA is proposing to update outdated references to section 515(d)(3) of the FD&C Act in the PMA (§§ 814.40, 814.44, and 814.45) and HDE (§ 814.118) regulations. FDA is proposing to make this update because section 515(d)(3) of the FD&C Act was redesignated as section 515(d)(4) by section 202 of the Food and Drug Administration Modernization Act of 1997 (Pub. L. 105–115).

V. Proposed Effective Date

FDA is proposing that any final rule based on this proposed rule become effective 30 days after the date of its publication in the **Federal Register**.

VI. Preliminary Economic Analysis of Impacts

A. Introduction

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

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this proposed rule, if finalized, would not impose any additional regulatory burden on the industry, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

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

B. Summary of Benefits and Costs

The benefit of this proposed rule, if finalized, is that it would result in cost savings to FDA from discontinuing publishing in the **Federal Register**, on a quarterly basis, a list of medical device PMA and HDE approvals and denials. Discontinuing publishing **Federal Register** notices with these approval and denial lists would eliminate duplication in announcing this information; information on these approvals and denials would continue being readily available to the public on FDA's home page on the internet (*https://www.fda.gov*). We estimate no additional benefits beyond these cost savings to FDA.

We estimate that this proposed rule, if finalized, would result in no additional costs to industry because the rule would not require performance of any additional tasks. This proposed rule, therefore, would not impose any additional regulatory burden on the industry.

Table 1 summarizes the estimated benefits and costs of the proposed rule, if finalized. Annualized over 10 years, the estimated benefits (*i.e.,* cost savings) of the proposed rule, if finalized, would range from $0.008 million to $0.013 million at both 3 and 7 percent discount rate, with a primary estimate of $0.010 million. The present value of the estimated benefits (*i.e.,* cost savings) of the proposed rule, if finalized, would range from $0.068 million to $0.111 million at a 3 percent discount rate and from $0.056 million to $0.091 million at a 7 percent discount rate. The annualized costs of the proposed rule, if finalized, would be $0 at both 3 and 7 percent discount rate. The present value of costs of the proposed rule, if finalized, would also be $0 at both 3 and 7 percent discount rate.

TABLE 1—SUMMARY OF BENEFITS, COSTS, AND DISTRIBUTIONAL EFFECTS OF PROPOSED RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Benefits:							
Annualized Monetized $millions/year	$0.010	$0.008	$0.013	2018	7	10	Benefits are cost savings.
	0.010	0.008	0.013	2018	3	10	Benefits are cost savings.
Annualized Quantified							
Qualitative							
Costs:							
Annualized Monetized $millions/year	0	0	0	2018	7	10	
	0	0	0	2018	3	10	

TABLE 1—SUMMARY OF BENEFITS, COSTS, AND DISTRIBUTIONAL EFFECTS OF PROPOSED RULE—Continued

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Annualized Quantified	....	....	....	....	....	....	
Qualitative	....	....	....	....	....	....	
Transfers: Federal Annualized Monetized $millions/year	....	....	....	....	....	....	
From/To	From:			To:			
Other Annualized Monetized $millions/year	....	....	....	....	....	....	
From/To	From:			To:			

Effects:
State, Local or Tribal Government: No significant effect
Small Business: No significant effect.
Wages: N/A.
Growth: N/A.

In line with Executive Order 13771, in table 2 we discuss annualized and present values of costs and cost savings over an infinite time horizon. The present value of the net costs would be $0 at both 3 and 7 percent discount rate. The total annualized cost savings would range from $0.008 million to $0.013 million at both 3 and 7 percent discount rates.

TABLE 2—EXECUTIVE ORDER 13771 SUMMARY TABLE

[in $ Millions 2016 Dollars, Over an Infinite Time Horizon]

Item	Primary estimate (7%)	Lower estimate (7%)	Upper estimate (7%)	Primary estimate (3%)	Lower estimate (3%)	Upper estimate (3%)
Present Value of Costs	$0	$0	$0	$0	$0	$0
Present Value of Cost Savings	0.143	0.114	0.186	0.333	0.267	0.433
Present Value of Net Costs	(0.143)	(0.114)	(0.186)	(0.333)	(0.267)	(0.433)
Annualized Costs	0	0	0	0	0	0
Annualized Cost Savings	0.010	0.008	0.013	0.010	0.008	0.013
Annualized Net Costs	(0.010)	(0.008)	(0.013)	(0.010)	(0.008)	(0.013)

Note: Net costs are calculated as costs minus cost savings. Values in parentheses denote net negative costs (*i.e.* cost-savings).

We have developed a comprehensive Preliminary Economic Analysis of Impacts that assesses the impacts of the proposed rule. The full preliminary analysis of economic impacts is available in the docket for this proposed rule (Ref. 1) and at *https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm*.

VII. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VIII. Federalism

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

IX. Consultation and Coordination With Indian Tribal Governments

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13175. We have tentatively determined that the rule does not contain policies that would have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The Agency solicits comments from tribal officials on any potential impact on Indian Tribes from this proposed action.

X. Reference

The following reference is on display at the Dockets Management Staff (see **ADDRESSES**) and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; it is also available electronically at *https://www.regulations.gov*. FDA has verified the website address, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. FDA/Economics Staff, ''Revised Procedures for the Announcement of Approvals and Denials of Premarket Approval Applications and Humanitarian Device Exemption Applications, Preliminary Regulatory Impact Analysis, Preliminary Regulatory Flexibility Analysis, Unfunded Mandates Reform Act Analysis,'' 2019 (available at: *https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm*).

List of Subjects in 21 CFR Part 814

Administrative practice and procedure, Confidential business information, Medical devices, Medical research, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 814 be amended as follows:

PART 814—PREMARKET APPROVAL OF MEDICAL DEVICES

■ 1. The authority citation for part 814 continues to read as follows:

Authority: 21 U.S.C. 351, 352, 353, 360, 360c–360j, 360bbb–8b, 371, 372, 373, 374, 375, 379, 379e, 381.

§ 814.40 [Amended]

■ 2. In § 814.40, remove ''515(d)(3)'' and add in its place ''515(d)(4)''

§ 814.44 [Amended]

■ 3. Amend § 814.44 as follows:

■ a. In the fourth sentence in paragraph (d)(1), remove ''515(d)(3)'' and add in its place ''515(d)(4)'' and remove the sixth sentence;

■ b. In paragraph (d)(2), remove ''Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852'' and add in its place ''Freedom of Information Staff's address listed on the Agency's website at *https://www.fda.gov.*''; and

■ c. In paragraphs (e)(2)(ii) and (f)(2), remove ''515(d)(3)'' and add in its place ''515(d)(4)''.

§ 814.45 [Amended]

■ 4. Amend § 814.45 as follows:

■ a. In paragraph (d)(1), remove the third sentence and

■ b. In paragraph (e)(3), remove ''515(d)(3)'' and add in its place ''515(d)(4)''.

■ 5. In § 814.116 revise the fourth sentence in paragraph (b) to read as follows:

§ 814.116 Procedures for review of an HDE.

(b) * * * The notice of approval of an HDE will be placed on the FDA's home page on the internet (*https://www.fda.gov*) in accordance with the rules and policies applicable to PMAs submitted under § 814.20. * * *

§ 814.118 [Amended]

■ 6. In § 814.118(c)(3), remove ''515(d)(3)'' and add in its place ''515(d)(4)''.

Dated: December 9, 2019.

Brett P. Giroir,

Acting Commissioner of Food and Drugs.

[FR Doc. 2019–27045 Filed 12–16–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–107431–19]

RIN 1545–BP40

Treatment of Payments to Charitable Entities in Return for Consideration

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notification of public hearing.

SUMMARY: This document provides proposed amendments to the regulations under sections 162, 164, and 170 of the Internal Revenue Code (Code). First, the proposed amendments update the regulations under section 162 to reflect current law regarding the application of section 162 to a taxpayer that makes a payment or transfer to an entity described in section 170(c) for a business purpose. Second, the proposed amendments provide safe harbors under section 162 to provide certainty with respect to the treatment of payments made by business entities to an entity described in section 170(c). Third, the proposed amendments provide a safe harbor under section 164 for payments made to an entity described in section 170(c) by individuals who itemize deductions and receive or expect to receive a state or local tax credit in return. Fourth, the proposed amendments update the regulations under section 170 to reflect past guidance and case law regarding the application of the *quid pro quo* principle under section 170 to benefits received or expected to be received by a donor from a third party.

DATES: Written or electronic comments must be received by January 31, 2020 Requests to speak and outlines of topics to be discussed at the public hearing scheduled for February 20, 2020, must be received by January 31, 2020.

ADDRESSES: Submit electronic submissions via the Federal eRulemaking Portal at *http://www.regulations.gov* (indicate IRS and REG–107431–19) 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–107431–19), 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–107431–19), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Mon L. Lam and Merrill D. Feldstein at (202) 317–4059; concerning submission of comments and requests to speak at the public hearing, Regina Johnson at (202) 317–6901 (not toll-free numbers) or *fdms.database@irscounsel.treas.gov*.

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

I. Contributions in Exchange for State and Local Tax Credits

Section 170(a)(1) generally allows an itemized deduction for any ''charitable contribution'' paid within the taxable year. Section 170(c) defines ''charitable contribution'' as a ''contribution or gift to or for the use of'' an entity described in that section. Under section 170(c)(1), such entities include a State, a possession of the United States, or any political subdivision of the foregoing, or the District of Columbia. Section 170(c)(2) includes certain corporations, trusts, or community chests, funds, or foundations, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals. Section 1.170A–1(c)(5) of the Income Tax Regulations provides that transfers of property to an organization described in section 170(c) that bear a direct relationship to the taxpayer's trade or business and that are made with a reasonable expectation of financial return commensurate with the amount of the transfer may constitute allowable deductions as trade or business expenses rather than as charitable contributions. Section 162(a) allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Section 162(b) provides that no deduction shall be allowed under subsection (a) for any contribution or gift that would be allowable as a deduction under section 170 were it not for the percentage limitations, the dollar limitations, or the requirements as to the time of payment set forth in that section.

Section 1.162–15(a) applies to contributions to entities described in section 170(c). Section 1.162–15(a)(1) currently provides that no deduction is allowable under section 162(a) for a contribution or gift by an individual or a corporation if any part thereof is deductible under section 170. For example, if a taxpayer makes a contribution of $5,000 and only $4,000 of this amount is deductible under section 170(a) (whether because of the percentage limitation under either section 170(b)(1) or (2), the requirement as to time of payment, or both), no deduction is allowable under section 162(a) for the remaining $1,000. However, § 1.162–15(a)(2) clarifies that the limitations provided in section 162(b) and § 1.162–15(a)(1) apply only to payments that are in fact contributions or gifts to organizations described in section 170. For example, payments by a transit company to a local hospital (which is a charitable organization within the meaning of section 170) in consideration of a binding obligation on the part of the hospital to provide hospital services and facilities for the company's employees are not contributions or gifts within the meaning of section 170 and may be deductible under section 162(a) if the requirements of section 162(a) are otherwise satisfied.

Section 164(a) allows a deduction for the payment of certain taxes, including: (1) State and local, and foreign, real property taxes; (2) state and local personal property taxes; and (3) state and local, and foreign, income, war profits, and excess profits taxes. In addition, section 164 allows a deduction for taxes not described in the preceding sentence that are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212. Moreover, under section 164(b)(5), taxpayers may elect to deduct state and local general sales taxes in lieu of state and local income taxes.

Section 164(b)(6), as added by section 11042(a) of the Tax Cuts and Jobs Act Public Law 115–97, (the ''TCJA'') provides that in the case of an individual, deductions for foreign real property taxes are not allowable under section 164(a)(1), and the deduction for the aggregate amount of the following state and local taxes paid during the calendar year is limited to $10,000 ($5,000 in the case of a married individual filing a separate return): (1) Real property taxes; (2) personal property taxes; (3) income, war profits, and excess profits taxes; and (4) general sales taxes. This limitation applies to taxable years beginning after December 31, 2017, and before January 1, 2026, and does not apply to foreign taxes described in section 164(a)(3) or to any taxes described in section 164(a)(1) and (2) that are paid or accrued in carrying on a trade or business or an activity described in section 212.

In response to the limitation in section 164(b)(6), some taxpayers have considered tax planning strategies to avoid or mitigate its effects. Some of these strategies rely on state and local tax credit programs under which states provide tax credits in return for contributions by taxpayers to entities described in section 170(c), and some state and local governments have created new programs intended to facilitate use of these strategies.

On June 11, 2018, the Treasury Department and the IRS announced their intention to propose regulations addressing the proper application of sections 164 and 170 to taxpayers who make contributions under state and local tax credit programs to entities described in section 170(c). See Notice 2018–54, 2018–24 I.R.B. 750. On August 27, 2018, proposed regulations (REG–112176–18) under sections 170 and 642(c) were published in the **Federal Register** (83 FR 43563) (''2018 proposed regulations''). The 2018 proposed regulations proposed amending § 1.170A–1(h)(3) to provide, in general, that if a taxpayer makes a payment or transfers property to or for the use of an entity described in section 170(c), and the taxpayer receives or expects to receive a state or local tax credit in return for such payment or transfer, the tax credit constitutes a return benefit to the taxpayer and reduces the taxpayer's charitable contribution deduction. The 2018 proposed regulations were premised, in part, on the *quid pro quo* principle articulated by the Supreme Court in *United States* v. *American Bar Endowment,* 477 U.S. 105, 116 (1986), and its progeny that ''a payment of money generally cannot constitute a charitable deduction if the contributor expects a substantial benefit in return.'' The 2018 proposed regulations also proposed amending regulations under section 642(c), to provide a similar rule for payments made by a trust or decedent's estate.

The Treasury Department and the IRS received over 7,700 comments responding to the 2018 proposed regulations and 25 requests to speak at the public hearing, which was held on November 5, 2018. After taking into account the comments received and the concerns expressed at the public hearing, the Treasury Department and the IRS published final regulations in the **Federal Register** on June 13, 2019 (T.D. 9864, 84 FR 27513) (''the final regulations''). The final regulations retained the rules set out in the 2018 proposed regulations, with certain clarifying and technical changes. Most significantly, the final regulations retained the general rule that, if a taxpayer makes a payment or transfers property to or for the use of an entity described in section 170(c), and the taxpayer receives or expects to receive a state or local tax credit in return for such transfer, the tax credit constitutes a return benefit to the taxpayer, or *quid pro quo,* reducing the taxpayer's charitable contribution deduction. See § 1.170A–1(h)(3) of the final regulations.

In response to Notice 2018–54 and the 2018 proposed regulations, commenters raised several ancillary issues. These issues involved: (1) Treatment of business entity payments to entities described in section 170(c); (2) treatment of payments by individuals with total state and local tax liabilities that were less than or equal to the section 164(b)(6) limitations; and (3) application of the *quid pro quo* principle under section 170 to benefits received or expected to be received by the donor from a party other than the donee.

Although the Treasury Department and the IRS have provided sub-regulatory safe harbors related to the first two issues (in Rev. Proc. 2019–12, 2019–04 I.R.B. 401, and Notice 2019–12, 2019–27 I.R.B. 57), the Treasury Department and the IRS believe that it is appropriate to include these safe harbors in proposed regulations and to request comments. Further, in the preamble to the final regulations, the Treasury Department and the IRS extensively addressed the third issue—whether a benefit received or expected to be received from a party other than the donee may constitute a *quid pro quo* that reduces the taxpayer's charitable contribution deduction under section 170. The preamble to the final regulations stated that the Treasury Department and the IRS would propose additional regulations setting forth a general rule for benefits received or expected to be received from third parties. Accordingly, the proposed regulations, provided herein, would amend the regulations under sections 162, 164, and 170 to provide guidance on these three issues.

II. Payments by Business Entities in Exchange for State or Local Tax Credits

After the issuance of Notice 2018–54, and continuing after the publication of the 2018 proposed regulations, the Treasury Department and the IRS received inquiries from taxpayers regarding the application of the proposed regulations to businesses that make payments to entities described in section 170(c) pursuant to state and local tax credit programs. The taxpayers sought guidance as to whether a business entity may deduct these payments under section 162 as ordinary and necessary business expenses incurred in carrying on a trade or business. In response, on September 5, 2018, the IRS released a frequently asked question (''FAQ'') stating that a business taxpayer making a payment to an entity described in section 170(c) is generally permitted to deduct such payment as an ordinary and necessary business expense under section 162 if the payment is made with a business purpose. However, after the release of the FAQ, taxpayers continued to express concern about whether the business purpose requirement is met for contributions that result in a tax credit. Specifically, taxpayers asked whether payments by business entities in exchange for state and local tax credits would bear a direct relationship to the taxpayer's trade or business such that these payments would qualify as ordinary and necessary business expenses of carrying on a trade or business under section 162(a).

On December 28, 2018, the IRS issued Rev. Proc. 2019–12, providing a safe harbor under section 162 for payments made by a business entity that is a C corporation or specified passthrough entity to or for the use of an organization described in section 170(c) if the C corporation or specified passthrough entity receives or expects to receive state or local tax credits in return. The revenue procedure states that, to the extent that a C corporation receives or expects to receive a state or local tax credit in return for a payment to an organization described in section 170(c), it is reasonable to conclude that there is a direct benefit and a reasonable expectation of commensurate financial return to the C corporation's business in the form of a reduction in the state or local taxes the C corporation would otherwise be required to pay. Thus, the revenue procedure provides a safe harbor that allows a C corporation engaged in a trade or business to treat the portion of the payment that is equal to the amount of the credit received or expected to be received as meeting the requirements of an ordinary and necessary business expense under section 162.

The IRS determined that a similar analysis is appropriate in the case of a business entity other than a C corporation if (1) the business entity is regarded as separate from its owner for all Federal tax purposes under § 301.7701–3 of the Procedure and Administration Regulations (''passthrough entity''); (2) the passthrough entity operates a trade or business within the meaning of section 162; (3) the passthrough entity is subject to a state or local tax incurred in carrying on its trade or business that is imposed directly on the entity; and (4) in return for a payment to an entity described in section 170(c), the passthrough entity receives or expects to receive a state or local tax credit that the entity applies or expects to apply to offset a state or local tax other than a state or local income tax. Thus, to the extent that a specified passthrough entity makes a payment to an entity described in section 170(c) and receives or expects to receive a state or local tax credit, Rev. Proc. 2019–12 permits the passthrough entity to treat the payment as meeting the requirements of an ordinary and necessary business expense under section 162. The safe harbors for C corporations and specified passthrough entities apply only to payments of cash and cash equivalents.

In the interest of providing certainty for taxpayers, the Treasury Department and the IRS believe that it is appropriate to propose regulations to incorporate the safe harbors set out in Rev. Proc. 2019–12 and to request comments on these safe harbors. Thus, these proposed regulations propose amending § 1.162–15(a) to incorporate the Rev. Proc. 2019–12 safe harbors. These proposed regulations also propose amending § 1.170A–1(c)(5) and (h)(3)(viii) to provide cross references to § 1.162–15(a). The Treasury Department and the IRS specifically request comments on whether the safe harbors should be expanded to apply to an individual who is carrying on a trade or business or an activity described in section 212.

The proposed regulations propose additional revisions to § 1.162–15(a) to more clearly reflect the current state of the law regarding a taxpayer's payment or transfer to an entity described in section 170(c). If the taxpayer's payment or transfer bears a direct relationship to its trade or business, and the payment is made with a reasonable expectation of commensurate financial return, the payment or transfer to the section 170(c) entity may constitute an allowable deduction as a trade or business expense under section 162, rather than a charitable contribution under section 170. See § 1.170A–1(c)(5); *Marquis* v. *Commissioner,* 49 T.C. 695 (1968). A proposed example illustrates that this rule applies regardless of whether the taxpayer expects to receive a state or local tax credit in return.

The proposed revisions are also consistent with the decision in *American Bar Endowment,* which states that a payment to an entity described in section 170(c) may have a dual character—part charitable contribution and part business expense. 477 U.S. at 117. Under *American Bar Endowment* and § 1.170A–1(h), if a taxpayer makes a payment to an entity described under section 170(c) in an amount that exceeds the fair market value of the benefit that the taxpayer receives or expects to receive in return, and this excess amount is paid with charitable intent, the taxpayer is allowed a charitable contribution deduction under section 170 for this excess amount.

In addition, the proposed regulations propose to add a cross-reference to § 1.170A–1(h) (payments to section 170(c) entities in exchange for consideration), which provides more detailed rules for determining whether a payment, or a portion of a payment, to an entity described in section 170(c) may be deducted under section 162(a) or section 170.

III. Payments by Individuals in Exchange for State and Local Tax Credits

After publication of the 2018 proposed regulations, commenters expressed concerns that the proposed regulations would create unfair consequences for certain individuals who receive state or local tax credits in return for their payments. Specifically, commenters noted that individuals who itemize deductions for Federal income tax purposes and have total state and local tax liabilities for the taxable year of $10,000 or less ($5,000 or less in the case of a married individual filing a separate return) would be precluded from taking charitable contribution deductions to the extent that they receive state or local tax credits even though the individuals would have been able to deduct equivalent payments of state and local taxes. Thus, if these individuals chose to make a payment to a section 170(c) entity through a state or local tax credit program instead of paying tax to the state or local government, they would lose the deduction to which they would otherwise have been entitled under section 164 even after the application of the section 164(b)(6) limitation.

These state and local tax credit programs effectively offer taxpayers a choice of paying taxes to the state or local government or making a payment to a section 170(c) entity and receiving a tax credit that offsets a tax liability the taxpayer would otherwise owe to the state or local government. This situation can be analogized to situations in which an individual entitled to receive a payment from a second party directs or permits the second party to satisfy its payment obligation by making a payment to a third party. In such situations, the payment may be treated, for Federal income tax purposes, as a payment by the payor to the individual entitled to receive payment. *Cf.* Rev. Rul. 86–14, 1986–1 C.B. 304, modifying Rev. Rul. 74–75, 1974–1 C.B. 19 (payment made by an employer to a third party to discharge an obligation of an employee treated for Federal income tax purposes as made by the employer to the employee).

For these reasons, on June 11, 2019, the IRS released Notice 2019–12, announcing that the Treasury Department and the IRS intend to publish proposed regulations with a safe harbor under section 164 for individuals who make payments to section 170(c) entities in return for state or local tax credits. Under this safe harbor, an individual who itemizes deductions and who makes a payment to an entity described in section 170(c) in exchange for a state or local tax credit may treat as a payment of state or local tax for purposes of section 164 the portion of such payment for which a charitable contribution deduction is or will be disallowed under § 1.170A–1(h)(3). This treatment is allowed in the taxable year in which the payment is made, but only to the extent that the individual applies the resulting credit pursuant to applicable state or local law to offset the individual's state or local tax liability for such taxable year or the preceding taxable year. Notice 2019–12 requested comments for purposes of incorporating the safe harbor in proposed regulations.

The Treasury Department and the IRS received several comments in response to Notice 2019–12. Generally, commenters responded favorably to the safe harbor in the notice, finding that its rationale was sound and that the rule would effectively eliminate concerns that the final regulations under § 1.170A–1(h)(3) unfairly burden individuals who itemize deductions and have state and local tax liabilities that are less than the section 164(b)(6) limitation. One commenter noted that Executive Order 12866, which directs the agency issuing a regulation to identify the problem it intends to address and design the regulation in the most cost-effective manner to achieve that objective with the least amount of burden on society, further supports the safe harbor. See Executive Order 12866, section 1(b). This commenter also suggested that the IRS should track the effects of the safe harbor by requiring taxpayers to disclose state tax and local tax credits on their Form 1040, Schedule A. Alternatively, the commenter suggested that the IRS obtain this information directly from the states. Another commenter generally supported the safe harbor, but suggested that the Treasury Department and the IRS should avoid creating more safe harbor exceptions to § 1.170A–1(h)(3) of the final regulations. This commenter also expressed concerns about the application of the safe harbor when the state and local tax limitation under section 164(b)(6) expires or is modified.

Other commenters were concerned that Notice 2019–12 did not fully address the tax consequences to taxpayers who received or expected to receive state or local tax credits. Specifically, these commenters asked that the Treasury Department and the IRS provide guidance to address the treatment of state or local tax credits for Federal income tax purposes upon their sale or expiration. As noted in the preamble to the final regulations, the Treasury Department and the IRS recognize the significance and complexity of these questions. The Treasury Department and the IRS continue to study these issues and invite additional comment to inform potential future guidance on these issues.

The Treasury Department and the IRS continue to believe that the notice provides a fair, reasonable, and legally sound basis for the safe harbor for individual taxpayers, and that the safe harbor should be added to the regulations under section 164. Accordingly, these proposed regulations propose adding § 1.164–3(j) to provide a safe harbor for individuals who make a payment to or for the use of an entity described in section 170(c) in return for a state or local tax credit. These proposed regulations also propose adding § 1.170A–1(h)(3)(ix) to provide a cross reference to the safe harbor proposed under § 1.164–3(j) and to request comments.

Under these proposed regulations, an individual who itemizes deductions and who makes a payment to a section 170(c) entity in exchange for a state or local tax credit may treat as a payment of state or local tax for purposes of section 164 the portion of such payment for which a charitable contribution deduction under section 170 is or will be disallowed under § 1.170A–1(h)(3). This treatment is allowed in the taxable year in which the payment is made, but only to the extent that the resulting credit is applied pursuant to applicable state or local law to offset the individual's state or local tax liability for such taxable year or the preceding taxable year. Any unused credit permitted to be carried forward may be treated as a payment of state or local tax under section 164 in the taxable year or years for which the carryover credit is applied in accordance with state or local law. The safe harbor for individuals applies only to payments of cash and cash equivalents.

The proposed regulations are not intended to permit a taxpayer to avoid the limitations of section 164(b)(6). Therefore, the proposed regulations provide that any payment treated as a state or local tax under section 164, pursuant to the safe harbor provided in § 1.164–3(j) of the proposed regulations, is subject to the limitations on deductions in section 164(b)(6). Furthermore, the proposed regulations are not intended to permit deductions of the same payments under more than one provision. Thus, the proposed regulations provide that an individual who relies on the safe harbor in § 1.164–3(j) to deduct qualifying payments under section 164 may not also deduct the same payments under any other section of the Code.

IV. Consideration Provided by Party Other Than the Donee

Section 1.170A–1(h)(1) provides that no part of a payment that a taxpayer makes to or for the use of an organization described in section 170(c) that is in consideration for (as defined in § 1.170A–13(f)(6)) goods or services (as defined in § 1.170A–13(f)(5)) is a contribution or gift within the meaning of section 170(c) unless the taxpayer (i) intends to make a payment in an amount that exceeds the fair market value of the goods or services; and (ii) makes a payment in an amount that exceeds the fair market value of the goods or services.

Section 1.170A–1(h)(2) states that the charitable contribution deduction under section 170(a) may not exceed the amount of cash paid and the fair market value of property transferred to an organization described in section 170(c) over the fair market value of goods or services the organization provides in return. Section 1.170A–13(f)(5) defines goods or services as cash, property, services, benefits, and privileges. Section 1.170A–13(f)(6) provides that a donee provides goods or services in consideration for a taxpayer's payment if, at the time the taxpayer makes a payment to the donee, the taxpayer receives or expects to receive goods or services in exchange for that payment.

Section 1.170A–1(h)(3)(iii) defines ''in consideration for'' for purposes of determining whether a state or local tax credit should reduce a charitable contribution under section 170. This section provides that the term ''in consideration for'' shall have the meaning set forth in § 1.170A–13(f)(6), except that the state or local tax credit need not be provided by the donee organization.

Some commenters on the 2018 proposed regulations interpreted the definition of ''in consideration for'' under § 1.170A–13(f)(6) to suggest that consideration provided by a third party is disregarded in calculating the charitable contribution deduction, and that § 1.170A–1(h)(3)(iii) of the proposed regulations provided an exception from this rule solely for state or local tax credits provided by third parties. Other commenters disagreed with this interpretation and suggested that the final regulations should set forth a general rule clarifying that consideration includes all benefits that a taxpayer receives or expects to receive, regardless of whether they are provided by the donee.

In the preamble to the final regulations, the Treasury Department and the IRS acknowledged that the final regulations did not address all situations in which a taxpayer makes a payment or transfers property and receives or expect to receive benefits from a party that is not the donee. Accordingly, the preamble to the final regulations indicated that the Treasury Department and the IRS intended to propose amendments to the regulations under section 170 to make clear that the *quid pro quo* principle applies regardless of whether the party providing the *quid pro quo* is the donee.

As noted in the preamble to the final regulations, in *American Bar Endowment,* 477 U.S. at 116–17, and *Hernandez* v. *Commissioner,* 490 U.S. 680, 691–92 (1989), the Supreme Court made clear that a payment is not a charitable contribution if the donor expects to receive a substantial benefit in return. *American Bar Endowment* and *Hernandez* did not directly address the question of benefits provided by third parties; the return benefits at issue in those cases were provided by the donees. However, the Court derived the *quid pro quo* principle in those cases from a lower court decision and a revenue ruling that directly addressed the question. See *American Bar Endowment,* 477 U.S. at 117 (citing *Singer* v. *United States,* 449 F.2d 413 (Ct. Cl. 1971), and Rev. Rul. 67–246, 1967–2 C.B. 104); *Hernandez,* 490 U.S. at 691 (citing *Singer*). In *Singer,* the appellate division of the Court of Claims (the predecessor to the Court of Appeals for the Federal Circuit) held that a sewing machine company was not eligible for a charitable contribution deduction for selling sewing machines to schools at a discount because the company ''expected a return in the nature of future increased sales'' to students. *Singer,* 449 F.2d at 423–24. In so holding, the court expressly rejected the company's argument that this expected benefit should be ignored because it would come from the students rather than from the schools. *Id.* at 422–23. The court stated, ''Obviously, we cannot agree with plaintiff's distinction.'' *Id.*

In Rev. Rul. 67–246, Example 11, a local store agreed to award a transistor radio, worth $15, to each person who contributed $50 or more to a specific charity. The ruling concluded that if a taxpayer received a $15 radio as a result of a $100 payment to the charity, only $85 qualified as a charitable contribution deduction. It did not matter that the donor received the $15 radio from the store, a third party, rather than from the charity. This conclusion is reflected in the IRS's audit practices. See IRS Conservation Easement Audit Techniques Guide (Rev. Jan. 24, 2018, p. 16) (stating that a ''quid pro quo contribution is a transfer of money or property . . . partly in exchange for goods or services in return from the charity or a third party,'' and ''a quid pro quo may also be in the form of an indirect benefit from a third party'').

Moreover, courts have ruled that a taxpayer's expectation of significant financial returns demonstrates a lack of charitable intent. For example, in *Ottawa Silica Co.* v. *United States,* 699 F.2d 1124 (Fed. Cir. 1983), the Federal Circuit denied a taxpayer's charitable contribution deduction for the value of land the taxpayer donated for construction of a school. The court's analysis focused on the taxpayer's expectation of benefits, and not on the source of such benefits. The court found that the taxpayer had reason to believe that construction of a school would result in the construction of new roads that would in turn increase the value of the taxpayer's retained land. The court recognized that although the taxpayer did not receive an agreement from any party that the roads would be built, the expectation of this benefit was a sufficient reason to deny the charitable contribution deduction. More recently, in *Wendell Falls Development, LLC* v. *Commissioner,* T.C. Memo. 2018–45, a taxpayer contributed a conservation easement that essentially restricted land for use as a park. The taxpayer expected this restriction to increase the value of the taxpayer's adjacent property. The Tax Court disallowed the taxpayer's claimed charitable contribution deduction for the easement, finding that the taxpayer contributed the easement with the expectation of receiving a substantial benefit (increased value of taxpayer's adjacent property) from the contribution, even though the expected benefit would not come from the donee. In accordance with these authorities, the source of the return benefit is immaterial in determining whether the donee at the time of the contribution expects to receive substantial benefits in return.

The *quid pro quo* principle is thus equally applicable regardless of whether the donor expects to receive the benefit from the donee or from a third party. In either case, the donor's payment is not a charitable contribution or gift to the extent that the donor expects a substantial benefit in return. Accordingly, the Treasury Department and the IRS propose amendments to § 1.170A–1(h) that address a donor's payments in exchange for consideration in order for the regulation to reflect existing law. Specifically, these proposed amendments revise paragraph (h)(4) to provide definitions of ''in consideration for'' and ''goods and services'' for purposes of applying the rules in § 1.170A–1(h). Under the proposed regulations, a taxpayer will be treated as receiving goods and services in consideration for a taxpayer's payment or transfer to an entity described in section 170(c) if, at the time the taxpayer makes the payment or transfer, the taxpayer receives or expects to receive goods or services in return.

The proposed regulations do not amend the language of § 1.170A–13(f)(6) which discusses ''in consideration for'' for purposes of determining whether the taxpayer provides proper substantiation of its charitable contribution. Section 1.170A–13(f) details the requirements of a contemporaneous written acknowledgment, including a statement of whether the donee organization provides any goods or services in consideration for any cash or other property transferred to the donee organization and a description and a good faith estimate of the value of those goods or services. See § 1.170A–13(f)(2)(ii) and (iii). These substantiation provisions refer only to written acknowledgments from donee organizations and do not address the application of *quid pro quo* principles to benefits received from parties other than donees. The Treasury Department and the IRS request comments on whether guidance concerning substantiation and reporting of *quid pro quo* benefits provided or expected to be provided by third parties, including state governments, would be beneficial to taxpayers in demonstrating that they have given more than they received or expected to receive and to the IRS in administering the proposed regulation. In addition, the Treasury Department and the IRS request comments regarding the manner by which donors, donees, or third parties may report or provide substantiation for the value or type of consideration received or expected to be received from third parties.

For additional clarity, the proposed regulation amends the language in § 1.170A–1(h)(2)(i)(B) to clarify that the fair market value of goods and services includes the value of goods and services provided by parties other than the donee. Also, the proposed regulation adds a definition of ''goods and services'' that is the same as the definition in § 1.170A–13(f)(5). Finally, the proposed regulation revises the cross-references defining ''in consideration for'' and ''goods and services'' in paragraphs (h)(1) and (h)(3)(iii) to be consistent with the proposed definitions provided in paragraph (h)(4).

Proposed Applicability Dates

The proposed amendments contained in §§ 1.162–15(a)(1) and (2) and 1.170A–1(c)(5), regarding the application of section 162 to taxpayers that make payments or transfers to entities described in section 170(c), are proposed to apply to payments or transfers on or after December 17, 2019. However, a taxpayer may rely on these proposed regulations for payments and transfers made on or after January 1, 2018 and before the date regulations finalizing these proposed regulations are published in the **Federal Register**.

The proposed amendment contained in § 1.162–15(a)(3), regarding safe harbors for C corporations and specified passthrough entities making payments to or for the use of section 170(c) entities in exchange for state or local tax credits, is proposed to apply to payments on or after December 17, 2019. However, prior to this date, a taxpayer may continue to apply Rev. Proc. 2019–12, which applies to payments made on or after January 1, 2018.

The proposed amendments contained in §§ 1.164–3(j) and 1.170A–1(h)(3)(ix), regarding the safe harbor for payments by certain individuals to or for the use of section 170(c) entities, are proposed to apply to payments made on or after June 11, 2019, the date that the IRS issued Notice 2019–12, announcing it intended to publish proposed regulations with a safe harbor under section 164 for individuals who make payments to section 170(c) entities in return for state or local tax credits. However, individuals may rely on these proposed regulations for payments made after August 27, 2018, the applicability date of the final regulations, and before the date regulations finalizing these proposed regulations are published in the **Federal Register**.

Finally, the proposed amendments contained in §§ 1.170A–1(h)(1), (h)(2)(i)(B), (h)(3)(iii), and (h)(4)(i), and 1.170A–13(f)(7) clarifying ''in consideration for'' for purposes of applying § 1.170A–1(h) are proposed to apply to payments or transfers on or after December 17, 2019.

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. This proposed rule is expected to be an E.O. 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the rule's economic analysis.

These proposed 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 significant under section 1(b) of the MOA. Accordingly, the OMB has reviewed these regulations.

A. Background

Section 164 of the Code allows a deduction for certain state and local taxes paid, including state or local income and property taxes. Section 164(b)(6), added by the TCJA, generally limits an individual's deduction of these taxes to $10,000 ($5,000 in the case of a married individual filing a separate return). The limitation does not apply to foreign income taxes or to property taxes that are paid or incurred in carrying on a trade or business or an activity described in section 212. Section 162 allows a deduction for ordinary and necessary expenses paid or incurred in carrying on a trade or business. Section 170 allows a deduction for charitable contributions, specifically for payments or transfers to an entity described in section 170(c); however, the deduction must be reduced by any *quid pro quo* benefit that the taxpayer receives or expects to receive in return.

After the enactment of the TCJA, questions arose regarding the interaction of these deductions. To clarify the application of these provisions, the Treasury Department and the IRS issued guidance including: (1) Final regulations (T.D. 9864, 84 FR 27513) providing that a tax credit received or expected to be received in return for a payment or transfer to an entity described in section 170(c) (hereafter referred to as a charitable entity) is a return benefit to the taxpayer, resulting in the reduction of the charitable contribution deduction; (2) Notice 2019–12 announcing the intent to issue proposed regulations providing a safe harbor for individuals under which a charitable contribution that is disallowed because of a return benefit of a state or local tax credit may be treated as a payment of state or local tax; and (3) Rev. Proc. 2019–12 providing a safe harbor allowing as a deductible business expense certain payments by businesses to charitable organizations.

B. Need for the Proposed Regulations

The Treasury Department and the IRS believe that it is appropriate to propose as regulations and seek additional public comment on the safe harbors provided in Notice 2019–12 and Rev. Proc. 2019–12. In addition, comments received in response to Notice 2018–54 and the 2018 proposed regulations (guidance preceding the final regulations T.D. 9864) indicate that taxpayers will benefit from additional guidance regarding contributions to a charitable entity resulting in a return benefit from a third party.

C. Overview of the Proposed Regulations

First, these proposed regulations reflect the guidance in Notice 2019–12. Under the safe harbor an individual who itemizes deductions and who makes a payment to a charitable entity in exchange for a state or local tax credit may be able to claim a state and local tax deduction for the portion of the payment for which a charitable contribution deduction is or will be disallowed as a return benefit. The safe harbor for individuals applies only to payments of cash and cash equivalents. In addition, these payments are subject to the overall limitation on state and local deductions added by the TCJA. Further, any payment may be deducted under only one provision of the Code. Thus, an individual who has total state and local tax liability of $10,000 or less, and who makes a payment to a charitable entity and receives a state tax credit in return resulting in the disallowance of a charitable contribution deduction, may claim an itemized deduction for the disallowed amount, subject to other requirements of the Code.

Second, the proposed regulations incorporate into the regulations under section 162 longstanding principles from case law and existing section 170 regulations regarding a taxpayer's payment or transfer to a charitable entity. Specifically, the proposed regulations confirm that, when a taxpayer's transfer or payment bears a direct relationship to its trade or business, and that transfer or payment is made with a reasonable expectation of commensurate financial return, the transfer or payment to the charitable entity may constitute an allowable deduction under section 162, rather than under section 170. In addition, the proposed regulations incorporate the safe harbors provided by Rev. Proc. 2019–12 for certain payments by C corporations and specified passthrough entities, for cases in which the financial return is a tax credit. Thus, under the proposed regulations, a C corporation may treat the portion of the payment to a charitable entity that is equal to the amount of tax credit received or expected to be received in return as a deductible business expense under section 162. Consistent with Rev. Proc. 2019–12, the proposed regulations also provide that a specified passthrough entity may treat a payment resulting in a tax credit as a business expense if the business is regarded as separate from its owner for Federal tax purposes, if it operates a trade or business within the meaning of section 162, if it is subject to state or local tax incurred in carrying on its trade or business that is imposed directly on the passthrough entity, and if it receives or expects to receive a state or local tax credit in return for the payment.

Third, the proposed regulations clarify that a payment to a charitable entity that results in a return benefit is a *quid pro quo* for purposes of section 170, regardless of whether the donor expects to receive the benefit from the donee or from a third party. As a result, the contribution is reduced by the amount of the return benefit for purposes of determining the amount allowable as a charitable contribution deduction.

D. Economic Analysis

1. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of these proposed regulations compared to a no-action baseline that reflects anticipated Federal income tax-related behavior in the absence of these proposed regulations.

2. Summary of Economic Effects

The proposed regulations reflect existing, published, Treasury Department and IRS policies. As a result, they provide some additional clarity to taxpayers by clearly articulating these existing policies as regulations. The Treasury Department does not expect any noticeable change in taxpayer behavior resulting from these regulations, but requests comments on their potential economic effects. The increased clarity, in particular the provision of safe harbors, is expected to reduce compliance burdens.

As described in the Special Analyses for the final regulations (T.D. 9864), allowing a payment that is disallowed as a charitable contribution deduction because of the receipt or expected receipt of a tax credit to be deducted as a payment of state or local tax means that payments by taxpayers with state and local tax liabilities of $10,000 or less are subject to the same tax treatment under these proposed regulations as under the TCJA (in absence of any guidance) and as under the law prior to the TCJA. (See Example 2, Table 1, T.D. 9864.) It also means that such taxpayers are not treated less favorably than taxpayers with state and local tax liabilities in excess of $10,000 or taxpayers subject to the Alternative Minimum Tax. (See Examples 1 and 3 of Table 1, T.D. 9864.)

The Treasury Department and the IRS request comments on the economic effects of the proposed regulations.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. Although data are not readily available for the IRS and the Treasury Department to assess the number of small entities that are likely to be directly affected by the regulations, the economic impact is unlikely to be significant.

As discussed elsewhere in this preamble, the proposed rule largely updates the regulations to reflect existing law and policy. The proposed amendments would update the section 162 and section 170 regulations to reflect current law. In addition, the proposed amendments add to the regulations safe harbors under section 162 and section 164, regarding deductions when payments are made to entities described in section 170(c) and the donor receives or expects to receive a state or local tax credit in return; these safe harbors were provided previously in Internal Revenue Bulletin guidance. These regulations are expected to provide some additional certainty to taxpayers but are not expected to result in any noticeable change in taxpayer behavior. The increased certainty, and in particular the provision of safe harbors, is expected to reduce compliance burdens. Accordingly, the Treasury Department and the IRS certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Notwithstanding this certification, the Treasury Department and the IRS invite comments about the potential impact of this proposed rule on small entities.

Pursuant to section 7805(f), the proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Requests and Public Hearing

Before the regulations proposed herein are adopted as final regulations, consideration will be given to any electronic and written comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. All comments submitted will be made available at *http://www.regulations.gov* or upon request. A public hearing has been scheduled for February, 20, 2020, beginning at 10 a.m. in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC 20224. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic by January 31, 2020. Submit a signed paper or electronic copy of the outline as prescribed in this preamble under the **ADDRESSES** heading. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices, and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative 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.*

Drafting Information

The principal author of these proposed regulations is the Office of the Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department 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.** Section 1.162–15 is amended by revising paragraph (a) to read as follows:

§ 1.162–15 Contributions, dues, etc.

(a) *Payments and transfers to entities described in section 170(c)*—(1) *In general.* A payment or transfer to or for the use of an entity described in section 170(c) that bears a direct relationship to the taxpayer's trade or business and that is made with a reasonable expectation of financial return commensurate with the amount of the payment or transfer may constitute an allowable deduction as a trade or business expense rather than a charitable contribution deduction under section 170. For payments or transfers in excess of the amount deductible under section 162(a), see § 1.170A–1(h).

(2) *Examples.* The following examples illustrate the rules of paragraph (a)(1) of this section:

(i) *Example 1. A,* an individual, is a sole proprietor who manufactures musical instruments and sells them through a website. *A* makes a $1,000 payment to a local church (which is a charitable organization described in section 170(c)) for a half-page advertisement in the church's program for a concert. In the program, the church thanks its concert sponsors, including *A. A's* advertisement includes the URL for the website through which *A* sells its instruments. *A* reasonably expects that the advertisement will attract new customers to *A's* website and will help *A* to sell more musical instruments. *A* may treat the $1,000 payment as an expense of carrying on a trade or business under section 162.

(ii) *Example 2. P,* a partnership, operates a chain of supermarkets, some of which are located in State N. *P* operates a promotional program in which it sets aside the proceeds from one percent of its sales each year, which it pays to one or more charities described in section 170(c). The funds are earmarked for use in projects that improve conditions in State N. *P* makes the final determination on which charities receive payments. *P* advertises the program. *P* reasonably believes the program will generate a significant degree of name recognition and goodwill in the communities where it operates and thereby increase its revenue. As part of the program, *P* makes a $1,000 payment to a charity described in section 170(c). *P* may treat the $1,000 payment as an expense of carrying on a trade or business under section 162. This result is unchanged if, under State N's tax credit program, *P* expects to receive a $1,000 income tax credit on account of *P's* payment, and under State N law, the credit can be passed through to *P's* partners.

(3) *Safe harbors for C corporations and specified passthrough entities making payments in exchange for state or local tax credits*—(i) *Safe harbor for C corporations.* If a C corporation makes a payment to or for the use of an entity described in section 170(c) and receives or expects to receive in return a state or local tax credit that reduces a state or local tax imposed on the C corporation, the C corporation may treat such payment as meeting the requirements of an ordinary and necessary business expense for purposes of section 162(a) to the extent of the amount of the credit received or expected to be received.

(ii) *Safe harbor for specified passthrough entities*—(A) *Definition of specified passthrough entity.* For purposes of this paragraph (a)(3)(ii), an entity is a specified passthrough entity if each of the following requirements is satisfied—

(*1*) The entity is a business entity other than a C corporation and is regarded for all Federal income tax purposes as separate from its owners under § 301.7701–3 of this chapter;

(*2*) The entity operates a trade or business within the meaning of section 162;

(*3*) The entity is subject to a state or local tax incurred in carrying on its trade or business that is imposed directly on the entity; and

(*4*) In return for a payment to an entity described in section 170(c), the entity described in paragraph (a)(3)(ii)(A)(*1*) of this section receives or expects to receive a state or local tax credit that this entity applies or expects to apply to offset a state or local tax described in paragraph (a)(3)(ii)(A)(*3*) of this section.

(B) *Safe harbor.* Except as provided in paragraph (a)(3)(ii)(C) of this section, if a specified passthrough entity makes a payment to or for the use of an entity described in section 170(c), and receives or expects to receive in return a state or local tax credit that reduces a state or local tax described in paragraph (a)(3)(ii)(A)(*3*) of this section, the specified passthrough entity may treat such payment as meeting the requirements of an ordinary and necessary business expense for purposes of section 162(a) to the extent of the amount of credit received or expected to be received.

(C) *Exception.* The safe harbor described in this paragraph (a)(3)(ii) does not apply if the credit received or expected to be received reduces a state or local income tax.

(iii) *Definition of payment.* For purposes of this paragraph (a)(3), payment is defined as a payment of cash or cash equivalent.

(iv) *Examples.* The following examples illustrate the rules of paragraph (a)(3) of this section.

(A) *Example 1: C corporation that receives or expects to receive dollar-for-dollar state or local tax credit. A,* a C corporation engaged in a trade or business, makes a payment of $1,000 to an entity described in section 170(c). In return for the payment, *A* expects to receive a dollar-for-dollar state tax credit to be applied to *A's* state corporate income tax liability. Under paragraph (a)(3)(i) of this section, *A* may treat the $1,000 payment as an expense of carrying on a trade or business under section 162.

(B) *Example 2: C corporation that receives or expects to receive percentage-based state or local tax credit. B,* a C corporation engaged in a trade or business, makes a payment of $1,000 to an entity described in section 170(c). In return for the payment, *B* expects to receive a local tax credit equal to 80 percent of the amount of this payment ($800) to be applied to *B'*s local real property tax liability. Under paragraph (a)(3)(i) of this section, *B* may treat $800 as an expense of carrying on a trade or business under section 162. The treatment of the remaining $200 will depend upon the facts and circumstances and is not affected by paragraph (a)(3)(i) of this section.

(C) *Example 3: Partnership that receives or expects to receive dollar-for-dollar state or local tax credit. P* is a limited liability company classified as a partnership for Federal income tax purposes under § 301.7701–3 of this chapter. *P* is engaged in a trade or business and makes a payment of $1,000 to an entity described in section 170(c). In return for the payment, *P* expects to receive a dollar-for-dollar state tax credit to be applied to *P'*s state excise tax liability incurred by *P* in carrying on its trade or business. Under applicable state law, the state's excise tax is imposed at the entity level (not the owner level). Under paragraph (a)(3)(ii) of this section, *P* may treat the $1,000 as an expense of carrying on a trade or business under section 162.

(D) *Example 4: S corporation that receives or expects to receive percentage-based state or local tax credit. S* is an S corporation engaged in a trade or business and is owned by individuals *C* and *D. S* makes a payment of $1,000 to an entity described in section 170(c). In return for the payment, *S* expects to receive a local tax credit equal to 80 percent of the amount of this payment ($800) to be applied to *S'*s local real property tax liability incurred by *S* in carrying on its trade or business. Under applicable state and local law, the real property tax is imposed at the entity level (not the owner level). Under paragraph (a)(3)(ii) of this section, *S* may treat $800 of the payment as an expense of carrying on a trade or business under section 162. The treatment of the remaining $200 will depend upon the facts and circumstances and is not affected by paragraph (a)(3)(ii) of this section.

(v) *Applicability of section 170 to payments in exchange for state or local tax benefits.* For rules regarding the availability of a charitable contribution deduction under section 170 where a taxpayer makes a payment or transfers property to or for the use of an entity described in section 170(c) and receives or expects to receive a state or local tax benefit in return for such payment, see § 1.170A–1(h)(3).

(4) *Applicability dates.* Paragraphs (a)(1) and (2) of this section, regarding the application of section 162 to taxpayers making payments or transfers to entities described in section 170(c), apply to payments or transfers on or after December 17, 2019. However, taxpayers may choose to apply paragraphs (a)(1) and (2) to payments and transfers on or after January 1, 2018. Paragraph (a)(3) of this section, regarding the safe harbors for C corporations and specified passthrough entities making payments to section 170(c) entities in exchange for state or local tax credits applies to payments made by these entities on or after December 17, 2019. However, taxpayers may choose to apply the safe harbors of paragraph (a)(3) to payments on or after January 1, 2018.

* * * * *

■ **Par. 3.** Section 1.164–3 is amended by adding paragraph (j) to read as follows:

§ 1.164–3 Definitions and special rules.

* * * * *

(j) *Safe harbor for payments by individuals in exchange for state or local tax credits*—(1) *In general.* An individual who itemizes deductions and who makes a payment to or for the use of an entity described in section 170(c) in consideration for a state or local tax credit may treat as a payment of state or local tax for purposes of section 164 the portion of such payment for which a charitable contribution deduction under section 170 is disallowed under § 1.170A–1(h)(3). This treatment as payment of state or local tax under section 164(a) is allowed in the taxable year in which the payment is made to the extent that the resulting credit is applied, consistent with applicable state or local law, to offset the individual's state or local tax liability for such taxable year or the preceding taxable year.

(2) *Credits carried forward.* To the extent that a state or local tax credit described in paragraph (j)(1) of this section is not applied to offset the individual's applicable state or local tax liability for the taxable year of the payment or the preceding taxable year, any excess state or local tax credit permitted to be carried forward may be treated as a payment of state or local tax under section 164(a) in the taxable year or years for which the carryover credit is applied in accordance with state or local law.

(3) *Limitation on individual deductions.* Nothing in this paragraph (j) may be construed as permitting a taxpayer who applies this safe harbor to avoid the limitations of section 164(b)(6) for any amount paid as a tax or treated under this paragraph (j) as a payment of tax.

(4) *No safe harbor for transfers of property.* The safe harbor provided in this paragraph (j) applies only to a payment of cash or cash equivalent.

(5) *Coordination with other deductions.* An individual who deducts a payment under section 164 may not also deduct the same payment under any other Code section.

(6) *Examples.* In the following examples, assume that the taxpayer is an individual who itemizes deductions for Federal income tax purposes.

(i) *Example 1.* In year 1, Taxpayer *A* makes a payment of $500 to an entity described in section 170(c). In return for the payment, *A* receives a dollar-for-dollar state income tax credit. Prior to application of the credit, *A'*s state income tax liability for year 1 was more than $500. *A* applies the $500 credit to *A'*s year 1 state income tax liability. Under paragraph (j)(1) of this section, *A* treats the $500 payment as a payment of state income tax in year 1. To determine *A'*s deduction amount, *A* must apply the provisions of section 164 applicable to payments of state and local taxes, including the limitation in section 164(b)(6). See paragraph (j)(3) of this section.

(ii) *Example 2.* In year 1, Taxpayer *B* makes a payment of $7,000 to an entity described in section 170(c). In return for the payment, *B* receives a dollar-for-dollar state income tax credit, which under state law may be carried forward for three taxable years. Prior to application of the credit, *B'*s state income tax liability for year 1 was $5,000; *B* applies $5,000 of the $7,000 credit to *B'*s year 1 state income tax liability. Under paragraph (j)(1) of this section, *B* treats $5,000 of the $7,000 payment as a payment of state income tax in year 1. Prior to application of the remaining credit, *B'*s state income tax liability for year 2 exceeds $2,000. *B* applies the excess credit of $2,000 to *B'*s year 2 state income tax liability. For year 2, under paragraph (j)(2) of this section, *B* treats the $2,000 as a payment of state income tax under section 164. To determine *B'*s deduction amounts in years 1 and 2, *B* must apply the provisions of section 164 applicable to payments of state and local taxes, including the limitation under section 164(b)(6). See paragraph (j)(3) of this section.

(iii) *Example 3.* In year 1, Taxpayer *C* makes a payment of $7,000 to an entity described in section 170(c). In return for the payment, *C* receives a local real property tax credit equal to 25 percent of the amount of this payment ($1,750). Prior to application of the credit, *C'*s local real property tax liability in year 1 was more than $1,750. *C* applies the $1,750 credit to *C'*s year 1 local real property tax liability. Under paragraph (j)(1) of this section, for year 1, *C* treats $1,750 of her $7,000 payment as a payment of local real property tax for purposes of section 164. To determine *C'*s deduction amount, *C* must apply the provisions of section 164 applicable to payments of state and local taxes, including the limitation under section 164(b)(6). See paragraph (j)(3) of this section.

(7) *Applicability date.* This paragraph (j) applies to payments made to section 170(c) entities on or after June 11, 2019. However, a taxpayer may choose to apply this paragraph (j) to payments made to section 170(c) entities after August 27, 2018.

■ **Par. 4.** Section 1.170A–1 is amended as follows:

■ 1. Paragraph (c)(5) is revised.

■ 2. In paragraph (h)(1), remove the cross-references to ''§ 1.170A–13(f)(6)'' and ''§ 1.170A–13(f)(5)'' and add in their places ''paragraph (h)(4)(i) of this section'' and ''paragraph (h)(4)(ii) of this section'', respectively.

■ 3. Paragraphs (h)(2)(i)(B) and (h)(3)(iii) are revised.

■ 4. Paragraph (h)(3)(viii) is redesignated as paragraph (h)(3)(x).

■ 5. New paragraph (h)(3)(viii) and paragraph (h)(3)(ix) are added.

■ 6. Paragraphs (h)(4) through (6) are redesignated as paragraphs (h)(5) through (7).

■ 7. New paragraph (h)(4) is added.

The revisions and additions read as follows:

§ 1.170A–1 Charitable, etc., contributions and gifts; allowance of deduction.

* * * * *

(c) * * *

(5) For payments or transfers to an entity described in section 170(c) by a taxpayer carrying on a trade or business, see § 1.162–15(a).

* * * * *

(h) * * *

(2) * * *

(i) * * *

(B) The fair market value of the goods or services received or expected to be received in return.

* * * * *

(3) * * *

(iii) *In consideration for.* For purposes of paragraph (h) of this section, the term *in consideration for* has the meaning set forth in paragraph (h)(4)(i) of this section.

* * * * *

(viii) *Safe harbor for payments by C corporations and specified passthrough entities.* For payments by a C corporation or by a specified passthrough entity to an entity described in section 170(c), where the C corporation or specified passthrough entity receives or expects to receive a state or local tax credit that reduces the charitable contribution deduction for such payments under paragraph (h)(3) of this section, see § 1.162–15(a)(3) (providing safe harbors under section 162(a) to the extent of that reduction).

(ix) *Safe harbor for individuals.* Under certain circumstances, an individual who itemizes deductions and makes a payment to an entity described in section 170(c) in consideration for a state or local tax credit may treat the portion of such payment for which a charitable contribution deduction is disallowed under paragraph (h)(3) of this section as a payment of state or local taxes under section 164. See § 1.164–3(j), providing a safe harbor for certain payments by individuals in exchange for state or local tax.

* * * * *

(4) *Definitions.* For purposes of this paragraph (h), the following definitions apply:

(i) *In consideration for.* A taxpayer receives goods or services in consideration for a taxpayer's payment or transfer to an entity described in section 170(c) if, at the time the taxpayer makes the payment to such entity, the taxpayer receives or expects to receive goods or services from that entity or any other party in return.

(ii) *Goods or services.* Goods or services means cash, property, services, benefits, and privileges.

(iii) *Applicability date.* The definitions provided in this paragraph (h)(4) are applicable for amounts paid or property transferred on or after December 17, 2019.

* * * * *

§ 1.170A–13 [Amended]

■ **Par. 5.** Section 1.170A–13(f)(7) is amended by removing the cross-reference to ''§ 1.170A–1(h)(5)'' and adding in its place ''§ 1.170A–1(h)(6).''

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2019–26969 Filed 12–13–19; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Part 401

RIN 1245–AA08

Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies

AGENCY: Office of Labor-Management Standards, Department of Labor.

ACTION: Proposed rule and request for comments.

SUMMARY: The Department of Labor (Department) proposes to promulgate a rule governing intermediate bodies that are wholly composed of public sector organizations but are subordinate to national or international labor organizations that are covered by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Act). Under the proposed rule, such intermediate bodies would now be covered by the LMRDA, and would be required to file the Form LM–2 and Form LM–3 annual union financial reports.

DATES: Submit written comments on or before February 18, 2020.

ADDRESSES: You may submit comments, identified by RIN 1245–AA08, only by the following method: Electronic Comments: Submit comments through the Federal eRulemaking Portal *http://www.regulations.gov.* To locate the proposed rule, use key words such as ''Labor-Management Standards'' or ''Labor Organization Annual Financial Reports'' to search documents accepting comments. Follow the instructions for submitting comments. Please be advised that comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this rulemaking.

FOR FURTHER INFORMATION CONTACT: Andrew Davis, Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5609, Washington, DC 20210, (202) 693–0123 (this is not a toll-free number), (800) 877–8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

The Department of Labor's statutory authority is set forth in sections 201 and 208 of the LMRDA, 29 U.S.C. 431, 438. Section 208 of the LMRDA provides that the Secretary of Labor shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under Title II of the Act and such other reasonable rules and regulations as he may find necessary to prevent the circumvention or evasion of the reporting requirements. 29 U.S.C. 438. Section 201, discussed in more detail below, sets out the substantive reporting obligations.

The Secretary has delegated his authority under the LMRDA to the Director of the Office of Labor-Management Standards and permitted redelegation of such authority. *See* Secretary's Order 03–2012 (Oct. 19, 2012), published at 77 FR 69376 (Nov. 16, 2012).

II. Background

A. Introduction

In October of 2003, the Department of Labor (Department) issued an interpretation that required certain intermediate labor bodies to file reports under the LMRDA. The Department reversed this interpretation in December 2010. Because the Department is of the opinion that it was correct in 2003 and incorrect in 2010, the Department proposes to adopt the 2003 interpretation and reject the 2010 interpretation.

On December 27, 2002, the Department proposed revisions to Forms LM–2, LM–3, and LM–4, which are used by labor organizations to file annual financial reports required under Title II of the LMRDA with the Department of Labor's Office of Labor-Management Standards (OLMS). 67 FR 79279 (Dec. 27, 2002). A portion of the proposed rule stated the Department's intent to revise its interpretation of an aspect of the definition of ''labor organization . . . deemed to be engaged in an industry affecting commerce'' under the LMRDA.

After receiving and considering comments, the Department published a final rule on October 9, 2003. 68 FR 58374 (Oct. 9, 2003). The interpretation in the final rule stated that intermediate bodies that are subordinate to a national or international labor organization that includes a covered labor organization will be covered by the LMRDA, even if the intermediate body's constituents are solely public sector local labor unions not covered by the Act. Before this final rule issued, an intermediate body was subject to the LMRDA only if one or more of its constituent local labor unions represented private sector employees.

Labor organizations affected by the new interpretation of the LMRDA challenged the rule in federal district court. The court granted summary judgment in favor of the labor unions. *Alabama Education Ass'n* v. *Chao,* 2005 WL 736535 (D.D.C. Mar. 31, 2005). On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed the grant of summary judgment. *Alabama Education Ass'n* v. *Chao,* 455 F.3d 386 (D.C. Cir. 2006). The court also concluded, however, that the Department had failed to provide a ''*reasoned analysis* supporting its change of position'' and remanded the rule to the Department to provide such analysis. *Id.* at 396–397 (emphasis added).

The Department issued a ''reasoned analysis'' supporting the change on January 26, 2007. 72 FR 3735. The analysis in support of expanded coverage rested on three rationales. First, the policy, it was asserted, advanced the twin Congressional goals that labor organizations' financial conditions and operations should be subject to public disclosure to benefit employees who participate in those organizations, and that the definition of ''labor organizations'' should be interpreted broadly to advance union democracy, financial transparency, and integrity. Second, expanded coverage promoted disclosure of financial disbursements and receipts to and from structurally related labor organizations, thus enhancing members' ability to trace their dues money and to identify any potential financial irregularities. Third, the revised interpretation gave full meaning to the statute, which focuses on covering intermediate bodies precisely because they are subordinate to a covered national or international labor organization, even though they may consist only of unions that do not bargain with private sector employers.

Labor organizations challenged the policy interpretation in U.S. district court. *Alabama Education Assn.* v. *Chao,* 539 F. Supp. 2d 378 (D.D.C. 2008), *clarified on denial of reconsideration,* 595 F. Supp. 2d 93 (D.D.C. 2009). The Court upheld the Secretary's position, concluding ''[o]nce there is more than a single interpretation that is permissible, the Secretary may select between or among them as long as she provides a 'reasoned explanation' for her choice.'' *Id.* at 384. The court found it ''difficult to argue against the proposition—which is the thrust and congressional purpose behind the statute—that if detailed financial reports will keep leaders honest and help those they lead to choose their leaders, the more the merrier.'' *Id.* The court also deferred to the Department's position that the broader reporting requirements allowed a private sector employee to trace his or her dues, which could be redirected to a public sector intermediate body after being disbursed by the covered national or international labor organization, and that this furthered the policies underlying the Act. The court stated that, ''[w]ith the deference that is due under *Chevron,* this Court cannot say that the Secretary has failed to provide a reasoned explanation for her change of statutory interpretation.'' *Id.* at 385. The court cited the Secretary's stated objective to further the congressional goal of financial visibility and allow private sector dues-paying members to trace dues up to the national union and then down to the intermediate. The court also referred to the fact that: ''Without doubt, some of the monies the AFT and NEA collect come from the dues of private sector employees. After that, both AFT and NEA can, if either chooses, disburse some of that dues money to public sector intermediate organizations.'' *Id.*

In 2009, the Department engaged in notice-and-comment rulemaking to return to its pre-2003 policy, which interpreted the Act to exclude, rather than cover, intermediate labor organizations that contain no local labor organization members representing employees in the private sector. 75 FR 5456, 5462 (February 2, 2010).

In support of its return to the pre-2003 interpretation, the Department first concluded that the preferred interpretation of the statute was one that comported with the LMRDA's primary regulatory focus on labor organizations that represent employees in the private sector. *Id.* Second, the Department concluded that the coverage of wholly public sector intermediate bodies would produce little or no incremental value to union members' understanding of the labor organization that represents them at the local level. Third, the Department determined that the pre-2003 interpretation comported with the statutory language. See 75 FR 74946–47.

B. Statutory and Regulatory Background

Congress enacted the LMRDA after an extensive investigation of ''the labor and management fields . . . [found] that there ha[d] been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct. . . .'' 29 U.S.C. 401(b). Congress intended the Act to ''eliminate or prevent improper practices'' in labor organizations, to protect the rights and interests of employees, and to prevent union corruption. 29 U.S.C. 401(b), (c).

As part of the statutory scheme designed to accomplish these goals, the Act required labor organizations to file annual financial reports with the Secretary of Labor. 29 U.S.C. 431(b). Congress sought full and public disclosure of a labor organization's financial condition and operations in order to curb embezzlement and other improper financial activities by union officers and employees. See S. Rep. No. 86–187 (1959), reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 398–99.

Pursuant to the Act, labor organizations must file reports containing information such as assets, liabilities, receipts, salaries, loans to officers, employees, members or businesses and other disbursements ''in such detail as may be necessary accurately to disclose [their] financial condition and operations for [the] preceding fiscal year.'' 29 U.S.C. 431(b).

Section 3(i) of the LMRDA, 29 U.S.C. 402(i), defines a ''labor organization'' as (1) any organization ''engaged in an industry affecting commerce . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment,'' or (2) ''any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization other than a State or local central body.'' [1]

The first clause of Section 3(i) applies to entities that exist, at least in part, to deal with employers concerning terms and conditions of employment. The second clause applies to conferences, general committees, joint or system boards or joint councils—entities that are known as ''intermediate'' labor organizations. *See* 29 CFR 451.4(f).

The Act defines ''employer'' broadly, but excludes the United States, States, and local governments. 29 U.S.C. 402(e). Thus, an organization is not covered under the first clause of Section 3(i), which requires that the organization deal with a statutory ''employer,'' if it deals only with federal, state or local governments. However, an ''organization'' covered by the second clause of the definition (a ''conference, general committee, [etc.] subordinate to a national or international'') need not deal with employers at all. 29 U.S.C. 402(i). Instead, such an intermediate labor body is covered by the Act so long as it is subordinate to a *covered* national or international labor organization and is ''engaged in an industry affecting commerce.'' *Id.*

Section 3(j) of the LMRDA, 29 U.S.C. 402(j), sets forth the circumstances under which labor organizations will be ''deemed to be engaged in an industry affecting commerce'' under the Act. In particular, Section 3(j)(5) of the Act provides that: An intermediate labor organization is deemed ''engaged in an industry affecting commerce'' if it is: ''a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.'' 29 U.S.C. 402(j)(5).[2]

III. Proposed Regulatory Revision and Need for Rulemaking

The Department proposes to revise its interpretation of Section 3(j)(5). The revised interpretation of the statute would expand the coverage of intermediate labor bodies subject to the reporting requirements of the LMRDA. Consistent with the interpretation of Section 3(j)(5) that the Department adopted in 2003, the Department proposes to clarify the definition of ''labor organization . . . deemed to be engaged in an industry affecting commerce,'' by interpreting the ''which includes'' clause of this provision as modifying ''national or international labor organization.'' [3] Under this statutory interpretation, intermediate labor bodies do not have to have private sector members to be covered under the LMRDA; rather, they need only be subordinate to a national or international labor organization that includes a union that represents private sector workers. See *Alabama Education Ass'n* v. *Chao,* 455 F.3d at 394–95 (''In our view, nothing in § 3, including the definition of 'labor organization' in § 3(i), forecloses the possibility that a body without private sector members may be subject to the LMRDA if it is subordinate to or part of a larger organization that does have private sector members.''); *Alabama Education Assn.* v. *Chao,* 539 F. Supp. 2d at 384 (''Once there is more than a single interpretation that is permissible, the Secretary may select between or among them. . . .''). The Department invites comment on all aspects of this analysis.

A. The Ninth Circuit

The Department's pre-2003 (and current) interpretation of Section 3(j)(5) came into question following the decision in *Chao* v. *Bremerton Metal Trades Council,* 294 F.3d 1114 (9th Cir. 2002). There, the Ninth Circuit held that the Bremerton Metal Trades Council, a joint council, met the LMRDA definition of ''labor organization'' because it was subordinate to the Metal Trades Department, a national or international labor organization engaged in an industry affecting commerce. *Bremerton,* 294 F.3d at 1118. The court reasoned that ''[w]e must decide not whether the Bremerton Council bargains directly with any private employers but, instead, whether the Metal Trades Department, the organization to which the Bremerton Council is subordinate, is engaged in an industry affecting commerce.'' *Id.* at 1117. The court held dispositive whether the union to which the intermediate body was subordinate was engaged in an industry affecting commerce, rather than the composition of the intermediate body itself.

This holding conflicted with the Department's pre-2003, as well as present, interpretation. *Bremerton* adopted an analysis under Section 3(j)(5) that looked not to the composition of the intermediate body itself, but rather to whether the national or international labor union to which it is subordinate is engaged in an industry affecting commerce. The Department believes the Ninth Circuit's reading of the statute is the superior one, and proposes to adopt that interpretation here.

B. Changes in Public Sector Labor Organizing

The increase in public sector unionization since Congress enacted the 1959 LMRDA further supports the Department's proposed interpretation. The Supreme Court in *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31* overruled precedent and ruled that state law requiring nonconsenting public sector employees to pay collective bargaining fees violated the First Amendment. 138 S. Ct. 2448, 2483 (2018). The Court in that case considered changes in public sector unionization as relevant to its constitutional analysis.

Even by the late 1970s, public sector unionism was still considered a relatively new branch of the American labor movement. *Id.* Collective bargaining by state and local employees

[1] A state or local central body differs from an ''intermediate body'' in that a state or local central body is chartered by a federation of national or international unions. An intermediate body is subordinate to a single national or international union. A state or local central body admits to membership subordinate bodies of international unions that are affiliated with the chartering federation within the state or local central body's territory. Its functions also differ, in that a state or local central body exists primarily to carry on educational, legislative, and coordinating activities. See 29 CFR 451.5

[2] Section 3(j) of the LMRDA, 29 U.S.C. 402(j), contains four other provisions, which also set forth the circumstances under which labor organizations will be ''deemed to be engaged in an industry affecting commerce'' under the Act: (1) If the intermediate labor organization is the certified representative of employees under the provisions of the National Labor Relations Act or the Railway Labor Act; (2) If a national, international, or local labor organization is recognized or acting as the representative of employees of an employer engaged in an industry affecting commerce; (3) If the organization has chartered a local labor organization which is representing or actively seeking to represent employees of employers within the meaning of (1) or (2); or (4) If the organization has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of (1) or (2) as the local or subordinate body through which such employees may enjoy membership. 29 U.S.C. 402(j)(1)–(4).

[3] The conflicting approach would have the ''which includes'' clause modify ''a conference, general committee, joint or system board, or joint council.''

with their government employer had not been authorized by any state until 1959, when Wisconsin became the first to pass a law permitting the practice. *See id.* Until the late 1960's and early 1970's, public-sector union membership had been relatively low. *Id.*

However, as the ''spurt'' in membership began in those decades, the rise of public-sector unions was marked by a parallel increase in state and local government spending. *Id.* In 1970, total public expenditures amounted to about $4,000 per capita in 2014 dollars; by 2014, that figure had inflated rapidly to more than double the original figure, approximately $10,238 per capita. *Id.* While the court did not attribute the increase entirely to public-sector unions, unionism amongst state employees ''undoubtedly played a substantial role'' in the ballooning costs of public-employee wages, benefits, and pensions. *Id.* Essentially, the *Janus* Court considered changed circumstances for public sector unions as a factor in determining the significance of compelled speech in the context of agency fee payments.[4]

From the time the statute was enacted, OLMS' interpretation of the statute excluded from LMRDA coverage intermediate bodies that represented no private sector employees and that contained no local unions that represented private sector employees. 75 FR 74936, 74944. The LMRDA was enacted in 1959, at which time states seldom permitted collective bargaining by government employees. Changed circumstances among public sector unions counsel a change in the reporting regime. The increased prevalence of public sector unions and their use of substantial monies affecting matters of great public interest, like state spending, require union financial reporting to the extent permissible under the LMRDA. Private sector union members and the public have an interest in how labor unions, including intermediate bodies, spend their union member dues. And this interest is no less great when the money is spent in ways that affect political activities, state electoral outcomes, and state budgets. Extending LMRDA coverage to intermediate bodies subordinate to covered international unions brings transparency to these activities and serves the public interest in disclosure and financial integrity.

[4] The Department is not suggesting a constitutional analysis applies here. Rather, the reasoning of the court supports the policy reasons for expanded scope of disclosure.

C. Purpose of the LMRDA

In enacting the LMRDA, Congress intended to ''eliminate or prevent improper practices'' in labor organizations, protect the rights and interests of workers, and prevent union corruption. 29 U.S.C. 401(b), (c). To curb embezzlement and other improper financial activities of labor organizations, Congress required labor organizations to file detailed annual financial reports with the Secretary of Labor. 29 U.S.C. 431(b). Additionally, the reporting provisions of the LMRDA were devised to implement the basic premise of the LMRDA—that the Act was intended to safeguard democratic procedures within labor organizations and protect the basic democratic rights of union members. By mandating that labor organizations disclose their financial operations to employees they represent, Congress intended to promote union self-government, which would be advanced by union members receiving sufficient information to permit them to take effective action in regulating internal union affairs.

In particular, Section 501(a) of the LMRDA imposes a fiduciary duty on all union officers. *Noble* v. *Dunn,* 895 F.3d 807, 810 (D.C. Cir. 2018) (in which a union member brought action against the union, alleging that officers breached their fiduciary duties under LMRDA). A labor organization's officer, agents, shop steward, and other representatives occupy positions of trust in relation to the labor organization and its members as a group. 29 U.S.C. 501(a). It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members. 29 U.S.C. 501(b); *Guidry* v. *Sheet Metal Workers Nat. Pension Fund,* 493 U.S. 365, 374, (1990) (in which a union official convicted of embezzling union funds brought action against union to recover retirement benefits and the Court ruled that the LMRDA did not override ERISA prohibition on pension benefit alienation). Section 501(b) provides, under certain conditions, a private right of action ''to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization.'' 29 U.S.C. 501(b). Thus, union members are empowered by Section 501(b) to take action in the event that they are confronted with an intransigent or corrupt labor organization. The LMRDA is a remedial statute, meaning it was enacted for the purpose of correcting a defect in an existing law, or provide a remedy where none previously existed. 73 a.m. Jur. 2d Statutes Section 7. The LMRDA was necessary to impose high standards and ethical conduct in the administration of internal union affairs. *Wirtz* v. *Local 153, Glass Bottle Blowers Assn.,* 389 U.S. 463, 469–470 (1968). In addition, Congress intended the definition of labor organization to be construed broadly to achieve the Act's purposes. *Donovan* v. *Nat'l Transient Div., Int'l Bhd. of Boilermakers,* 736 F.2d 618, 621 (10th Cir. 1984), *cert. denied,* 469 U.S. 1107 (1985). In order to fully effectuate and serve the remedial purposes of the Act, the Department seeks to interpret the definitional sections of the LMRDA broadly ''to include all labor organizations of any kind other than those clearly shown to be outside the scope of the Act.'' 29 CFR 451.2.

The Department's current interpretation of Section 3(j)(5), in place since 2010, does not fully serve the remedial purposes of the LMRDA. Union members concerned about payments to and from public sector intermediate labor organizations subordinate to a covered national or international labor organization do not have access to the quality and quantity of information available to members of unions that have historically filed the Department's annual disclosure forms. Absent such disclosures, union members know less about the governance of their unions and cannot fully monitor the spending of their dues monies. They cannot fully apprise themselves of the financial commitments and obligations of their union. They are disadvantaged in their ability to make informed decisions when electing their union officers, and they do not have detailed information about the funding decisions made by incumbent officeholders. Similarly, the public does not enjoy the same transparency as they do with other covered union bodies.

In contrast, members of unions that file LMRDA financial disclosure forms, such as the Form LM–2 Labor Organization Annual Report, have a tool that can help them detect fraud and embezzlement due to the comprehensive reporting such forms offer. The Form LM–2 is the most detailed annual financial report filed by labor organizations with OLMS. The report requires the completion of no less than 21 informational items, 47 financial items, and 20 supporting schedules. Six functional schedules require itemization, namely for individual receipts and disbursements of $5,000 or more and total receipts or disbursements to a single entity or individual that aggregate to $5,000 or more. Other information reported includes, but is not limited to, whether the union has any trust in which the union is interested, whether the union has a political action committee (PAC), and whether the union discovered any loss or shortage of funds.

With LM–2 reporting, a unions' financial transactions are recorded, reported, and made publicly available on the internet for review. Such disclosure deters union officers and employees from committing financial fraud. Union members concerned about the expenditures of intermediate bodies that do not report as the result of the Department's policy are denied the benefits of increased transparency as well as the ability to sue for damages on the union's behalf. These benefits also include more effective member participation in union decision-making, more informed voters in union officer elections, and the deterrence and detection of fraud. Members of the public also are deprived of insight into how union money might be used to affect government spending or other issues. Unless all intermediate bodies subordinate to LMRDA-covered labor organizations are themselves subject to annual financial reporting, union financial integrity and democracy suffer.

In addition to financial reporting, LMRDA coverage brings with it a number of other benefits to union transparency, integrity, and democracy. First, the LMRDA provides union members with a ''Bill of Rights,'' which gives individual members protections, and the right to file suit to legally enforce them, against the union (*e.g.,* freedom of speech, right to participate in elections, and right to attend meetings). 29 U.S.C. 411–14. Members are also protected by provisions that limit when and how a union can take disciplinary action against its members. 29 U.S.C. 411(a)(5). Second, the elections of the union are held to minimum standards that ensure they are fair, including requirements for secret ballots, maximums for terms between regularly scheduled elections, and equal treatment of candidates. 29 U.S.C. 481–83. Third, various union officials are held subject to a fiduciary duty to the union and its members and must have sufficient surety bonds protecting the union from any malfeasance on their part. 29 U.S.C. 501–02. Fourth, a portion of the LMRDA is specifically directed to preventing union abuse of the trusteeship power, by which subordinate labor organizations temporarily lose their autonomy to a parent union. 29 U.S.C. 461–66. Fifth, the LMRDA also sets out requirements for unions to maintain adequate financial and election records so that the Department can investigate and ensure LMRDA compliance. 29 U.S.C. 436, 481(e)–(f).

Moreover, the LMRDA provides full investigatory authority to the Secretary of Labor. 29 U.S.C. 521. OLMS is the front line agency responsible for enforcing the LMRDA through its criminal and civil investigations. OLMS criminal investigations may address embezzlement, deprivation of rights by violence, willful failure to file reports, filing false reports, and prohibited union office holding or employment of convicted persons. Civil investigations may include violations of union election procedures, financial disclosure requirements, and trusteeship standards. OLMS also conducts audits of union finances. OLMS investigations have previously discovered both civil and criminal violations in intermediate bodies. OLMS analyzed all 1,001 criminal cases it closed during the most recent five-year period, FY15–19. Of these cases, 57 of these unions constituted intermediate unions, which equals 5.7%. The 1,230 union audit cases closed during the same five-year period (FY15–19) were also reviewed, 65 of which involved intermediate unions. Of these, in nine cases OLMS closed the audit and opened a criminal investigation because the investigation revealed indications of fraud or embezzlement. These nine cases, out of a total of 65 intermediate union audits, means a criminal fallout rate for intermediate unions of 13.8%.[5] The enforcement of both civil and criminal law is of paramount public importance.

D. Structural and Financial Complexity of Labor Organizations

In a unionized workplace, employees may be members of a local labor organization, which represents employees with respect to terms and conditions of employment at that particular workplace. That local union is typically chartered by a national union, which in turn may be affiliated with a national federation of unions. In addition, there are city and state federations of labor organizations, international federations of labor, joint and district councils, and departments within a national federation of unions, among others.

The interrelatedness, and resulting structural complexity, of labor organizations has a number of causes. The need for collaboration among and between labor organizations with shared interests, the necessity of labor organization cohesion, the need for large-scale reform regarding certain issues, such as nation-wide wages and hours reform, the rise in multi-city or national corporations, and the growth of a global economy, have all contributed to the increase in labor organization affiliation within local, central, and national labor organizations.

Union structure, the level at which bargaining takes place and decision-making authority is held, tends to be highly centralized in most developed economies, with collective bargaining occurring at the level of an entire industry or sector. U.S. labor has traditionally been considered extremely decentralized in its structure, with most negotiations and decision-making happening at the firm level; U.S. union locals must deal with immediate market risks in the context of their company, which means keeping the jobs of their employee members at a particular company rather than effecting broader change. Complexity has emerged in union structure as the result of traditionally local-focused labor organizations attempting to scale their impact. Locals organizing as a part of a national union, locals affiliating with other locals not traditionally in the same industry, and national unions organizing into federations have been the means by which the traditionally firm-level U.S. labor movement has scaled its influence to achieve larger political or economic impact. Such changes could only otherwise have been or be achieved by fundamentally altering U.S. union structure to occur at a higher level, namely across an entire industry or sector (*i.e.,* organizing of a ''labor organization'' would happen for workers across multiple companies in a single industry simultaneously), something that has yet to occur in earnest. *See generally* Matthew Dimick, *Productive Unionism,* 4 UC Irvine L. Rev. 679, 680–721 (2014).

This structural complexity pales in comparison to the financial complexity created by these relationships. Dues and fees are collected from members at the local level, and that money is sent on to other related organizations in the form of per capita assessments to support an increasingly complicated, sophisticated, and coordinated set of expenditures by

[5] As part of the effort to protect and safeguard union funds and assets, OLMS investigates possible embezzlement from unions and other violations of criminal laws. OLMS also conducts audits of labor unions to detect embezzlements and ensure and promote compliance with the LMRDA. Compliance audit closing letters are located on the OLMS website. Because it is not feasible for OLMS to audit every union, OLMS developed a methodology to direct its auditing resources to unions where criminal activity is more likely to be found. The effectiveness of this methodology is measured by the percent of audits resulting in the opening of a ''fallout'' criminal case.

related labor organizations, including education, organizing, political action at all levels of government, strike funds, public relations, research, legal representation, and so on.

A local union member interested in ascertaining the end-point of his or her dues collected by the local but cast into the stream of affiliate expenditures must obtain the financial reports of the local and each affiliated labor organization—the national or international, the state level organization, the national federation, and any other labor organizations affiliated directly or indirectly with the local union. Of course, this opportunity to study and analyze one's own local union expenditures is lost if, within the chain of affiliations, one of the affiliates has not filed an annual financial report.

Given the increased complexity of union structures and finances, the ability of union members to benefit from the transparency afforded by the LMRDA should not be diminished by a labor organization's relationship to an intermediate body that does not presently file annual financial reports. Such a circumstance is akin to a parent corporation disguising its assets and expenditures by lodging them with an undisclosed subsidiary. To avoid this scenario in the context of labor organizations, the LMRDA should be interpreted, to the extent permitted by the statute's terms, so that union members have the ability to lift the cloak of structural and financial complexity, and fully understand the activities and expenditures of their local unions, their local's national affiliates, and the national organization's subordinate labor organizations.

OLMS reporting data indicates that financial transfers take place among LMRDA-covered local unions and international unions, and non-covered intermediate bodies. As explained below, private-sector members contribute an estimated maximum of $2,806,200 in per capita dues payments to their national union, which may, ultimately, make their way to non-covered intermediate unions.[6] Appendix Table 1 sets forth per capita tax distributions for four labor organizations: American Federation of Teachers (AFT), Fraternal Order of Police (FOP), National Education Association (NEA), and International Association of Fire Fighters (IAFF).[7] The data are derived from their affiliates' fiscal year 2018 annual financial disclosure reports, and details per capita fees paid to the national by members of those covered affiliates.[8] Of the 143 AFT reporting affiliates, 111 reported paying per capita fees to the AFT, in a total amount of $118,421,366. Of the twelve FOP reporting affiliates, seven reported per capita fees in a total amount of $70,284. Of the 63 IAFF reporting affiliates, 51 reported per capita fees in a total amount of $1,047,528. For the 34 NEA reporting affiliates, 18 reported per capita fees paid in a total amount of $1,030,246. (See Appendix Table 1).

The AFT, FOP, NEA, and IAFF disburse funds to their non-covered intermediate bodies, in the form of direct and indirect disbursements reported by the national or international union on Form LM–2 Schedules 15 (Representational Activities), 16 (Political Activities and Lobbying), 17 (Contributions, Gifts, and Grants), 18 (General Overhead), and 19 (Administration).[9]

The Department identified 12 AFT intermediate bodies that do not submit LM reports. Of these, 8 receive disbursements from the AFT. Reported disbursements for Schedule 15 totaled $1,180,103, Schedule 16 totaled $566,131, and Schedule 17, 18, and 19 reported a total of $0. This results in a total of $1,746,234 in disbursements from the AFT to its non-filing intermediate bodies.

The Department has identified 46 FOP intermediate bodies that do not submit LM reports. A review of the FOP's FY 18 Form LM–2 report indicated that it did not disburse funds to any of its non-covered intermediates.

The Department has identified 42 NEA intermediate bodies that do not submit LM reports. Reported disbursements for Schedule 15 totaled $14,465,776, Schedule 16 totaled $7,210,996, Schedule 17 totaled $52,066,677, Schedule 18 totaled $0, and Schedule 19 reported a total of $656,646 in disbursements. This results in a total of $74,471,218 in disbursements from the NEA to its non-filing intermediate bodies. See Appendix Table 2.

The Department has identified 39 IAFF intermediate bodies that do not currently submit LM reports. A review of the IAFF's FY 18 Form LM–2 report indicated that it disbursed funds to two of its non-covered intermediates, as identified in Schedules 15, 16, 17, 18, and 19. IAFF's Illinois and Rhode Island intermediates only received Schedule 19 disbursements totaling $29,720.

To estimate the maximum amount of private-sector dues traced to the wholly public-sector intermediate body, the Department assumes that the amount of money being traced for any given union is equal to the total disbursements being made to non-covered intermediates of that union, unless the total amount of per capita fees collected from its LMRDA-covered locals is less than the disbursement amount, in which case the per capita fee total represents the maximum amount of money being traced. This assumption is reasonable because funds disbursed in excess of the per capita fee would no longer derive, at least potentially, from LMRDA-covered local funds.

For IAFF, FOP, and AFT, per capita fee totals exceed disbursement totals, and therefore, these three unions' disbursements to their respective non-covered intermediates is the maximum amount of potentially private-sector money that could be traced for each of them. The sum of these three figures is $1,775,954 [$29,720 + $0 + $1,746,234 = $1,775,954]. NEA, however, disbursed funds far in excess of the per capita fees; while the NEA disbursed $74,471,218 to its non-covered intermediates, it collected only $1,030,246 in per capita fees. Therefore, the amount of traceable funds is limited to the $1,030,246 in private-sector funds collected. Thus, the final total of all traceable funds is $2,806,200 [$1,775,954 + $1,030,246 = $2,806,200]. As discussed above, union members and the public at large all have an interest in disclosure regarding the flow and use of those monies.

E. Alternatives

The Department requests comments onalternative approaches, including continuing to exclude all wholly public-sector intermediate labor organizations from coverage and any approaches that could lessen the costs imposed by the proposed rulemaking. As discussed more fully below, the Department also

[6] While this figure represents the maximum private-sector dues contributed to non-covered intermediate bodies, those newly-covered bodies would still be required to report on all receipts under the proposed rule.

[7] The Department has identified just these unions, but it invites comment on whether the proposed rule would affect others.

[8] The Department notes that the per capita payments reported in Form LM–2, Item 56, and Form LM–3, Item 47, may over represent the portion that the parent national union ultimately receives, since a portion may, instead, go to the AFL–CIO or other entities. Further, some of the local affiliates may constitute ''mixed'' private-sector and public-sector member unions. Thus, not all of their per capita payments derive from private-sector members. However, the Department views these totals a valid estimate for the maximum private-sector per capita dues sent to the parent national union.

[9] The Department presumes that the state affiliates' non-filing status is due to their wholly public sector composition of their constituent locals and not due to any other exception or exemption under the LMRDA.

requests comment on whether to raise the threshold for filing a LM–2 form from $250,000 in annual receipts for intermediate bodies covered by this rule and, if so, what the threshold should be.

IV. Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

Under Executive Order (E.O.) 12866, the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 *FR* 51735. Sec. 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* OMB has determined that this proposed rule is a significant regulatory action under Sec. 3(f) of E.O. 12866, but is not economically significant.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This proposed rule is expected to be an E.O. 13771 regulatory action. We estimate that it would impose $4,422,042 in annualized costs at a 7% discount rate, discounted to a 2016 equivalent, over a perpetual time horizon. The Department requests comment on all aspects of its analysis, including whether there are additional benefits or costs and whether there are any approaches that could lessen the costs imposed by the proposed rulemaking.

A. Costs for Intermediate Bodies

As stated in the preamble, intermediate bodies are labor organizations that are subordinate to a covered national or international labor organization that includes a union that represents private sector workers. Using data from the websites of the most likely national/international unions affected by this proposed rule (the American Federation of Teachers (AFT), Fraternal Order of Police (FOP), International Association of Firefighters (IAFF), and the National Education Association (NEA)), the Department estimates that there would be 139 total intermediate bodies affected by this rule (*i.e.,* the intermediate bodies identified on those four national unions' websites, subtracting those that already file with OLMS). Out of these, 115 have annual receipts above $250,000, and would presumably need to file the LM–2 report annually. The other 24 intermediate bodies have annual receipts below $250,000, and presumably would be required to fill out the LM–3 report annually. As estimated in the most recently approved Information Collection Request (ICR), pursuant to the Paperwork Reduction Act (PRA), the average form LM–2 filer spend approximately 530 hours on average each year to fill out the report.[10] It is assumed that employees responsible for filling out the Form LM–2 report would be an accountant spending 90 percent of 530 hours, a bookkeeper or clerk spending 5 percent of 530 hours, a secretary or treasurer spending 4 percent of 530 hours, and the president of an intermediate body spending 1 percent of 530 hours. Based on current filings, the average hourly wage for an accountant of LM–2 filers is $35.42, $17.37 for a bookkeeper or clerk, $21.54 for a secretary or treasurer, and $26.10 for the president, respectively. The weighted average hourly wage for Form LM–2 filers is $33.87. To account for fringe benefits and overhead costs, the average hourly wage has been doubled, so the fully loaded hourly wage is $67.74 (= $33.87 × 2). Therefore, the total cost for the 115 new filers to complete the Form LM–2 is estimated to be $4,128,753 (= $67.74 × 115 filers × 530 hours) and $35,902.20 per filer.

As estimated in the most recently approved ICR, pursuant to the PRA, the average form LM–3 filer spends approximately 103 hours on average to fill out the report.[11] It is assumed that employees responsible for filling out this LM–3 report would be an accountant spending 22 percent of 103 hours, a bookkeeper or clerk spending 28 percent of 103 hours, a secretary or treasurer spending 48 percent of 103 hours, and the president of an intermediate body spending 2 percent of 103 hours. Based on current filings, the average hourly wage for an accountant of LM–3 filers is $35.42, $17.37 for a bookkeeper or clerk, $23.45 for a secretary or treasurer, and $23.45 for the president, respectively. The weighted average hourly wage for LM–3 filers is $24.38. To account for fringe benefits and overhead costs, the average hourly wage has been doubled, so the fully loaded hourly wage is $48.76 (= $24.38 × 2). The total cost for the 24 new filers to complete the LM–3 is estimated to be $120,534.72 (= $48.76 × 24 filers × 103 hours) and $5,022.28 per filer.

In addition to filling out either the LM–2 form or the LM–3 form, each of these 139 intermediate labor organizations would be responsible for filing a Form LM–1 Labor Organization Information Report. Each intermediate body would incur a one-time, first-year Form LM–1 cost. The most recent Information Collection Request (ICR) estimated that Form LM–1 filers would spend approximately 55 minutes on average per report. It is assumed that employees responsible for filling out this Form LM–1 report would be a secretary or treasurer spending 50 percent of 0.917 hours and the president of an intermediate body spending the other 50 percent of 0.917 hours. The weighted average hourly wage for LM–1 filers is $23.45. To account for fringe benefits and overhead costs, the average hourly wage has been doubled, so the fully loaded hourly wage is $46.90 (= $23.45 × 2). The total cost for the 139 filers to complete the Form LM–1 is estimated to be $5,978.01 (= $46.90 × 139 filers × 0.917 hours) and $43.01 per filer.

Regulatory familiarization costs represent direct costs to intermediate bodies associated with reviewing the new regulation. The Department calculated this cost by multiplying the estimated time to review the rule by the hourly compensation of the president of an intermediate body. Using the same

[10] See the PRA statement on page one of the Form LM–2 Instructions: *https://www.dol.gov/olms/regs/compliance/GPEA_Forms/2016/efile/LM-2_Instructions_Revised2016.pdf.*

[11] See the PRA statement on page one of the Form LM–3 Instructions: *https://www.dol.gov/olms/regs/compliance/GPEA_Forms/2016/efile/LM-3_InstructionsRevised2016.pdf.*

fringe benefit and overhead costs rationale as above, the fully loaded hourly wage for the president of an intermediate body is $46.90 ($23.45 × 2). The Department estimates that the president of an intermediate body would spend 10 minutes to review the rule. Therefore, the one-time familiarization cost for all 139 intermediate bodies is estimated to be $1,108.25 (= $46.90 × 139 × 0.17 hours) in the first year.

The Department emphasizes that the estimated costs are averages. The Department expects that the costs for intermediate bodies with higher total receipts will be greater and the costs for intermediate bodies with smaller total receipts will be less. The Department requests comment on its cost estimates, including what it costs unions of varying sizes to complete the LM–2 and LM–3 forms and whether those costs are less for unions with smaller total receipts.

Finally, the proposed rule would also subject these public sector intermediate bodies to other provisions of the LMRDA, as noted above. While the Department believes application of these other LMRDA provisions is beneficial, the Department does not anticipate that making those provisions applicable to the public sector intermediate bodies affected by this rule will materially increase costs. The Department invites comment on whether application on all aspects of its cost analysis, including whether application of non-Title II provisions of the LMRDA will result in material costs.

B. Summary of Costs

For all 139 intermediate bodies, the expected first-year costs would be $4,256,373.98 (= $4,128,753 + $120,534.72 + $5,978.01 + $1,108.25). In the subsequent years, the total cost would be $4,249,287.72 (= $4,128,753 + $120,534.72). The 10-year annualized cost is expected to be $4,250,094 at a 3 percent discount rate and $4,250,231 at a 7 percent discount rate. The annualized perpetual costs at a 7 percent discount rate are expected to be $4,422,042.

C. Benefits

As explained more fully above, the Department proposes this rulemaking in order to more fully implement Congress' goals, in passing the LMRDA, to ''eliminate or prevent improper practices'' in labor organizations, protect the rights and interests of workers, and prevent union corruption. 29 U.S.C. 401(b), (c). To curb embezzlement and other improper financial activities of labor organizations, Congress required labor organizations to file detailed annual financial reports with the Secretary of Labor. 29 U.S.C. 431(b). The reporting provisions of the LMRDA were devised to implement the basic premise of the LMRDA—that the Act was intended to safeguard democratic procedures within labor organizations and protect the basic democratic rights of union members. By mandating that labor organizations disclose their financial operations to the public and the employees they represent, Congress intended to promote union self- government, which would be advanced by union members receiving sufficient information to permit them to take effective action in regulating internal union affairs. The Department is considering this rule in order to expand the benefits of such labor union financial transparency to members of public-sector intermediate labor unions.

Additionally, the Department proposes such expanded labor organization coverage now, as the Department believes that the increased prevalence of public sector unions and the potential for corruption within those unions justifies requiring union financial reporting to the maximum extent permissible under the LMRDA. The LMRDA was enacted in 1959, at which time states seldom permitted collective bargaining by government employees. Changed circumstances among public sector unions counsel a change in the reporting regime. The increased prevalence of public sector unions and their use of substantial monies affecting matters of great public interest, like state spending, require union financial reporting to the extent permissible under the LMRDA. Private sector union members and the public have an interest in how labor unions, including intermediate bodies, spend their union member dues. And this interest is no less great—and possibly greater—when the money is spent in ways that affect political activities, state electoral outcomes, and state budgets. Extending LMRDA coverage to intermediate bodies subordinate to covered international unions brings transparency to these activities and serves the public interest in disclosure and financial integrity. As mentioned above, 5.7% of all criminal cases in the past five years involved intermediate bodies. Similarly, 13.8% of audits of intermediate bodies revealed evidence of criminal activity, requiring the opening of a criminal investigation.

The Department believes that the benefits of the proposed rule outweigh the costs, although the benefits resist quantification. The Department requests comment on its analysis, including whether any of the benefits can be quantified and whether other approaches might lower the costs imposed by the rule.

V. Initial Regulatory Flexibility Analysis (IRFA)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' Public Law 96–354. To achieve that objective, the Act requires agencies promulgating final rules to prepare a certification and a statement of the factual basis supporting the certification, when drafting regulations that will not have a significant economic impact on a substantial number of small entities. The Act requires the consideration of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.* However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department conducted this initial regulatory flexibility analysis to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. The Department invites interested persons to submit comments on the number of small entities affected by the proposed rule's requirements, the compliance cost estimates, and whether alternatives exist that would reduce the burden on small entities.

A. Why the Department Is Considering Action

As explained more fully in the preamble, the Department is considering this rule in order to more fully implement Congress' goals, in passing the LMRDA, to ''eliminate or prevent improper practices'' in labor organizations, protect the rights and interests of workers, and prevent union corruption. 29 U.S.C. 401(b), (c). To curb embezzlement and other improper financial activities of labor organizations, Congress required labor organizations to file detailed annual financial reports with the Secretary of Labor. 29 U.S.C. 431(b). The reporting provisions of the LMRDA were devised to implement the basic premise of the LMRDA—that the Act was intended to safeguard democratic procedures within labor organizations and protect the basic democratic rights of union members. By mandating that labor organizations disclose their financial operations to employees they represent, Congress intended to promote union self-government, which would be advanced by union members receiving sufficient information to permit them to take effective action in regulating internal union affairs. The Department is considering this rule in order to expand the benefits of such labor union financial transparency to the members of public-sector intermediate labor unions.

Additionally, the Department proposes such expanded labor organization coverage, now, as the Department believes that the increased prevalence of public sector unions and the potential for corruption within those unions justifies requiring union financial reporting to the maximum extent permissible under the LMRDA. The LMRDA was enacted in 1959, at which time states seldom permitted collective bargaining by government employees. Changed circumstances among public sector unions counsel a change in the reporting regime. The increased prevalence of public sector unions and their use of substantial monies affecting matters of great public interest, like state spending, require union financial reporting to the extent permissible under the LMRDA. Private sector union members and the public have an interest in how labor unions, including intermediate bodies, spend their union member dues. And this interest is no less great—and possibly greater—when the money is spent in ways that affect political activities, state electoral outcomes, and state budgets. Extending LMRDA coverage to intermediate bodies subordinate to covered international unions brings transparency to these activities and serves the public interest in disclosure and financial integrity. As mentioned above, OLMS finds civil and criminal violations in all tiers of labor unions, including intermediate bodies. During the immediate five-year period, 5.7% of OLMS criminal investigations concerned intermediate unions. Further, the criminal fallout rate for intermediate bodies during this same period was 13.8%.

B. Objectives of and Legal Basis for the Proposed Rule

Congress enacted the LMRDA after an extensive investigation of ''the labor and management fields . . . [found] that there ha[d] been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct. . . .'' 29 U.S.C. 401(b). Congress intended the Act to ''eliminate or prevent improper practices'' in labor organizations, to protect the rights and interests of employees, and to prevent union corruption. 29 U.S.C. 401(b), (c).

As part of the statutory scheme designed to accomplish these goals, the Act required labor organizations to file annual financial reports with the Secretary of Labor. 29 U.S.C. 431(b). Congress sought full and public disclosure of a labor organization's financial condition and operations in order to curb embezzlement and other improper financial activities by union officers and employees. See S. Rep. No. 86–187 (1959), reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 398–99.

Pursuant to the Act, labor organizations must file reports containing information such as assets, liabilities, receipts, salaries, loans to officers, employees, members or businesses and other disbursements ''in such detail as may be necessary accurately to disclose [their] financial condition and operations for [the] preceding fiscal year.'' 29 U.S.C. 431(b). The Department of Labor's statutory authority is set forth in sections 201 and 208 of the LMRDA, 29 U.S.C. 431, 438. Section 208 of the LMRDA provides that the Secretary of Labor shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under Title II of the Act and such other reasonable rules and regulations as he may find necessary to prevent the circumvention or evasion of the reporting requirements. 29 U.S.C. 438. Section 201 sets out the substantive reporting obligations.

This proposed rule would expand the Department's interpretation concerning the scope of labor organization coverage under the LMRDA, pursuant to Sections 3(i) and (j) of the Act, 201 29 U.S.C. 402. Under the revised statutory interpretation, covered intermediate labor bodies would not have to have private sector members to be covered under the LMRDA; rather, they would need only to be subordinate to a national or international labor organization that includes a union that represents private sector workers. See *Alabama Education Ass'n* v. *Chao,* 455 F.3d at 394–95 (''In our view, nothing in § 3, including the definition of 'labor organization' in § 3(i), forecloses the possibility that a body without private sector members may be subject to the LMRDA if it is subordinate to or part of a larger organization that does have private sector members.''); *Alabama Education Assn.* v. *Chao,* 539 F. Supp. 2d at 384 (''Once there is more than a single interpretation that is permissible, the Secretary may select between or among them. . . .'').

C. Estimating the Number of Small Businesses Affected by the Rulemaking

As stated in the Regulatory Impact Analysis (RIA), this rule would impact 139 intermediate bodies of labor unions, which are labor organizations that are subordinate to a national or international labor organization that represents private sector workers (NAICS 813930). According to the Small Business Administration (SBA), organizations under NAICS 813930 are considered small entities if they have average annual receipts of less than $7.5 million.[12] Based on this threshold and the most recent revenue receipts from these intermediate bodies, 88 out of 139 intermediate bodies qualify as small entities,[13] or roughly 63% of these organizations.[14]

D. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

This proposed rule would require the intermediate bodies affected to file the Form LM–1 in the first year. In addition,

[12] *https://www.sba.gov/document/support--table-size-standards.*

[13] The Department was unable to find IRS Form 990s, and thus revenue, for 26 of the 139 intermediate bodies affected by this rulemaking. Since it is impossible to determine whether there would be a significant impact on them without revenue data, these entities are not considered small entities for the purpose of this IRFA. The thresholds for filing LM–2 and LM–3 forms are set by total annual receipts. Form 990s, however, report total annual revenues. The Department believes that the differences across intermediate bodies between receipts and revenues would not materially affect the estimates of the cost of this rulemaking. The Department requests comment on its use of Form 990 revenue data to estimate the number of organizations that would have to file the LM–2 and LM–3 forms.

such intermediate bodies with annual receipts of at least $250,000 would be required to fill out the Form LM–2 report annually, while intermediate bodies with annual receipts below $250,000 would be required to fill out the Form LM–3 report annually.

Regulatory familiarization costs represent direct costs to intermediate bodies associated with reviewing the new regulation. The Department calculated this cost by multiplying the estimated time to review the rule by the hourly compensation of $46.90 for the president of an intermediate body. The Department estimates that the president of an intermediate body would spend 10 minutes to review the rule. Therefore, the one-time familiarization cost for all 139 intermediate bodies is estimated to be $1,108.25 (= $46.90 × 139 × 0.17 hours) or $7.97 per small entity in the first year.

It takes approximately 55 minutes on average to fill out a Form LM–1 report and 530 hours on average to fill out a Form LM–2 report, and 103 hours on average to fill out an LM–3 report. The Department estimated a fully loaded hourly wage of $46.90 for filing LM–1 report and $67.74 for filing a Form LM–2 report, and $48.76 for filing LM–3 report.

Using the average hour estimates for LM–3 filers, the costs in Year 1 for the intermediate bodies with annual receipts below $250,000 is estimated to be $43.01 (= $46.90 × 0.917 hours) for LM–1 report, $5,022.28 (= $48.76 × 103 hours) for LM–3 report, and $7.97 for regulatory familiarization. Therefore, the total cost in Year 1 for intermediate bodies with annual receipts below $250,000 is $5,073.26 ($43.01 + $5,022.28 + $7.97) on average per filer. The total cost in the subsequent years is $5,022.28 per filer per year on average. Out of 88 small business filers, there are 24 filers with revenue below $250,000. For 15 of these 24 small business entities, their first year cost is assumed to be higher than 3 percent of their annual revenue.

Using the average hour estimates for LM–2 filers, the costs in Year 1 for the intermediate bodies with annual receipts between $250,000 and $7.5 million is estimated to be $43.01 on average (= $46.90 × 0.917 hours) for the LM–1 report, $35,902.20 (= $67.74 × 530 hours) on average for the LM–2 report, and $7.97 for regulatory familiarization. Therefore, the total cost in Year 1 for the intermediate bodies with annual receipts between $250,000 and $7.5 million is $35,943.18 on average ($43.01 + $35,902.20 + $7.97). The total cost in the subsequent years is $35,902.20 on average per year. Out of 88 small business filers, there are 64 filers with annual revenue between $250,000 and $7.5 million. For 37 of out 64 small business filers, the first year cost is assumed to be more than 3 percent of their annual revenue.

A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact. See, *e.g.,* 79 FR 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 81 FR 39108 (June 15, 2016, Discrimination on the Basis of Sex). This threshold is also consistent with that sometimes used by other agencies. See, *e.g.,* 79 FR 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant). The Department believes that its use of a three percent of revenues significance criterion is appropriate.

Therefore, out of the 88 small entities, the small entities affected by a significant impact of more 3% are the 15 out of 24 LM–3 filers and 37 out of 64 LM–2 filers, for a total of 52 filers. This constitutes 59.09% of the 88 filers [52/88 × 100 = 59.09%], which falls above the 20% substantiality threshold being used for this NPRM.

The following chart further breaks down the expected burden on small entities, by revenue:

Size (by revenue)	Number of small unions affected	Average I.B. rule burden per union	% of small unions affected	Number of small unions subject to significant impact *	% of Small unions subject to significant impact **
$5M–$7.5M	7	$35,943	7.95	0	
$2.5M–$4.99M	9	35,943	10.23	0	
$1M–$2.49M	12	35,943	13.64	1	
$500K–$999,999	21	35,943	23.86	21	
$250K–$499,999	15	35,943	17.05	15	
$100K–$249,999	15	5,073	17.05	6	
$10K–$99,999	9	5,073	10.23	9	
Total	88		*** 100	52/88	59.09

E. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Rule

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

F. Alternatives to the Proposed Rule

The Department believes that qualitative benefits for union members and the public associated with greater transparency for certain public-sector intermediate labor organizations—and the benefits from application of the rest of the LMRDA—outweighs the marginal burden imposed on such organizations. However, the Department will consider continuing to exclude all wholly public-sector intermediate labor organizations from coverage. That option would impose no changes and thus maintain the status quo of no disclosure by these entities. The Department seeks public feedback on that and any other alternatives, including any approaches that could lessen the costs imposed by the proposed rulemaking.

In particular, the Department seeks comment on whether to raise the threshold for filing the LM–2 form from $250,000 in annual receipts for intermediate bodies covered by the proposed rulemaking.[15] The Department anticipates that the ratio of (a) costs from completing the LM–2 form to (b) annual receipts—*i.e.,* (a)/(b)—could increase as annual receipts decrease, even though costs also likely tend to decrease. That is, the Department expects that the relative burden of completing the LM–2 form could be greater for newly-covered entities with

[15] Although the data in this proposed rule is based on revenues currently reported on IRS Form 990s, the Department would continue to base the various reporting requirements under this proposed rule on the labor organization's annual receipts.

smaller annual receipts. Therefore, raising the threshold for filing the LM–2 form for intermediate bodies covered by this rule could decrease the relative burden on some of these intermediate bodies by allowing them to file the LM–3 form instead. The Department requests comment on its assumptions with respect to the relative burden of completing the LM–2 form and seeks input as to whether public sector intermediate bodies covered by this rule would be uniquely burdened by the requirement to file a form LM–2 at the current receipt threshold. The Department also requests comment on related questions. Would raising the threshold for only the organizations affected by this rulemaking be consistent with Section 208 of the LMRDA, 29 U.S.C. 438, which authorizes the Secretary of Labor to allow, by general rule, for the filing of ''simplified reports for labor organizations or employers for whom he finds that by virtue of their size a detailed report would be unduly burdensome''? If so, how should the new threshold be set? Should the threshold be set by adjusting for inflation from the effective date of the previous increase in the receipt threshold to $250,000? Should the threshold be set higher or lower than an inflation-adjusted amount, and why? Should the threshold be set through some other method or analysis? Would raising the threshold materially lower costs? Would raising the threshold materially decrease benefits? Considering all appropriate factors, would raising the threshold for filing the LM–2 form for only intermediate bodies covered by the proposed rulemaking be justified?

G. Differing Compliance and Reporting Requirements for Small Entities

This NPRM provides for no differing compliance requirements and reporting requirements for small entities, other than the simplified Form LM–3 report for those unions with fewer than $250,000 in total annual receipts.

H. Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities

This NPRM was drafted to clearly state the compliance and reporting requirements for all small entities subject to this proposed rule.

VI. Unfunded Mandates Reform

This proposed rule will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of $100 million or more, or in increased expenditures by the private sector of $100 million or more.

VII. Paperwork Reduction Act

The Department estimates that 139 intermediate unions would become subject to the LMRDA as a result of the proposed rule and will be required to file annual financial disclosure reports. The Department derives this estimate from a review of the non-filing intermediate bodies associated with the four national/international labor organizations likely affected by this rule: The American Federation of Teachers (AFT), Fraternal Order of Police (FOP), International Association of Firefighters (IAFF), and the National Education Association (NEA).

Initially, each of these 139 intermediate labor organizations would be responsible to file a Form LM–1 Labor Organization Information Report. The most recent ICR estimated that Form LM–1 filers would spend approximately 55 minutes per report (see Form LM–1 Instructions), which results in a total increase of 7,645 additional Form LM–1 burden minutes (139 * 55 minutes) or approximately 127 additional burden hours. The additional 139 Form LM–1 filing intermediate bodies would result in a total of 352 Form LM–1 reports filed (139 + 213), as a result of the proposed rule.

Additionally, OLMS has determined that 24 of these newly-filing intermediate bodies would file an annual Form LM–3 Labor Organization Annual Report, as, based upon their most recent IRS Form 990 report, they would not exceed the $250,000 filing threshold for the more detailed Form LM–2 report. The previous ICR estimated that Form LM–3 filers would spend approximately 103 hours per report (see Form LM–3 Instructions), which results in a total increase of 2,472 additional Form LM–3 burden hours (24 * 103). The additional 24 Form LM–3 filing intermediate unions would result in a total of 12,063 Form LM–3 reports filed (24 + 12,039).

Based upon the most recent Form 990 data, the Department determined that the remaining 115 entities would exceed the $250,000 filing threshold and thus be required to file the Form LM–2 annual financial disclosure report. (Note: For the 20 entities in which the Department could not locate their most recent IRS Form 990, the Department assumes that each would file the more detailed Form LM–2 report.) The previous ICR estimated that Form LM–2 filers would spend approximately 530 hours per report (see Form LM–2 Instructions), which results in a total increase of 60,950 additional Form LM–2 burden hours (115 * 530), and the additional 115 Form LM–2 filing intermediate unions would result in a total of 6,188 Form LM–2 reports filed (115 + 6,073).

As the proposed rule requires an information collection, the Department is submitting, contemporaneous with the publication of this notice, an information collection request (ICR) to revise the Paperwork Reduction Act (PRA) clearance to address the clearance term. The ICR includes updated Forms LM–1, LM–2, LM–3, and LM–4, which the Department revised to make clear that wholly public-sector intermediate unions must complete and submit such forms, consistent with this proposed rule. A copy of this ICR, with applicable supporting documentation, including among other items a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201907-1245-001* (this link will only become active on the day following publication of this document) or from the Department by contacting Andrew Davis on 202–693–0123 (this is not a toll-free number)/email: *OLMS-Public@dol.gov.*

Type of Review: Revision of a currently approved collection.

Agency: Office of Labor-Management Standards.

Title: Labor Organization and Auxiliary Reports.

OMB Number: 1245–0003.

Affected Public: Private Sector—labor organizations.

Total Estimated Number of Responses: 31,686.

Frequency of Response: Varies.

Estimated Total Annual Burden Hours: 4,643,596.

Estimated Total Annual Other Burden Cost: $0.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 29 CFR Part 401

Labor management relations.

Accordingly, for the reasons provided above, the Department proposes to amend part 401 of title 29, chapter IV of the Code of Federal Regulations as set forth below:

PART 401—MEANING OF TERMS USED IN THIS SUBCHAPTER

■ 1. The authority citation for part 401 continues to read as follows:

Authority: Secs. 3, 208, 301, 401, 402, 73 Stat. 520, 529, 530, 532, 534 (29 U.S.C. 402, 438, 461, 481, 482); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012; § 401.4 also issued under sec. 320 of Title III of the Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2678.

■ 2. Amend § 401.9 by adding paragraphs (a) through (c) to read as follows:

§ 401.9 Labor organization.

* * * * *

(a) Any organization that exclusively represents public sector employees, is composed solely of labor unions that exclusively represent public sector employees, or is a conference, general committee, joint or system board, or joint council subordinate to a national or international union that is composed solely of public sector labor unions is not a 'labor organization' covered by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

(b) Any national or international union or any conference, general committee, joint or system board, or joint council that includes one or more local unions that are ''labor organizations engaged in an industry affecting commerce' is a 'labor organization' covered by the LMRDA.

(c) Any conference, general committee, joint or system board, or joint council that is subordinate to a national or international labor organization that is a labor organization 'engaged in an industry affecting commerce' is a 'labor organization' covered by the LMRDA.

Arthur F. Rosenfeld,

Director, Office of Labor-Management Standards.

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

Appendix: Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies

TABLE 1—FISCAL YEAR 2018 PER CAPITA TAX DISBURSEMENTS FROM LMRDA-COVERED LOCAL UNIONS

Locals Affiliated With American Federation of Teachers	
ACADEMY TEACHER'S ASSOCIATION	$34,221
ADJUNCT FACULTY AT PACE	84,726
ADJUNCTS UNITED, NYSUT, AFT	40,962
AFT—LU 5105	0
AFT—NEW HAMPSHIRE	0
AFT HEALTH PROFESSIONALS AND ALLIED EMPLOYEES	0
AFT NEW JERSEY	0
ALASKA NURSES ASSOCIATION	231,873
ALASKA PUBLIC EMPLOYEES ASSOCIATION	811,084
ALLIANCE OF CHARTER SCHOOL EMPLOYEES AFT PA	57,781
AMERICAN SCHOOL FOR THE DEAF FEDERATION OF TEACHER	31,600
ASN FOR RETARDED CITIZENS EMPLOYEES	0
ASSOCIATION OF BUILDING TRADES INSTRUCTORS	24,868
ASSOCIATION OF CATHOLIC TEACHERS	62,956
BACKUS FEDERATION OF NURSES AFT CONNECTICUT	178,511
BAKER HALL UNITED TEACHERS	38,500
BARRACK HEBREW ACADEMY FACULTY ASSOCIATION	18,604
BAY AREA FRENCH-AMERICAN FEDERATION OF TEACHERS	191,519
BERKLEE FEDERATION OF TEACHERS	262,649
BRECK FEDERATION OF TEACHERS	10,580
BRYANT FACULTY FEDERATION	40,953
BUCKLEY FACULTY ASSOCIATION	0
CW POST COLLEGIAL FEDERATION	150,251
CALIFORNIA	0
CAMBRIDGE COLLEGE EMPLOYEES FEDERATION	35,937
CAMPUS EDUCATION ASSOCIATION	15,552
CANTALICIAN CENTER PROF STAFF ASSOCIATION	68,549
CHICAGO ALLIANCE OF CHARTER TEACHERS AND STAFF	0
CHICAGO TEACHERS UNION	6,292,448
CLEVELAND ACTS	42,159
CONNECTICUT STATE	0
COOPER UNION FED COLLEGE TEACHERS	6,869
DANBURY & NEW MILFORD FED OF HEALTHCARE TECHNICAL	72,531
DANBURY HOSP PROF NURSES ASN	0
DE SOTO COUNTY EDUCATORS ASSOCIATION	124,734
EARLY CHILDHOOD FEDERATION	103,673
FACULTY—U OF CHICAGO LAB SCHOOLS	100,297
FANWOOD TEACHERS ASSOCIATION	37,597
FEDERATION OF CREDIT UNION EMPLS	7,032
FEDERATION OF INDIAN SERVICE EMPLOYEES	119,717
FEDERATION OF NURSES & HEALTH PROS	55,277

TABLE 1—FISCAL YEAR 2018 PER CAPITA TAX DISBURSEMENTS FROM LMRDA-COVERED LOCAL UNIONS—Continued

GEORGIA FEDERATION OF TEACHERS	65,192
GREEN TREE FEDERATION OF TEACHERS	26,232
GROVE STREET ACADEMY FACULTY—NYSUT	11,307
GUAM FEDERATION OF TEACHERS	361,047
HALLEN TEACHERS ASSOCIATION	47,758
HEALTH CARE PROS, DOWNEAST FED OF	11,931
HEALTH PROFESSIONALS & ALLIED EMPLOYEES	2,135,146
HEALTH PROFESSIONALS AND ALLIED EMPLOYEES (LU—5621)	0
HEALTH PROFESSIONALS AND ALLIED EMPLOYEES AFT (LU—5058)	0
HEALTH PROFESSIONALS ASSN EMPLOYEES	0
HEALTHCARE—PSEA/PSEA/AFT	0
HENRY VISCARDI SCHOOL FACULTY ASSN	62,827
HOUSTON FEDERATION OF TEACHERS	2,207,515
HPAE LOCAL 5186	0
HPAE SOUTH JERSEY HEALTHCARE	0
HPAE/PALISADES MEDICAL CENTER	0
HPAE—COOPER HOSPITAL	0
HRDF—HRDE WORKERS UNION	22,512
ILLINOIS	0
JOB CORPS EMPLOYEES FEDERATION	23,188
JOHNSON MEMORIAL REGISTERED NURSES	40,637
L & M HEALTHCARE WORKERS UNION	278,928
LA SALLE INSTITUTE FACULTY ASSOCIAT	11,629
LAWRENCE & MEM HOSPITALS REG NURSES	240,554
LAWRENCE & MEMORIAL FEDERATION OF TECHNOLOGISTS	94,947
LEWIS & CLARK COLLEGE SUPORT STAFF	68,968
LINCOLN TECHNICAL INSTITUTE	3,223
LONG ISLAND UNIVERSITY FACULTY FEDERATION	158,375
LONGY FACULTY UNION	13,232
MANCHESTER MEM HOSPITAL PROF NURSE	97,999
MASSACHUSETTS	0
MEA–MFT [16]	190,158
MICHIGAN	4,828
MILL NECK MANOR EDUCATIONAL ASSN	31,369
MISSOURI	0
MITCHELL COLLEGE FACULTY FEDERATION	11,417
MOORE COLLEGE OF ART & DESIGN	10,241
N RHODE ISLAND COLLABORATIVE EMPLS	24,094
NY STATE PUBLIC EMPLOYEES FED PEF	9,874,302
NATCHAUG FED OF REGISTERED NURSES	47,095
NEW HAVEN FEDERATION OF TEACHERS	778,410
NEW MEXICO	57,950
NEW MILFORD HOSPITAL FED. OF REGIST	31,934
NEW YORK CITY TEACHERS	72,483,652
NEW YORK STATE UNITED TEACHERS (LU—0)	3,512,767
NEW YORK STATE UNITED TEACHERS (LU—6420)	118,597
NORTH CAROLINA	1,615
NORTH JERSEY SKILLS FOR TECHNOLOGY	1,516
NORTHCOAST EARLY CHILDHOOD WORKERS	12,966
NURSES & HEALTH PROS, FAIRVIEW	33,844
NURSES & HEALTH PROS, VISITING	82,972
NURSES, BRATTLEBORO FEDERATION OF	42,893
OAKWOOD	50,856
OKLAHOMA FEDERATION OF TEACHERS	6,667
OREGON	720
OREGON FED OF NURSES—KAISER	908,194
OREGON NURSES ASSOCIATION	0
OVERSEAS FEDERATION	126,218
PACIFIC NORTHWEST HOSPITAL MEDICINE ASSOCIATION	0
PALOMAR FACULTY FEDERATION	401,919
PARK COLLEGE FACULTY, FEDERATION OF	22,617
PENNSYLVANIA	0
PENNSYLVANIA SCHOOL FOR THE DEAF UNITED	12,555
PORTER FEDERATION OF NURSES & HEALTH PROFESSIONALS	41,254
PROFESSIONAL STAFF CONGRESS/CUNY	10,982,000
RHODE ISLAND	1,744
RINDGE FACULTY FEDERATION	32,055
RIVERHEAD FREE LIBRARY STAFF ASSOCIATION	12,807
ROCH. SCH./DEAF UNITED FACULTY ASSO	21,058
SAN FRANCISCO ARCHDIOCESAN FEDERATION OF TEACHERS	112,752
SSMEU LOCAL 5121	86,674
ST MARYS SCHOOL FOR DEAF	0
ST. DOMINIC'S SCHOOL STAFF ASSOCIAT	13,157
STATE FEDERATION	0

TABLE 1—FISCAL YEAR 2018 PER CAPITA TAX DISBURSEMENTS FROM LMRDA-COVERED LOCAL UNIONS—Continued

TEMPLE UNIVERSITY	279,389
TENNESSEE	0
TEXAS	0
TROCAIRE FACULTY ASSOCIATION—NYSUT 37–975	18,990
TUGSA	19,556
UCATS	556,271
UNITED CENTER EMPLOYEES ASSN	62,723
UNITED CEREBRAL PALSY	183,635
UNITED FEDERATION OF COLLEGE TEACHERS	111,960
UNITED TEACHERS OF NEW ORLEANS—UTNO	163,459
UNIVERSITY OF SAN FRANCISCO FACULTY ASSOCIATION	251,821
VERMONT NURSES AND HEALTH PROFESSON	0
VETERANS ADMN STAFF NURSES COUNCIL	117,601
VISTING NURSES	2,533
WASHINGTON	211,309
WENTWORTH FACULTY FEDERATION	50,614
WEST HARTFORD DORMITORY SUPERVISORS	44,010
WEST VIRGINIA	384,371
WESTCHESTER FEDERATION OF VISITING NURSES, NYSUT	0
WESTERN PENN SCHOOL FOR BLIND CHILD	16,402
WESTERN STATES CHIROPRACTIC FACULTY	19,325
WILLAMETTE VALLEY CHILD CARE FED	15,542
WINDHAM COMMUNITY MEM HOSP EMPLS	106,854
WINDHAM HOSPITAL REGISTERED NURSES	42,755
WOODHAVEN FED OF HUMAN SERV PROF	9,064
LU—5071	0
LU—5091	0
LU—5000	230,158
Total	118,421,366
Locals Affiliated With Fraternal Order of Police	
AMTRAK POLICE COMMITTEE	0
BEP POLICE LABOR COMMITTEE	4,850
DC #1	0
DOD POLICE FORT DIX NEW JERSEY	4,086
FIRST FEDERAL LODGE F1 PENNSYLVANIA	2,276
LODGE 12	7,057
NIH POLICE LC COMMITTEE	0
NJ LABOR COUNCIL	0
PRINCETON FOP LODGE 75	1,961
US CAPITOL POLICE LABOR COMMITTEE	47,221
UNIVERSITY OF PA POLICE	2,833
WRAMC/DOD POLICE LABOR COMMITTEE	0
Total	70,284
Locals Affiliated With National Education Association	
ADRIAN COLLEGE ASN OF PROFESSORS	76,749
AGORA CYBER EDUCATION ASSOCIATION	0
BAKER COLLEGE EDUCATION ASSOCIATION	14,079
CAMBRIA HEIGHTS EDUCATIONAL SUPPORT PROFESSIONAL	14,749
EDUCATION MINNESOTA	0
ENDICOTT COLLEGE FACULTY ASN	17,460
FEA—PACIFIC AREA COUNCIL	0
FEA—STATESIDE REGION	0
FEA–EUROPE AREA COUNCIL	0
FLORIDA EDUCATION ASN	0
GRAND RAPIDS EDUCATIONAL SUPPORT	60,772
ILLINOIS EDUCATION ASSOCIATION	0
LAVELLE SCHOOL PROFESSIONAL STAFF ASSN	35,874
MAINE EDUCATION ASSOCIATION	0
MICHIGAN EDUCATION ASSOCIATION	0
MILTON HERSHEY EDUCATION ASN	0
OHIO EDUCATION ASSOCIATION	0
PART TIME FACULTY ASSOCIATION	63,713
PENNSYLVANIA	0
PENNSYLVANIA VIRTUAL CHARTER EDUCATION ASSOCIATION	77,451
PSEA RIVERSIDE EDUCATIONAL SUPPORT PERSONNEL	17,000
PSEA VIRTUAL CLASSROOM TEACHERS	93,858
R I SCHOOL OF DESIGN FACULTY	115,108
R WMS COLL ASN CLERICALS/TECHNICALS	42,193
RHODE ISLAND NATIONAL EDUCATION ASN	0

TABLE 1—FISCAL YEAR 2018 PER CAPITA TAX DISBURSEMENTS FROM LMRDA-COVERED LOCAL UNIONS—Continued

RISD TECHNICAL ASSOCIATION	0
ROGER WILLIAMS UNIVERSITY FACULTY	144,178
UNITED EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION	12,630
UNITED FACULTY OF FLORIDA	0
UNIV OF DETROIT PROFESSORS' UNION	177,004
UNIVERSITY OF DETROIT SUPPORT STAFF	36,163
VERMONT—NATIONAL EDUCATION ASN	0
YOUNG SCHOLARS OF CENTRAL PA EDUCATION ASSOCIATION	31,265
Total	1,030,246
Locals Affiliated With International Association of Fire Fighters	
BOEING FIRE FIGHTERS/INDUSTRIAL	60,607
CALIFORNIA PROFESSIONAL FIREFIGHTERS	0
CAMP PARKS PROFESSIONAL FIREFIGHTERS	6,965
CAMP PENDLETON LOCAL	35,138
CUMBERLAND VALLEY	2,679
DOBBINS AFB LOCAL	4,098
FIVE CITIES FIREFIGHTERS	0
FORT LEE FIRE & EMERGENCY SERVICES	6,921
GRAND FORKS SAFEGUARD FIREFIGHTERS ASSOCIATION	5,723
GREEN BAY AREA	83,374
HANFORD FIREFIGHTERS/BCFD#2	67,227
HANSCOM AIRFORCE BASE FIRE DEPT.	8,956
IOWA PROF FIRE FIGHTERS A–00–14	0
KAPL PROFESSIONAL FIREFIGHTER ASSOCIATION	2,957
LEXINGTON BLUE GRASS ARMY DEPOT	4,840
LOCAL UNION 108	6,487
LOCAL UNION 1117	11,066
LOCAL UNION 123	5,867
LOCAL UNION 14	10,215
LOCAL UNION 17	4,456
LOCAL UNION 170	4,665
LOCAL UNION 191	6,924
LOCAL UNION 211	10,554
LOCAL UNION 263	37,235
LOCAL UNION 267	8,004
LOCAL UNION 281	8,785
LOCAL UNION 282	53,090
LOCAL UNION 283	45,880
LOCAL UNION 33	48,987
LOCAL UNION 37	7,771
LOCAL UNION 68	7,590
LOCAL UNION 154	6,701
LOCAL UNION 100	3,601
LOCAL UNION 102	9,614
LOCAL UNION 105	6,640
LOCAL UNION 116	13,371
LOCAL UNION 147	3,903
LOCAL UNION 25	36,954
LOCAL UNION 88	13,488
LOCAL UNION 89	19,230
MISSOURI STATE COUNCIL OF FIRE FIGHTERS	0
MOFFETT FIELD FIRE FIGHTERS ASSOCIATION	0
MUSCATINE FIREFIGHTERS ASSOCIATION	0
NATIONAL CAPITAL FEDERAL FIRE FIGHTERS	30,476
NAVAL AIR STATION LOCAL	6,825
NIH PROFFESSIONAL FIREFIGHTERS	4,401
PENNSYLVANIA PROFESSIONAL FIRE FIGHTERS	0
PROFESSIONAL FIRE FIGHTERS ASN, NY	0
PROFESSIONAL FIRE FIGHTERS OF OKLAHOMA	254
PROFESSIONAL FIRE FIGHTERS OF WISCONSIN	0
ROBINS AIR FORCE BASE	5,502
ROCK ISLAND ARSENAL	4,561
SAN MATEO COUNTY FIREFIGHTERS	166,315
STATE ASSOCIATION 45	0
TAG 914	5,937
TEXAS STATE ASSOCIATION OF FIRE FIGHTERS	0
UNIFORMED PROFESSIONAL OF CONNECTICUTT	0
UNITED EMERGENCY MEDICAL PROFESSION	68,560
UNITED MARICOPA COUNTY FIREFIGHTERS	47,003
WALTER REED AMC	6,447
WHITE SANDS MISSILE RANGE FD	11,046

TABLE 1—FISCAL YEAR 2018 PER CAPITA TAX DISBURSEMENTS FROM LMRDA-COVERED LOCAL UNIONS—Continued

X–10 INDUSTRIAL FIREFIGHTERS	6,590
YAKIMA TRAINING CENTER FD UNION	3,048
Total	1,047,528

TABLE 2—FISCAL YEAR 2018 DISBURSEMENTS TO INTERMEDIATE STATE-LEVEL LABOR ORGANIZATIONS

American Federation of Teachers [17]	
AFT ALABAMA	$61,621
AFT INDIANA	44,127
AFT KANSAS	60,524
AFT MARYLAND	280,230
AFT MISSISSIPPI	89,409
AFT PENNSYLVANIA	338,161
FLORIDA EDUCATION ASSOCIATION	693,461
NORTH DAKOTA	178,701
Total	1,746,234
International Association of Fire Fighters	
ILLINOIS	18,620
RHODE ISLAND	11,100
Total	29,720
National Education Association	
ALABAMA	3,114,390
ALASKA	1,931,082
ARIZONA	2,101,734
ARKANSAS	635,161
COLORADO	2,291,781
CONNECTICUT	1,609,485
DELAWARE	994,853
FLORIDA	3,435,500
GEORGIA	1,050,613
HAWAII	948,354
IDAHO	779,714
IOWA	1,166,944
INDIANA	1,473,773
KANSAS	879,254
KENTUCKY	1,505,270
LOUISIANA	1,655,376
MARYLAND	3,194,106
MASSACHUSETTS	3,679,465
MISSISSIPPI	588,430
MISSOURI	1,153,029
MONTANA	0
NEBRASKA	1,395,713
NEVADA	1,187,793
NEW HAMPSHIRE	961,472
NEW JERSEY	6,858,117
NEW MEXICO	1,100,735
NEW YORK	2,343,591
NORTH DAKOTA	1,189,615
OKLAHOMA	1,468,118
OREGON	2,071,153
PENNSYLVANIA	6,105,353
SOUTH CAROLINA	749,964
SOUTH DAKOTA	733,007
TENNESSEE	1,732,573
TEXAS	2,100,400
UTAH	703,996
VIRGINIA	2,579,663

[16] Identified as a state association but submits LM reports as a local organization.

[17] Included in these totals were the following ancillary organizations and funds that had the same mailing addresses as the intermediate labor organization: The AFT Maryland Solidarity Fund, The Louisiana Federation of Teacher's F of T/AFT Peg fund, the Georgia Federation of Teacher's ''Cope'' project, the Florida Joint Organizing Project, AFT Pennsylvania's Solidarity Fund, and Vermont's Solidarity Fund.

TABLE 2—FISCAL YEAR 2018 DISBURSEMENTS TO INTERMEDIATE STATE-LEVEL LABOR ORGANIZATIONS—Continued

WASHINGTON	3,446,409
WEST VIRGINIA	805,839
WISCONSIN	1,938,230
WYOMING	811,163
Total	74,471,218

[FR Doc. 2019–26699 Filed 12–16–19; 8:45 am]

BILLING CODE 4510–86–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0897]

RIN 1625–AA00

Safety Zone; Isle of Wight Bay, Ocean City, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a temporary safety zone for certain waters in Isle of Wight Bay. This action is necessary to provide for the safety of personnel and vessels at and immediately adjacent to the Harry W. Kelley Memorial (US–50) Bridge during submarine electrical cable replacement operations which will occur from January 27, 2020, through February 3, 2020, daily from 6 a.m. until 10 p.m. This proposed rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port Maryland—National Capital Region or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before January 2, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2019–0897 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Petty Officer Courtney Perry, Sector Maryland—NCR, Waterways Management Division, U.S. Coast Guard; telephone 410–576–2570, email *Courtney.E.Perry@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

The Maryland Department of Transportation notified the Coast Guard that it will be conducting an installation of submarine cables from January 27, 2020, through February 3, 2020, within the navigation channel at the Harry W. Kelley Memorial (US–50) Bridge located in Ocean City, MD. The installation operations will be conducted at all hours during this time period. Vessels will not be able to use the navigation channel to pass through the draw span, daily from January 27, 2020, through February 3, 2020, from 6 a.m. until 10 p.m. Divers will be working from a barge and floating platforms which will impede 75 to 125 feet of the channel. On site marine equipment and vessels will be operated by Covington Machine and Welding, Inc. of Annapolis, MD or its subcontractors. Vessels engaged in work for this project will utilize marine band radio VHF–FM channel 13. The navigable waters outside of the navigation channel, in the vicinity of the bridge, will be unobstructed during this time and may be used at mariners' discretion. The COTP Maryland—National Capital Region has determined potential hazards associated with the installation of submarine electrical cables would be a safety concern for anyone at and immediately adjacent to the bridge.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters at and immediately adjacent to the Harry W. Kelley Memorial (US–50) Bridge during this project. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

III. Discussion of Proposed Rule

The Coast Guard is proposing to establish a safety zone January 27, 2020, through February 3, 2020 from 6 a.m. until 10 p.m. The safety zone will cover all navigable waters of the Isle of Wight Bay encompassed by a line connecting the following points beginning at 38°19′57.2″ N, 075°05′26.0″ W, thence to 38°19′56.9″ N, 075°05′24.8″ W, thence to 38°19′55.6″ N, 075°05′25.3″ W, thence to 38°19′55.9″ N, 075°05′26.6″ W, and back to the beginning point, located at Ocean City, MD. The regulated area is approximately 100 feet in width and 180 feet in length.

This regulation would require that the bridge owner post a sign facing the northern and southern approaches of the navigation channel labeled ''CABLE WORK—DANGER—STAY AWAY'' affixed to the sides of the on-scene marine equipment and vessels operating within the area of the safety zone. This provides on-scene notice of the safety zone. This notice will consist of a diamond shaped sign (minimum 4 feet by 4 feet) with a 3-inch orange retro reflective border. The word ''DANGER'' will be 10 inch black block letters centered on the sign with the words ''CABLE WORK'' and ''STAY AWAY'' in 6 inch black block letters placed above and below the word ''DANGER,'' respectively, on a white background.

The COTP will notify the public that the safety zone will be enforced by all appropriate means to the affected segments of the public, including publication in the **Federal Register**, as practicable, in accordance with 33 CFR 165.7(a). Such means of notification may also include, but are not limited to, Broadcast Notice to Mariners or Local Notice to Mariners. Vessels or persons violating this rule are subject to the penalties set forth in 46 U.S.C. 70036 (previously codified in 33 U.S.C. 1232) and 46 U.S.C. 70052 (previously codified in 50 U.S.C. 192).

The duration of enforcement of the zone is intended to ensure the safety of vessels and these navigable waters throughout the submarine electrical cable installation. Except for marine equipment and vessels operated by Covington Machine and Welding, Inc. or its subcontractors, no vessel or person will be permitted to enter the safety zone without permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, duration, and the time-of-year of the safety zone. The proposed submarine cable installation is being planned during the winter/non-peak season, when vessel transits in this section of the federal navigation channel are unlikely. Vessel traffic not required to use the navigation channel will be able to safely transit around the safety zone. This safety zone would impact a small designated area of Isle of Wight Bay for approximately 8 days and coincides with the non-peak season for recreational boating.

B. Impact on Small Entities

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

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

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule will have a significant economic, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If this rule were to 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. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it 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 proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone lasting approximately eight days that would prohibit use of navigable waters at or adjacent to the Harry W. Kelley Memorial (US–50) Bridge. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

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.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's Correspondence System of Records notice (84 FR 48645, September 26, 2018).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–0897 to read as follows:

§ 165.T05–0897 Safety Zone; Isle of Wight Bay, Ocean City, MD

(a) *Location.* The following area is a safety zone: All navigable waters of Isle of Wight Bay, encompassed by a line connecting the following points beginning at 38°19′57.2″ N, 075°05′26.0″ W, thence to 38°19′56.9″ N, 075°05′24.8″ W, thence to 38°19′55.6″ N, 075°05′25.3″ W, thence to 38°19′55.9″ N, 075°05′26.6″ W, and back to the beginning point, located at Ocean City, MD. These coordinates are based on datum NAD 1983.

(b) *Definitions.* As used in this section—

Captain of the Port (COTP) means the Commander, U.S. Coast Guard Sector Maryland—National Capital Region.

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Maryland—National Capital Region to assist in enforcing the security zone described in paragraph (a) of this section.

Marine equipment means any vessel, barge or other equipment operated by Covington Machine and Welding, Inc. or its subcontractors.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative. Except for marine equipment, all vessels within this safety zone at the time it is implemented are to depart the zone.

(2) To seek permission to enter, contact the COTP or the COTP's representative by telephone number 410–576–2693 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz). Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement officials.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement.* This safety zone will be enforced during the period described in paragraph (f) of this section. A ''CABLE WORK—DANGER—STAY AWAY'' sign facing the northern and southern approaches of the navigation channel will be posted on the sides of the marine equipment on-scene within the location described in paragraph (a) of this section.

(f) *Enforcement period.* This section will be enforced daily January 27, 2020, through February 3, 2020, from 6:00 a.m. until 10 p.m.

Dated: December 12, 2019.

Joseph B. Loring,

Captain, U.S. Coast Guard, Captain of the Port Sector Maryland—NCR.

[FR Doc. 2019–27153 Filed 12–16–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0460]

RIN 1625–AA00

Safety Zone; San Juan Harbor, San Juan, PR

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to revise an existing moving safety zone for San Juan Harbor, San Juan, Puerto Rico. The proposed revisions would expand the existing moving safety zone to include an adjacent berthing; add a 50-yard radius around moored liquefied natural gas and liquefied petroleum gas carriers; and update terminal names. This action would continue to prohibit persons and vessels from entering the safety zone, unless authorized by the Captain of the Port San Juan or a designated representative. This action is necessary to better meet the safety and security needs of San Juan Harbor. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before January 16, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2019–0460 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Lieutenant Commander Pedro Mendoza, Sector San Juan Prevention Department, Waterways Management Division, U.S. Coast Guard; telephone 787–729–2374, email *Pedro.L.Mendoza@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

The existing regulation in 33 CFR 165.754, contains a moving safety zone around transiting liquefied petroleum gas (LPG) carriers en route to, or departing from, the Gulf Refinery Oil dock or the Cataño Oil dock. On December 12, 2017, the Coast Guard received a request to assess the waterway suitability of transiting and semi-permanently moored liquefied natural gas (LNG) carriers within the San Juan Harbor. On September 26, 2018, the Coast Guard determined the Port of San Juan could accommodate the safe navigation and mooring of LNG carriers within the San Juan Harbor. On July 18, 2019, a Notice was published in the **Federal Register** (84 FR 34323) announcing two public meetings would be held on July 26, 2019 by the Coast Guard and New Fortress Energy to receive comments regarding the safe navigation and mooring of LNG carriers through the San Juan Harbor. There were approximately 50 attendees at the public meeting. We received approximately 20 comments, addressing 25 concerns, at the public meetings and through written submissions made in response to the Notice announcing the public meetings on *https://www.regulations.gov* under Docket Number USCG–2019–0460.

While the Coast Guard completes the rulemaking process for this NPRM, we published two temporary final rules (TFR) under the same docket number (USCG–2019–0686) and both entitled ''Safety Zone; San Juan Harbor, San Juan, PR.'' These TFRs established temporary safety zones for navigable waters within an area of one half mile around each LNG carrier or LPG carrier (collectively referred to as LG carriers) entering and departing San Juan Harbor. The TFRs also established a 50-yard radius around each vessel when moored at the Puma Energy dock, Cataño Oil dock, or Wharf B. The first TFR was published on September 13, 2019 (see 84 FR 48278), and was effective from August 23, 2019 until November 15, 2019. The second TFR was published on October 31, 2019 (84 FR 59726), and is effective until February 28, 2020.

Due to their cargoes, size, draft, and the local channel restrictions, LNG carriers must use of the center of navigation channels for safe transit. The COTP San Juan has determined that potential hazards associated with LNG carriers would be a safety concern for anyone within an area of one half mile during their transit and a 50-yard radius while moored. The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within one half mile during the transit of LG carriers through San Juan Harbor and a 50-yard radius while the LG carriers are moored at Puma Energy dock, Cataño Oil dock, or Wharf B. The proposed rule would safeguard vessels at an adjacent berthing location, Puerto Nuevo Berth B, which supplies LNG to the Puerto Rico Electric Power Authority (PREPA) and other industrial sectors.

These regulations are necessary for the protection of life and property on the navigable waters of the United States. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The proposed rule would amend the existing moving safety zone in 33 CFR 165.754 to include LNG carriers, in addition to LPG carriers. We are proposing to change the terminal names, ''Gulf Refinery Oil dock or Catano Oil dock'' currently referenced in § 165.754 to ''Puma Energy Dock, Cataño Oil dock, and Wharf B'' to reflect current ownership. The current safety zone is only enforced when LPG carriers are transiting the waters of the San Juan Harbor. However, the moving safety zone in the proposed rule would remain in effect while LG carriers are transiting through the Harbor, and when the carriers are moored. A 50-yard radius is proposed to be added around an LG carriers when these vessels are moored at the terminals. Vessels may seek permission from the COTP to enter, transit through, anchor in, or remain within the safety zone. The public would be notified of the safety zone by a Marine Broadcast Notice to Mariners, which would be issued to the maritime community before the safety zone is activated.

The proposed safety zone would continue to prohibit persons and vessels from entering the safety zone unless authorized by the Captain of the Port San Juan or a designated representative. The new LNG facility at Wharf B expects to receive one carrier every three days with ship-to-ship transfer operations lasting approximately 18 hours in duration. We do not anticipate this would significantly affect current port operations or navigation. Neighboring facilities would be able to safely continue operations when a LG carrier is transiting, moored, or engaged in transfer operations. The proposed regulatory text appears at the end of this document.

As noted above, we received approximately 20 comments, addressing 25 concerns, at the public meetings. A discussion of the comments and responses follows.

Two commenters raised concerns about the source of the LNG. Although, this comment is outside of the scope of this proposed rulemaking, New Fortress Energy advised the Coast Guard that the gas will be sourced from a variety of places including Trinidad and Europe. It is unlikely to be sourced from fracking.

Four commenters asked questions about the specific operations being conducted at the new facility. Although, this comment is outside of the scope of this proposed rulemaking, New Fortress Energy advised they anticipate one LNG carrier to arrive every three days and that each ship-to-ship transfer would take around 18 hours. The gas would then be loaded to trucks to be delivered to another primary or secondary power source.

Three commenters raised concerns about changes to operations within San Juan Harbor. Maritime operations within San Juan Harbor are not expected to be hindered by the proposed safety zone, due to its limits in size and duration during the transit and mooring of each LNG vessel. Neighboring facilities will still be able to conduct operations as normal during each LNG transfer.

Two commenters raised concerns about safety, specifically risk for explosion. The Coast Guard has reviewed dispersion rates and explosive limits of the facility's operation and has set the safety zone accordingly to reduce the risk of such an event. Additionally, New Fortress Energy has considered this issue and determined that the effects of an explosion, which is considered highly unlikely, would be contained within the property lines because there is no landed LNG storage at the facility.

Four commenters raised concerns about not having access to certain documents including the Letter of Intent (LOI) and Waterway Suitability Assessment (WSA). These documents contain business and security sensitive information and would need to be requested through the Freedom of Information Act (FOIA). FOIA requests may be submitted in writing via mail or overnight carrier to: Commandant (Cg–611), ATTN FOIA Officer, US Coast Guard Stop 7710, 2703 Martin Luther King Jr Ave. SE, Washington, DC 20593–7710.

Five commenters asked questions about the Coast Guard's rulemaking process. We explained our rulemaking process including the purpose of the **Federal Register** and the types of documents commonly uploaded to the docket folder associated with the rulemaking and contained at *https://www.regulations.gov.* This NPRM provides additional opportunity for public comment on the proposed safety zone.

One commenter raised concern about climate change in Puerto Rico. This comment is outside the scope of this rulemaking.

One commenter asked about the relationship between New Fortress Energy and the Coast Guard. The Coast Guard shares the same relationship and partnership with all of our stakeholders equally and serves as regulators.

Two commenters asked about the project cost, funding source, and consumer savings. This comment is outside the scope of this proposed rulemaking; however, this project has received no public funding and the cost is in the hundreds of millions.

One commenter asked if New Fortress Energy is building any other facilities in Puerto Rico. This comment is outside the scope of this proposed rulemaking; however, New Fortress Energy does not intend to build other facilities in Puerto Rico at this time.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, available exceptions to the enforcement of the safety zone, and notice to mariners. The regulated area will impact small designated areas of navigable channels within San Juan Harbor. The rule will allow vessels to seek permission to enter, transit through, anchor in, or remain within the safety zone. Additionally, notifications to the marine community will be made through Local Notice to Mariners, Broadcast Notice to Mariners via VHF–FM marine channel 16, and on-scene representatives. The notifications will allow the public to plan operations around the affected areas.

B. Impact on Small Entities

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

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

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity, and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone that would establish a 50-yard radius around transiting and moored liquefied gas carriers. Normally such actions are categorically excluded from further review under paragraph L60(a) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures. A preliminary Record of Environmental Consideration supporting this determination will be available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's Correspondence System of Records notice (84 FR 48645, September 26, 2018).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Revise § 165.754 to read as follows:

§ 165.754 Safety Zone; San Juan Harbor, San Juan, PR.

(a) *Regulated area.* A moving safety zone is established in the following area:

(1) The waters around liquefied gas (LG) carriers entering San Juan Harbor in an area one half mile around each vessel, beginning one mile north of the Bahia de San Juan Lighted Buoy #3, in approximate position 18°28′17.8″ N, 066°07′36.4″ W and continuing until the vessel is moored at the Puma Energy dock, Cataño Oil dock, or Wharf B in approximate position 18°25′47″ N, 066°6′32″ W. All coordinates are North American Datum 1983.

(2) The waters around LG carriers in a 50-yard radius around each vessel when moored at the Puma Energy dock, Cataño Oil dock, or Wharf B.

(3) The waters around LG carriers departing San Juan Harbor in an area one half mile around each vessel beginning at the Puma Energy Dock, Cataño Oil dock, or Wharf B in approximate position 18°25′47″ N, 066°6′32″ W when the vessel gets underway, and continuing until the stern passes the Bahia de San Juan Lighted Buoy #3, in approximate position 18°28′17.8″ N, 066°07′36.4″ W. All coordinates referenced use datum: NAD 83.

(b) *Regulations.* (1) No person or vessel may enter, transit or remain in the safety zone unless authorized by the Captain of the Port (COTP), San Juan, Puerto Rico, or a designated Coast Guard commissioned, warrant, or petty officer. Those operating in the safety zone with the COTP's authorization must comply with all lawful orders or directions given to them by the COTP or his designated representative.

(2) Persons desiring to transit the area of the safety zones may contact the COTP San Juan or his designated representative to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the COTP or his designated representative.

(3) Vessels encountering emergencies, which require transit through the moving safety zone, should contact the Coast Guard patrol craft or Duty Officer on VHF Channel 16. In the event of an emergency, the Coast Guard patrol craft may authorize a vessel to transit through the safety zone with a Coast Guard designated escort.

(4) The Captain of the Port and the Duty Officer at Sector San Juan, Puerto Rico, can be contacted at telephone number 787–289–2041. The Coast Guard Patrol Commander enforcing the safety zone can be contacted on VHF–FM channels 16 and 22A.

(5) Coast Guard Sector San Juan will, when necessary and practicable, notify the maritime community of periods during which the safety zones will be in effect by providing advance notice of scheduled arrivals and departure of liquefied gas carriers via a Marine Broadcast Notice to Mariners.

(6) All persons and vessels must comply with the instructions of on-scene patrol personnel. On-scene patrol personnel include commissioned, warrant, or petty officers of the U.S. Coast Guard. Coast Guard Auxiliary and local or state officials may be present to inform vessel operators of the requirements of this section, and other applicable laws.

Dated: November 27, 2019.

G.H. Magee,

Captain, U.S. Coast Guard, Acting Captain of the Port San Juan.

[FR Doc. 2019–27105 Filed 12–16–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2019–0148; FRL–10003–33–Region 4]

Air Plan Approval; Florida; Infrastructure Requirements for the 2015 8-Hour Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the State Implementation Plan (SIP) submission provided by the State of Florida, through the Florida Department of Environmental Protection (FDEP), through a letter dated September 18, 2018, for inclusion into the Florida SIP. This proposal pertains to the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2015 8-hour ozone national ambient air quality standards (NAAQS). Whenever EPA promulgates a new or revised NAAQS, the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA. FDEP certified

that the Florida SIP contains provisions that ensure the 2015 8-hour ozone NAAQS is implemented, enforced, and maintained in Florida. EPA is proposing to determine that Florida's SIP submission satisfies certain required infrastructure elements for the 2015 8-hour ozone NAAQS.

DATES: Written comments must be received on or before January 16, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2019–0148 at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT:
Tiereny Bell, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9088. Ms. Bell can also be reached via electronic mail at *bell.tiereny@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Overview

On October 1, 2015 (published on October 26, 2015, *see* 80 FR 65292), EPA promulgated a revised primary and secondary NAAQS for ozone revising the 8-hour ozone NAAQS from 0.075 parts per million to a new more protective level of 0.070 ppm. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIP revisions meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. This particular type of SIP is commonly referred to as an ''infrastructure SIP.'' States were required to submit such SIPs for the 2015 8-hour ozone NAAQS to EPA no later than October 1, 2018.[1]

This rulemaking is proposing to approve portions of Florida's September 18, 2018 [2] ozone infrastructure SIP submission for the applicable requirements of the 2015 8-hour ozone NAAQS. EPA is not taking action on the interstate transport requirements of section 110(a)(2)(D)(i)(I). EPA will consider these requirements for Florida for the 2015 8-hour ozone NAAQS separately. For the aspects of Florida's submittal proposed for approval in this rulemaking, EPA notes that the Agency is not approving any specific rule, but rather proposing that Florida's already approved SIP meets certain CAA requirements.

II. What elements are required under sections 110(a)(1) and (2)?

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains.[3]

[1] In these infrastructure SIP submissions, states generally certify evidence of compliance with sections 110(a)(1) and (2) of the CAA through a combination of state regulations and statutes, some of which have been incorporated into the federally-approved SIP. In addition, certain federally-approved, non-SIP regulations may also be appropriate for demonstrating compliance with sections 110(a)(1) and (2).

[2] The September 18, 2018 SIP submission provided by FDEP was received by EPA on September 26, 2018.

[3] Throughout this rulemaking, unless otherwise indicated, the term ''Florida Administrative Code'' or ''F.A.C.'' indicates that the cited regulation has been approved into Florida's federally-approved SIP. The term ''Florida Statutes'' or ''F.S.'' indicates cited Florida state statutes, which are not a part of the SIP unless otherwise indicated.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. The requirements of section 110(a)(2) are listed below and summarized in Section IV and in EPA's September 13, 2013, memorandum entitled ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2).'' [4]

- 110(a)(2)(A): Emission Limits and Other Control Measures
- 110(a)(2)(B): Ambient Air Quality Monitoring/Data System
- 110(a)(2)(C): Programs for Enforcement of Control Measures and for Construction or Modification of Stationary Sources [5]
- 110(a)(2)(D)(i)(I) and (II): Interstate Pollution Transport
- 110(a)(2)(D)(ii): Interstate Pollution Abatement and International Air Pollution
- 110(a)(2)(E): Adequate Resources and Authority, Conflict of Interest, and Oversight of Local Governments and Regional Agencies
- 110(a)(2)(F): Stationary Source Monitoring and Reporting
- 110(a)(2)(G): Emergency Powers
- 110(a)(2)(H): SIP Revisions
- 110(a)(2)(I): Plan Revisions for Nonattainment Areas [6]
- 110(a)(2)(J): Consultation with Government Officials, Public Notification, and Prevention of Significant Deterioration (PSD) and Visibility Protection

[4] Two elements identified in section 110(a)(2) are not governed by the three-year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D, title I of the CAA; and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, title I of the CAA. This proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the part D nonattainment permitting requirements of 110(a)(2)(C).

[5] As mentioned above, the Part D permit program for construction and modification of stationary sources is not relevant to this proposed rulemaking.

[6] As also mentioned above, this element is not relevant to this proposed rulemaking.

- 110(a)(2)(K): Air Quality Modeling and Submission of Modeling Data
- 110(a)(2)(L): Permitting fees
- 110(a)(2)(M): Consultation and Participation by Affected Local Entities

III. What is EPA's approach to the review of infrastructure SIP submissions?

EPA is acting upon the SIP submission from Florida that addresses the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2015 8-hour ozone NAAQS. Whenever EPA promulgates a new or revised NAAQS, CAA section 110(a)(1) requires states to make SIP submissions to provide for the implementation, maintenance, and enforcement of the NAAQS, commonly referred to as an ''infrastructure SIP.'' These infrastructure SIP submissions must meet the various requirements of CAA section 110(a)(2), as applicable. Due to ambiguity in some of the language of CAA section 110(a)(2), EPA believes that it is appropriate to interpret these provisions in the specific context of acting on infrastructure SIP submissions. EPA has previously provided comprehensive guidance on the application of these provisions through a guidance document for infrastructure SIP submissions and through regional actions on infrastructure submissions.[7] Unless otherwise noted below, we are following that existing approach in acting on this submission. In addition, in the context of acting on such infrastructure submissions, EPA evaluates the submitting state's implementation plan for facial compliance with statutory and regulatory requirements, not for the state's implementation of its SIP.[8] The EPA has other authority to address any issues concerning a state's implementation of the rules, regulations, consent orders, etc. that comprise its SIP.

IV. What is EPA's analysis of how Florida addressed the elements of the sections 110(a)(1) and (2) ''Infrastructure'' provisions?

The Florida infrastructure SIP submission addresses the provisions of sections 110(a)(1) and (2) as described below.

1. 110(a)(2)(A) *Emission Limits and Other Control Measures:* Section 110(a)(2)(A) requires that each implementation plan include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements. Several regulations within Florida's SIP are relevant to air quality control. The regulations described below include enforceable emission limitations and other control measures. Florida Administrative Code (F.A.C.) Chapters 62–204, *Air Pollution Control—General Provisions;* 62–210, *Stationary Sources—General Requirements;* 62–212, *Stationary Sources—Preconstruction Review;* 62–296, *Stationary Sources—Emissions Standards;* and 62–297, *Stationary Sources—Emissions Monitoring* collectively establish enforceable emissions limitations and other control measures, means or techniques for activities that contribute to ozone concentrations in the ambient air, and provide authority for FDEP to establish such limits and measures as well as schedules for compliance through SIP-approved permits to meet the applicable requirements of the CAA.

Additionally, the following sections of the Florida Statutes provide FDEP the authority to conduct certain actions in support of this infrastructure element. Section 403.061(9), Florida Statutes, authorizes FDEP to ''[a]dopt a comprehensive program for the prevention, control, and abatement of pollution of the air . . . of the state;'' and Section 403.8055, Florida Statutes, authorizes FDEP to ''[a]dopt rules substantively identical to regulations adopted in the **Federal Register** by the United States Environmental Protection Agency pursuant to federal law . . .''

EPA has made the preliminary determination that the provisions contained in these SIP-approved regulations and sections of the Florida Statutes satisfy section 110(a)(2)(A) for the 2015 8-hour ozone NAAQS in the State.

2. 110(a)(2)(B) *Ambient Air Quality Monitoring/Data System:* Section 110(a)(2)(B) requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to: (i) Monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator. SIP-approved rules at Chapters 62–204, 62–210, and 62–212 of the F.A.C. require the use of federal reference methods or equivalent monitors and also provide authority for FDEP to establish monitoring requirements through SIP-approved permits. Additionally, the following three sections of the Florida Statutes provide FDEP the authority to take specific actions in support of this infrastructure element: Section 403.061(1), Florida Statutes, authorizes FDEP to ''[a]pprove and promulgate current and long-range plans developed to provide for air quality and control and pollution abatement; Section 403.061(9), Florida Statutes, authorizes FDEP to [a]dopt a comprehensive program for the prevention, control and abatement of pollution of the air . . . of the State; and Section 403.061(11), Florida Statutes, authorizes FDEP to ''[e]stablish ambient air quality . . . standards for the state as a whole or for any part thereof.'' Annually, states develop and submit to EPA for approval statewide ambient monitoring network plans consistent with the requirements of 40 CFR parts 50, 53, and 58. The annual network plan involves an evaluation of any proposed changes to the monitoring network, includes the annual ambient monitoring network design plan, and includes a certified evaluation of the state's ambient monitors and auxiliary support equipment.[9] Florida submitted its monitoring network plan for 2018 to EPA on June 24, 2018. On October 22, 2019, EPA approved Florida's monitoring network plan. Florida's approved monitoring network plan can be accessed at *www.regulations.gov* using Docket ID No. EPA–R04–OAR–2019–0148. EPA has made the preliminary determination that Florida's SIP and practices are adequate for the ambient air quality monitoring and data system related to the 2015 8-hour ozone NAAQS.

3. 110(a)(2)(C) *Programs for Enforcement of Control Measures and for Construction or Modification of Stationary Sources:* This element

[7] EPA explains and elaborates on these ambiguities and its approach to address them in its September 13, 2013 Infrastructure SIP Guidance (available at *https://www3.epa.gov/airquality/urbanair/sipstatus/docs/Guidance_on_Infrastructure_SIP_Elements_Multipollutant_FINAL_Sept_2013.pdf*), as well as in numerous agency actions, including EPA's prior action on Florida's infrastructure SIP to address the 2010 1-hour Sulfur Dioxide NAAQS (80 FR 51157 (Aug. 24, 2015)).

[8] *See Mont. Envtl. Info. Ctr.* v. *Thomas*, 902 F.3d 971 (9th Cir. 2018).

[9] On occasion, proposed changes to the monitoring network are evaluated outside of the network plan approval process in accordance with 40 CFR part 58.

consists of three sub-elements: Enforcement, state-wide regulation of new and modified minor sources and minor modifications of major sources, and preconstruction permitting of major sources and major modifications in areas designated attainment or unclassifiable for the subject NAAQS as required by CAA title I part C (*i.e.,* the major source PSD program). FDEP's 2015 8-hour ozone NAAQS infrastructure SIP submission cited a number of SIP provisions to address these requirements. EPA's rationale for its proposed action regarding each sub-element is described below.

Enforcement: FDEP cited Chapters 62–210, 62–212, F.A.C., which provide for enforcement of emission limits and control measures through permitting. Florida also cited to Section 403.061(6), Florida Statutes, which requires FDEP to ''[e]xercise general supervision of the administration and enforcement of the laws, rules, and regulations pertaining to air and water pollution;'' and Section 403.121, Florida Statutes, which authorizes FDEP to seek judicial and administrative remedies for violations, including civil penalties, injunctive relief, and criminal prosecution for violations of any FDEP rule or permit. These provisions provide FDEP with authority for enforcement of volatile organic compounds (VOC) and nitrogen of oxides (NO_X) emission limits and control measures.

Regulation of minor sources and modifications: Section 110(a)(2)(C) also requires the SIP to include provisions that govern the minor source program that regulates emissions of the 2015 8-hour ozone NAAQS. FDEP cited Chapter 62–210, F.A.C. These provisions of Florida's SIP regulate the construction of any new minor stationary source and minor modifications at an existing stationary source. These regulations enable FDEP to regulate sources contributing to the 2015 8-hour ozone NAAQS.

PSD Permitting for Major Sources: EPA interprets the PSD sub-element to require that a state's infrastructure SIP submission for a particular NAAQS demonstrate that the state has a complete PSD permitting program in place covering the current PSD requirements for all regulated NSR pollutants. A state's PSD permitting program is complete for this sub-element (and J related to PSD) if EPA has already approved or is simultaneously approving the state's SIP with respect to all PSD requirements that are due under the EPA regulations or the CAA on or before the date of the EPA's proposed action on the infrastructure SIP submission. Florida's authority to regulate new and modified sources to assist in the protection of air quality in attainment or unclassifiable areas is established in F.A.C. Chapters 62–210, *Stationary Sources—General Requirements, Section 200—Definitions,* and 62–212, *Stationary Sources—Preconstruction Review, Section 400—Prevention of Significant Deterioration,* of the Florida SIP. Under Florida's SIP, new major sources and major modifications in areas of the State designated attainment or unclassifiable for a NAAQS are subject to a federally-approved PSD permitting program meeting all the current structural requirements of part C of title I of the CAA to satisfy the infrastructure SIP PSD elements.

EPA has made the preliminary determination that Florida's SIP and practices are adequate for program enforcement of control measures, regulation of minor sources and modifications, and PSD preconstruction permitting of major sources and major modifications.

4. 110(a)(2)(D)(i)(I) and (II) *Interstate Pollution Transport:* Section 110(a)(2)(D)(i) has two components: 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(i)(II). Each of these components has two subparts resulting in four distinct components, commonly referred to as ''prongs,'' that must be addressed in infrastructure SIP submissions. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state (''prong 1'') and interfering with maintenance of the NAAQS in another state (''prong 2''). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state from interfering with measures required to prevent significant deterioration of air quality in another state (''prong 3''), or to protect visibility in another state (''prong 4'').

110(a)(2)(D)(i)(I)—prongs 1 and 2: EPA is not proposing any action in this rulemaking related to the interstate transport provisions pertaining to the contribution to nonattainment or interference with maintenance in other states pursuant to section 110(a)(2)(D)(i)(I) (prongs 1 and 2). EPA will address prongs 1 and 2 in separate rulemakings.

110(a)(2)(D)(i)(II)—prong 3: With regard to section 110(a)(2)(D)(i)(II), the PSD element referred to as prong 3, this requirement may be met by a state's confirmation in an infrastructure SIP submission that new major sources and major modifications in the state are subject to a PSD program meeting current structural requirements of part C of title I of the CAA, or (if the state contains a nonattainment areas that has the potential to impact PSD in another state) a NNSR program. A state's PSD permitting program satisfies prong 3 if EPA has already approved or is simultaneously approving the state's implementation plan with respect to all PSD requirements that are due under EPA regulations or the CAA on or before the date of EPA's proposed action on the infrastructure SIP submission.

Florida's SIP contains provisions for the State's PSD program that reflects the required structural PSD requirements to satisfy prong 3 of section 110(a)(2)(D)(i)(II). Florida addresses prong 3 through F.A.C. 62–204, 62–210, and 62–212 for the PSD and NNSR programs. EPA has made the preliminary determination that Florida's SIP and practices are adequate for intestate transport for PSD permitting of major sources and major modifications related to the 2015 8-hour ozone NAAQS for section 110(a)(2)(D)(i)(II) (prong 3).

110(a)(2)(D)(i)(II)—prong 4: Section 110(a)(2)(D)(i)(II) requires that the SIP contain adequate provisions to protect visibility in other states. This requirement is satisfied for any relevant NAAQS when the state has a fully approved regional haze SIP.

Florida's submission relied on the State's SIP-approved regional haze program to address the prong 4 requirements of section 110(a)(2)(D)(i) for the 2015 8-hour ozone NAAQS.[10] Federal regulations require that a state's regional haze SIP contain a long-term strategy to address regional haze visibility impairment in each Class I area within the state and each Class I area outside the state that may be affected by emissions from the state.[11] A state participating in a regional planning process, such as Florida, must include all measures needed to achieve its apportionment of emissions reduction obligations agreed upon through that process.[12] EPA's approval of Florida's

[10] EPA approved Florida's regional haze SIP—*see* 77 FR 71111 (November 29, 2012); 78 FR 53250 (August 29, 2013).

[11] *See* 40 CFR 51.308(d).

[12] *See, e.g.,* 40 CFR 51.308(d)(3)(ii). Florida participated in the Visibility Improvement State and Tribal Association of the Southeast regional planning organization, a collaborative effort of state governments, tribal governments, and various Federal agencies established to initiate, and coordinate activities associated with the management of regional haze, visibility, and other air quality issues in the Southeastern United States. Member state and tribal governments included: Alabama, Florida, Georgia, Kentucky, Mississippi,

regional haze SIP therefore ensures that emissions from Florida are not interfering with measures to protect visibility in other states, satisfying the requirements of prong 4 of section 110(a)(2)(D)(i)(II) for the 2015 8-hour ozone NAAQS. Thus, EPA has made the preliminary determination that Florida's infrastructure SIP submission for the 2015 8-hour ozone NAAQS meet the requirements of prong 4 of section 110(a)(2)(D)(i)(II).

5. 110(a)(2)(D)(ii) *Interstate Pollution Abatement and International Air Pollution:* Section 110(a)(2)(D)(ii) requires SIPs to include provisions ensuring compliance with sections 115 and 126 of the Act, relating to notification to neighboring air agencies and interstate and international pollution abatement. Chapters 62–204, 62–210, and 62–212 of the F.A.C. require any new major source or major modification to undergo PSD or NNSR permitting and thereby provide notification to other potentially affected Federal, state, and local government agencies. Additionally, Florida does not have any pending obligation under sections 115 and 126 of the CAA relating to international or interstate pollution abatement. EPA has made the preliminary determination that Florida's SIP and practices are adequate for ensuring compliance with the applicable requirements relating to interstate and international pollution abatement for the 2015 8-hour ozone NAAQS.

6. 110(a)(2)(E) *Adequate Resources and Authority, Conflict of Interest, and Oversight of Local Governments and Regional Agencies:* Section 110(a)(2)(E) requires that each implementation plan provide: (i) Necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out its implementation plan, (ii) that the state comply with the requirements respecting state boards pursuant to section 128 of the Act, and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provisions. EPA is proposing to approve Florida's infrastructure SIP submission as meeting the requirements of sub-elements 110(a)(2)(E)(i), (ii), and (iii).

In support of sub-elements 110(a)(2)(E)(i) and (iii), FDEP's infrastructure submission demonstrates that it has authority to carry out its SIP as it is responsible for a comprehensive program to address air pollution in the state as described in Section IV.1 above in reference to 110(a)(2)(A). Additionally, FDEP cites to provisions that provide assurances for adequate personnel and funding. Section 403.061(2), Florida Statutes, authorizes FDEP to ''[h]ire only such employees as may be necessary to effectuate the responsibilities of the department.'' Section 403.061(4), Florida Statutes, authorizes FDEP to ''[s]ecure necessary scientific, technical, research, administrative, and operational services by interagency agreement, by contract, or otherwise.'' Section 320.03(6), Florida Statutes, authorizes FDEP to establish an Air Pollution Control Trust Fund and use a $1 fee on every motor vehicle license registration sold in the State for air pollution control purposes. Regarding the 110(a)(2)(E)(iii), Section 403.182, Florida Statutes, authorizes FDEP to approve local pollution control programs, and provides for the State air pollution control program administered by FDEP to supersede a local program if FDEP determines that an approved local program is inadequate, and the locality fails to take the necessary corrective actions.[13]

As evidence of the adequacy of FDEP's resources with respect to sub-elements (i) and (iii), FDEP has a performance partnership agreement with EPA outlining 105 grant commitments and current status of these commitments for fiscal year 2018. Annually, the State updates this performance partnership agreement based on current SIP requirements, air quality planning, and applicable requirements related to the NAAQS. Florida satisfactorily met all commitments agreed to in the Air Planning Agreement for fiscal year 2018, therefore, FDEP's grants were finalized and closed out. EPA has made the preliminary determination that Florida has adequate resources and authority for implementation of the 2015 8-hour ozone NAAQS.

Section 110(a)(2)(E)(ii) requires that the state comply with section 128 of the CAA. Section 128 requires that the SIP contain provisions providing that: (1) The majority of members of the state board or body which approves permits or enforcement orders represent the public interest and do not derive any significant portion of their income from persons subject to permitting or enforcement orders under the CAA; and (2) any potential conflicts of interest by such board or body, or the head of an executive agency with similar powers be adequately disclosed. For purposes of section 128(a)(1), Florida has no boards or bodies with authority over air pollution permits or enforcement actions. Such matters are instead handled by an appointed Secretary. As such, a ''board or body'' is not responsible for approving permits or enforcement orders in Florida, and the requirements of section 128(a)(1) are not applicable. For the requirements of 128(a)(2), Florida Statutes, subsections 112.3143(4), F.S., *Voting conflicts* and 112.3144, F.S, *Full and public disclosure of financial interests* address the conflict of interest provisions applicable to the head of FDEP and all public officers within the Department. On July 30, 2012 (77 FR 44485), EPA approved these Florida statutes into the SIP to comply with section 128 respecting state boards. EPA has made the preliminary determination that the State has adequately addressed the requirements of section 128(a)(2), and accordingly has met the requirements of section 110(a)(2)(E)(ii) with respect to infrastructure SIP requirements.

Therefore, EPA is proposing to approve Florida's infrastructure SIP submission as meeting the requirements of sub-elements 110(a)(2)(E)(i), (ii) and (iii).

7. 110(a)(2)(F) *Stationary Source Monitoring and Reporting:* Section 110(a)(2)(F) requires SIPs to meet applicable requirements addressing: (i) The installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to this section, which reports shall be available at reasonable times for public inspection. EPA's rules regarding how SIPs need to address source monitoring requirements at 40 CFR 51.212 require SIPs to exclude any provision that would prevent the use of credible evidence of noncompliance. Florida meets these

North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the Eastern Band of the Cherokee Indians.

[13] CAA Section 110(a)(2)(E)(iii) requires states to provide necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision. In the State of Florida, no local or regional areas submit implementation plans and the Department is solely responsible for the SIP. However, Florida Statute 403.061(21) authorizes the department to consult, cooperate and enter into agreements with other agencies of the State. The Department has specific operating agreements with Duval, Orange, Hillsborough, Pinellas, Sarasota, Palm Beach, Broward and Miami-Dade counties.

requirements through Chapters 62–210, 62–212, 62–296, and 62–297, F.A.C., which require emissions monitoring and reporting for activities that contribute to ozone concentrations in the air, including requirements for the installation, calibration, maintenance, and operation of equipment for continuously monitoring or recording emissions. These rules also provide authority for FDEP to establish such emissions monitoring and reporting requirements through SIP-approved permits and require reporting of ozone precursor emissions (NO_X and VOC) in a manner that allows the state to correlate such data and provide the information to EPA.

The following sections of the Florida Statutes provide FDEP the authority to conduct certain actions in support of this infrastructure element. Section 403.061(13) authorizes FDEP to ''[r]equire persons engaged in operations which may result in pollution to file reports which may contain . . . any other such information as the department shall prescribe . . .'' Section 90.401, Florida Statutes, defines relevant evidence as evidence tending to prove or disprove a material fact. Section 90.402, Florida Statutes, states that all relevant evidence is admissible except as provided by law. EPA is unaware of any provision preventing the use of credible evidence in the Florida SIP.

Additionally, Florida is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI) pursuant to Subpart A to 40 CFR part 51,—''Air Emissions Reporting Rule'' (AERR). The NEI is EPA's central repository for air emissions data. Specifically, all states are required to submit a comprehensive emission inventory every three years and report emissions for certain larger sources annually through EPA's online Emissions Inventory System. States report emissions data for the six criteria pollutants and the precursors that form them—nitrogen oxides, sulfur dioxide, ammonia, lead, carbon monoxide, particulate matter, and volatile organic compounds. Many states also voluntarily report emissions of hazardous air pollutants. Florida made its latest update to the NEI on December 17, 2014. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the website *http://www.epa.gov/ttn/chief/eiinformation.html.* EPA has made the preliminary determination that Florida's SIP and practices are adequate for the stationary source monitoring systems related to the 2015 8-hour ozone NAAQS.

8. 110(a)(2)(G) *Emergency Powers:* This section requires that states demonstrate authority comparable with section 303 of the CAA and adequate contingency plans to implement such authority. Section 303 authorizes EPA to take action seeking to immediately restrain pollution sources if such pollution is presenting an imminent and substantial endangerment to public health, welfare, or the environment. Florida's infrastructure SIP submission addresses emergency powers as outlined in Florida Statutes Sections 403.131 and 120.569(2)(n). These sections of the Florida Statutes were submitted for inclusion in the SIP to address the requirements of section 110(a)(2)(G) of the CAA and have been approved by EPA into Florida's SIP. Section 403.131 authorizes FDEP to: Seek injunctive relief to enforce compliance with this chapter or any rule, regulation or permit certification, or order; to enjoin any violation specified in Section 403.061(1); and to seek injunctive relief to prevent irreparable injury to the air, waters, and property, including animal, plant, and aquatic life, of the State and to protect human health, safety, and welfare caused or threatened by any violation. Section 120.569(2)(n), Florida Statutes, authorizes FDEP to issue emergency orders to address immediate dangers to the public health, safety, or welfare. EPA has made the preliminary determination that Florida's SIP, State laws, and practices are adequate to satisfy the infrastructure SIP obligations for emergency powers related to the 2015 8-hour ozone NAAQS. Accordingly, EPA is proposing to approve Florida's infrastructure SIP submission with respect to section 110(a)(2)(G).

9. 110(a)(2)(H) *SIP Revisions:* Section 110(a)(2)(H), in summary, requires each SIP to provide for revisions of such plan: (i) As may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii) whenever the Administrator finds that the plan is substantially inadequate to attain the NAAQS or to otherwise comply with any additional applicable requirements. As previously discussed, FDEP is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS. Florida has the ability and authority to respond to calls for SIP revisions and has provided a number of SIP revisions over the years for implementation of the NAAQS.

The following sections of the Florida Statutes provide FDEP the authority to conduct certain actions in support of this element. Section 403.061(35) gives FDEP the ''broad authority to implement the CAA.'' Section 403.061(9) authorizes FDEP to ''adopt a comprehensive program for the prevention, control, and abatement of pollution of the air of the state, and to review and modify such programs as necessary.'' EPA has made the preliminary determination that Florida adequately demonstrates a commitment to provide future SIP revisions related to the 2015 8-hour ozone NAAQS when necessary. Accordingly, EPA is proposing to approve Florida's infrastructure SIP submission with respect to section 110(a)(2)(H).

10. 110(a)(2)(J) *Consultation With Government Officials, Public Notification, and PSD and Visibility Protection:* EPA is proposing to approve Florida's infrastructure SIP for the 2015 8-hour ozone NAAQS with respect to the general requirement in section 110(a)(2)(J) to include a program in the SIP that complies with the applicable consultation requirements of section 121, the public notification requirements of section 127, PSD, and visibility protection. EPA's rationale for each sub-element is described below.

Consultation with government officials (121 consultation): Section 110(a)(2)(J) of the CAA requires states to meet the requirements of section 121 relating to consultation with local governments, designated organizations and federal land managers (FLMs) carrying out NAAQS implementation requirements. Florida's SIP-approved Chapters 62–204, 62–210, and 62–212, F.A.C., as well as its Regional Haze Implementation Plan (which allows for continued consultation with appropriate state, local, and tribal air pollution control agencies as well as the corresponding FLMs), provide for consultation with government officials whose jurisdictions might be affected by SIP development activities. Specifically, Florida adopted state-wide consultation procedures for the implementation of transportation conformity which includes the development of mobile inventories for SIP development. Required partners covered by Florida's consultation procedures include Federal, state and local transportation and air quality agency officials. Also, Section 403.061(21), Florida Statutes, authorizes FDEP to ''[a]dvise, consult, cooperate, and enter into agreements with other agencies of the state, the Federal Government, other states, interstate agencies, groups, political subdivisions, and industries affected by the provisions of this act, rules, or policies of the department.'' EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate consultation with government officials related to the 2015 8-hour ozone NAAQS when necessary.

Public notification (127 public notification): With respect to public notification, section 110(a)(3)(J) of the CAA requires states to notify the public of NAAQS exceedances and associated health hazards, and to enhance public awareness of measures that can prevent such exceedances. FDEP has public notice mechanisms in place to notify the public of instances or areas exceeding the NAAQS along with associated health effects through the Air Quality Index reporting system in required areas. Section 403.061(20), Florida Statutes, authorizes FDEP to ''[c]ollect and disseminate information . . . relating to pollution.'' Accordingly, EPA is proposing to approve Florida's infrastructure SIP submission with respect to section 110(a)(2)(J) public notification.

PSD: With regard to the PSD element of section 110(a)(2)(J), this requirement is met when a state demonstrates in an infrastructure SIP submission that its PSD program meets all the current requirements of part C of title I of the CAA. As discussed in more detail above under the section discussing 110(a)(2)(C), Florida's SIP contains provisions for the State's PSD program that reflect the relevant SIP revisions to satisfy the requirement of the PSD element of section 110(a)(2)(J). EPA has made the preliminary determination that Florida's SIP is adequate for PSD permitting of major sources and major modifications related to the 2015 8-hour ozone NAAQS for the PSD element of section 110(a)(2)(J).

Visibility protection: EPA's 2013 Guidance notes that it does not treat the visibility protection aspects of section 110(a)(2)(J) as applicable for purposes of the infrastructure SIP approval process. FDEP referenced its regional haze program as germane to the visibility component of section 110(a)(2)(J). EPA recognizes that states are subject to visibility protection and regional haze program requirements under part C of the Act (which includes sections 169A and 169B). However, there are no newly applicable visibility protection obligations after the promulgation of a new or revised NAAQS. Thus, EPA has determined that states do not need to address the visibility component of 110(a)(2)(J) in infrastructure SIP submittals so FDEP does not need to rely on its regional haze program to fulfill its obligations under section 110(a)(2)(J). As such, EPA has made the preliminary determination that Florida's infrastructure SIP submission is approvable for section 110(a)(2)(J) related to the 2015 8-hour ozone NAAQS and that Florida does not need to rely on its regional haze program to address this element.

11. 110(a)(2)(K) *Air Quality Modeling and Submission of Modeling Data:* Section 110(a)(2)(K) of the CAA requires that SIPs provide for performing air quality modeling so that effects on air quality of emissions from NAAQS pollutants can be predicted and submission of such data to the EPA can be made. FDEP cites to SIP-approved sections of Chapters 62–210 and 62–212, F.A.C., for this requirement. Specific to modeling, 62–212, F.A.C. requires air quality models to meet the requirements of 52.21(l). Also, the following sections of the Florida Statutes provide FDEP the authority to conduct actions in support of this element. Section 403.061(13), Florida Statutes, authorizes FDEP to ''[r]equire persons engaged in operations which may result in pollution to file reports which may contain information relating to locations, size of outlet, height of outlet, rate and period of emission, and composition and concentration of effluent and such other information as the department shall prescribe to be filed . . .'' Section 403.061(18), Florida Statutes, authorizes FDEP to ''[e]ncourage and conduct studies, investigations, and research relating to pollution and its causes, effects, prevention, abatement, and control.'' These regulations and State statutes demonstrate that Florida has the authority to conduct modeling and provide relevant data for the purpose of predicting the effect on ambient air quality of the 2015 8-hour ozone NAAQS. Additionally, Florida participates in a regional effort to coordinate the development of emissions inventories and conduct regional modeling for several NAAQS, including the 2015 8-hour ozone NAAQS, for the Southeastern states. Florida notes in its SIP submission that the FDEP has the technical capability to conduct or review all air quality modeling associated with the NSR program and all SIP-related modeling, except that photochemical grid modeling may be performed for FDEP under contract. FDEP also states that all such modeling is conducted in accordance with the provisions of 40 CFR part 51, Appendix W, ''Guideline on Air Quality Models,'' and agreed to submit any NSR or SIP modeling to EPA upon request. Taken as a whole, Florida's submission demonstrates that FDEP has the authority to conduct air quality modeling under EPA guidelines, and to provide such information to the EPA Administrator upon request. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate the State's ability to provide for air quality modeling, along with analysis of the associated data, related to the 2015 8-hour ozone NAAQS. Accordingly, EPA is proposing to approve Florida's infrastructure SIP submissions with respect to section 110(a)(2)(K).

12. 110(a)(2)(L) *Permitting Fees:* This section requires the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under the CAA, a fee sufficient to cover: (i) The reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V. Section 403.087(6)(a), Florida Statutes, directs FDEP to ''require a processing fee in an amount sufficient, to the greatest extent possible, to cover the costs of reviewing and acting upon any application for a permit. . . .'' Chapter 62–4.040(4)(a)1., F.A.C., requires each NSR permittee to pay a fee of $7,500.[14] Additionally, Florida has a fully approved title V operating permit program at Chapter 62–213 F.A.C.[15] that covers the costs of implementation and enforcement of the title V program, including applicable requirements of the SIP. EPA has made the preliminary determination that Florida's State rules and statutes adequately provide for permitting fees related to the 2015 8-hour ozone NAAQS, when necessary. Accordingly, EPA is proposing to approve Florida's infrastructure SIP submission with respect to section 110(a)(2)(L).

13. 110(a)(2)(M) *Consultation and Participation by Affected Local Entities:* This element requires states to provide for consultation and participation in SIP

[14] This regulation is not approved into the Florida SIP.

[15] Florida's title V program regulations are federally-approved but not incorporated into the SIP.

development by local political subdivisions affected by the SIP. Florida coordinates with local governments affected by the SIP. Florida has consulted with local entities for the development of transportation conformity and has worked with the FLMs as a requirement of the regional haze rule. Section 403.061(21), Florida Statutes, authorizes FDEP to ''[a]dvise, consult, cooperate and enter into agreements with other agencies of the state, the Federal Government, other states, interstate agencies, groups, political subdivisions, and industries affected by the provisions of this act, rules, or policies of the department.'' Further, Florida adopted state-wide consultation procedures for the implementation of transportation conformity which includes the development of mobile inventories for SIP development and the requirements that link transportation planning and air quality planning in nonattainment and maintenance areas. Required partners covered by Florida's consultation procedures include Federal, state and local transportation and air quality agency officials. The state and local transportation agency officials are most directly impacted by transportation conformity requirements and are required to provide public involvement for their activities including the analysis demonstrating how they meet transportation conformity requirements. Also, FDEP has agreements with eight county air pollution control agencies (Duval, Orange, Hillsborough, Pinellas, Sarasota, Palm Beach, Broward, and Miami-Dade) that delineate the responsibilities of each county in carrying out Florida's air program, including the Florida SIP. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate consultation with affected local entities related to the 2015 8-hour ozone NAAQS when necessary.

V. Proposed Action

With the exception of interstate transport provisions of section 110(a)(2)(D)(i)(I) pertaining to the contribution to nonattainment or interference with maintenance in other states, EPA is proposing to approve Florida's infrastructure submission provided on September 18, 2018, for the 2015 8-hour ozone NAAQS for the above described infrastructure SIP requirements. EPA is proposing to approve Florida's infrastructure SIP submission for certain elements for the 2015 8-hour ozone NAAQS because the submission is consistent with section 110 of the CAA for those elements.

VI. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

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

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

Dated: November 21, 2019.

Mary S. Walker,

Regional Administrator, Region 4.

[FR Doc. 2019–27163 Filed 12–16–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2018–0746; FRL–10002–18–OAR]

RIN 2060–AT85

National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed action; notification of public hearings and extension of comment period.

SUMMARY: On December 17, 2019, the U.S. Environmental Protection Agency (EPA) published the proposed rulemaking concerning the residual risk and technology review (RTR) for the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Miscellaneous Organic Chemical Manufacturing source category. The EPA also requested public comment on the proposed action. The EPA is announcing that it will hold two public hearings to provide interested parties the opportunity to present data, views, or arguments concerning the proposed action.

DATES:

Comments: The comment period for the proposed rule published December 17, 2019, is extended. The EPA must receive comments on this proposed action no later than February 18, 2020.

Public hearings: The EPA will hold one public hearing on January 14, 2020, in Houston, Texas, and a second public hearing on January 16, 2020, in

Washington, DC. The EPA will begin pre-registering speakers for the hearings on December 17, 2019. The last day to pre-register to speak at either hearing will be January 9, 2020, at 5:00 p.m. (ET). The EPA will not provide audiovisual equipment for presentations. Any media presentations should be submitted to the public docket at *https://www.regulations.gov/,* identified by Docket ID No. EPA–HQ–OAR–2018–0746. If you require the service of a translator such as audio description, please pre-register for the hearings and describe your needs by January 9, 2020. We may not be able to arrange accommodations without advanced notice. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearings.

ADDRESSES: The hearing in Houston, Texas, will be held in the Harris County Commissioners Courtroom, 1001 Preston Street, Suite 934, Houston, Texas. The hearing will convene at 9:00 a.m. (local time) and will conclude at 5:00 p.m. Lunch breaks will be scheduled as time will allow depending on the number of registered speakers.

The hearing in Washington, DC, will be held in the William Jefferson Clinton East Building (WJC East), 1201 Constitution Avenue NW, Room 1117, Washington, DC 20004. The hearing will convene at 9:00 a.m. (local time) and will conclude at 5:00 p.m. Lunch breaks will be scheduled as time will allow depending on the number of registered speakers.

The EPA's website for this rulemaking, which includes the proposal and information about the hearing, can be found at: *https://www.epa.gov/stationary-sources-air-pollution/miscellaneous-organic-chemical-manufacturing-national-emission.* Written comments on the proposed rule may be submitted to the EPA electronically, by mail, facsimile, or through hand delivery/courier. Please refer to the proposal for the addresses and detailed instructions.

FOR FURTHER INFORMATION CONTACT: To register to speak at the hearings, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/miscellaneous-organic-chemical-manufacturing-national-emission* or contact Ms. Virginia Hunt at (919) 541–0832 or at *hunt.virginia@epa.gov.*

SUPPLEMENTARY INFORMATION: Because both of these hearings are being held at government facilities, individuals planning to attend the hearings should be prepared to show valid picture identification to the security staff to gain access to the meeting room. Please note that the REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. For purposes of the REAL ID Act, the EPA will accept government-issued IDs, including driver's licenses, from the District of Columbia and all states and territories except from American Samoa. If your identification is issued by American Samoa, you must present an additional form of identification to enter the federal building where the public hearing will be held. Acceptable alternative forms of identification include: Federal employee badges, passports, enhanced driver's licenses, and military identification cards. For additional information on the status of your state regarding REAL ID, go to: *https://www.dhs.gov/real-id.* Any objects brought into the building need to fit through the security screening system, such as a purse, laptop bag, or small backpack. The EPA will not allow demonstrations during the public hearing.

On January 13, 2020, the EPA will post general agendas for the hearings that will list pre-registered speakers in approximate order at *https://www.epa.gov/stationary-sources-air-pollution/miscellaneous-organic-chemical-manufacturing-national-emission.* The EPA will make every effort to follow the schedules as closely as possible on the day of each hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule. Additionally, requests to speak will be taken the day of each hearing at the hearing registration desk. The EPA will make every effort to accommodate all speakers who arrive and register, although preferences on speaking times may not be able to be fulfilled.

Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically or in hard copy form. Please refer to the **ADDRESSES** section for additional information on how to provide written comments on the proposed rule.

The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearings. Verbatim transcripts of the hearings and written statements will be included in the docket for the rulemaking.

Please note that any updates made to any aspect of the hearings will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/miscellaneous-organic-chemical-manufacturing-national-emission.* While the EPA expects the hearings to go forward as set forth above, please monitor our website or contact Ms.Virginia Hunt at (919) 541–0832 or *hunt.virginia@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

Dated: December 12, 2019.

Panagiotis Tsirigotis,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 2019–27154 Filed 12–16–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 191211–0108; RTID 0648–XX019]

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; 2020 Specifications

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to maintain *Illex* squid, longfin squid, and butterfish specifications for the 2020 fishing year and maintain the 2019 Atlantic mackerel ABC for 2020 and adjust the recreational deduction based on updated scientific advice. This action is required to promote the sustainable utilization and conservation of the Atlantic mackerel, squid, and butterfish resources.

DATES: Public comments must be received by January 16, 2020.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council, including the Environmental Assessments (EA), the Supplemental Information Report (SIR), the Regulatory Impact Review (RIR), and the Regulatory Flexibility Act (RFA) analysis are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901, telephone (302) 674–2331. The analys is also accessible via the internet at *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0122.*

You may submit comments, identified by NOAA–NMFS–2019–0122, by any of the following methods:

• *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0122,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Submit written comments to NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on 2020 MSB Specifications.''

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Alyson Pitts, Fishery Management Specialist, (978) 281–9352.

SUPPLEMENTARY INFORMATION:

Background

This rule proposes specifications, which are the combined suite of commercial and recreational catch levels established for one or more fishing years, for Atlantic mackerel, *Illex* squid, longfin squid, and butterfish. Section 302(g)(1)(B) of the Magnuson-Stevens Fishery Conservation and Management Act states that the Scientific and Statistical Committee (SSC) for each regional fishery management council shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch (ABC), preventing overfishing, ensuring maximum sustainable yield, and achieving rebuilding targets. The ABC is a level of catch that accounts for the scientific uncertainty in the estimate of the stock's defined overfishing level (OFL).

The regulations implementing the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan (FMP) require the Mid-Atlantic Fishery Management Council's Atlantic Mackerel, Squid, and Butterfish Monitoring Committee to develop specification recommendations for each species based upon the ABC advice of the Council's SSC. The FMP regulations also require the specification of annual catch limits (ACL) and accountability measure (AM) provisions for butterfish and Atlantic mackerel. Both squid species are exempt from the ACL/AM requirements because they have a life cycle of less than one year. In addition, the regulations require the specification of domestic annual harvest (DAH), domestic annual processing (DAP), the butterfish mortality cap in the longfin squid fishery, and initial optimum yield (IOY) for both squid species.

On August 1, 2019 (84 FR 37778), we published a final rule in the **Federal Register** implementing *Illex* squid, longfin squid, and butterfish specifications for 2019. On October 29, 2019 (84 FR 58053), we published a final fule in the **Federal Register** implementing the Atlantic mackerel specifications for 2019–2021. The Council's SSC met in May 2019, to reevaluate the 2020 specifications based upon the latest information. At that meeting, the SSC concluded that no adjustments to the *Illex* squid, longfin squid, and butterfish specifications were warranted. However, the the SSC recommended a change to the Atlantic mackerel ABC, an update of the recreational catch, and a modification of the river herring and shad catch cap.

The Council did not recommend changes to any other regulations in place for the Atlantic mackerel, squid, and butterfish fisheries. Therefore, any other fishery management measures in place would remain unchanged for the 2020 fishing year. The Council submitted its recommendations, as summarized below, along with the required analyses, for initial agency review on September 30, 2019. NMFS must review the Council's recommendations for compliance with the FMP and applicable law, and conduct notice-and-comment rulemaking to propose and implement the final specifications.

Until new specifications are implemented, the existing Atlantic mackerel, *Illex* squid, longfin squid, and butterfish specifications, as described below, will continue to remain in place.

2020 Atlantic Mackerel Specifications

The Atlantic mackerel specifications for 2019–2021 were developed in May 2018 as part of Framework 13 to the Atlantic Mackerel Squid, and Butterfish FMP, by which the 2020 ABC for Atlantic mackerel was set to increase from the 2019 level (29,184 mt) (Table 1). The 2020 ABC recommended by the SSC for Framework 13 was based on projections that recognized a strong 2015 year class from the 2016 assessment results, which was the most recent data available for the assessment. However, at its May 2019 meeting, the SSC considered preliminary results from the 2019 Canadian Atlantic mackerel assessment, which indicated lower than expected recruitment. The SSC determined that it would not be prudent to implement the original higher 2020 ABC level based on the preliminary information from the Canadian assessment and instead, recommended maintaining the 2019 ABC for 2020 (29,184 mt). There is an Atlantic mackerel stock assessment update scheduled for 2020 that will inform future ABC specifications, so only a 1-year ABC for 2020 was recomended.

The Atlantic Mackerel, Squid, and Butterfish Monitoring Committee met in May 2019 and recommended changing the deduction for recreational catch based on an updated recreational catch accounting methodology. The monitoring committee recommended a new recreational deduction of 1,270 mt versus the previous 1,209 mt established in Framework 13. Using this updated value affects the other Atlantic mackerel specifications compared to 2019, as described in Table 1 below, which compares the implemented 2019 measures with the 2020 measures that are proposed in this action.

TABLE 1—2019 ATLANTIC MACKEREL SPECIFICATIONS COMPARED TO PROPOSED 2020 SPECIFICATIONS (mt)

Specification	2019	2020
OFL	31,764	NA
ABC	29,184	29,184
Canadian Deduction	10,000	10,000

TABLE 1—2019 ATLANTIC MACKEREL SPECIFICATIONS COMPARED TO PROPOSED 2020 SPECIFICATIONS (mt)—Continued

Specification	2019	2020
U.S. ABC	19,184	19,184
Recreational Allocation	1,209	1,270
Commerical Allocation	17,975	17,914
Management Uncertainty Buffer (3 percent)	539	537
Commercial Annual Catch Target	17,436	17,377
DAH	17,371	17,312

River Herring and Shad Catch Cap in the Atlantic Mackerel Fishery

Consistent with maintaining the Atlantic mackerel ABC in 2020 as in 2019, this action proposes to maintain the 2019 river herring and shad catch cap (129 mt) for 2020. The Council had previously adopted an increase in the river herring and shad catch cap to 152 mt for 2020. This action proposes to eliminate the 89-mt trigger provision that was implemented in Framework 13. If the 89 mt trigger was met, a 20,000 lb (9,071.84 kg) possession limit for limited access permitholders would be effective. Eliminating the initial 89 mt trigger would allow for additional landings by the Atlantic mackerel fishery, without compromising the 129-mt catch cap, which serves as an incentive to avoid river herring and shad.

Longfin Squid Specifications

This action maintains the existing projected longfin squid ABC of 23,400 mt for 2020, as implemented on March 1, 2018 (83 FR 8764). The background for this ABC is discussed in the proposed rule to implement the 2018–2020 squid and butterfish specifications (December 13, 2017; 82 FR 58583) and is not repeated here. The IOY, DAH, and DAP are calculated by deducting an estimated discard rate (2 percent) from the ABC (Table 2). This action also maintains the existing allocation of longfin squid DAH among trimesters according to percentages specified in the FMP (Table 3). The Council will make recommendations for 2021 and beyond in 2020.

TABLE 2—2020 LONGFIN SQUID SPECIFICATIONS IN METRIC TONS (mt)

OFL	Unknown
ABC	23,400
IOY	22,932
DAH/DAP	22,932

TABLE 3—2020 LONGFIN QUOTA TRIMESTER ALLOCATIONS

Trimester	Percent	Metric tons
I (Jan–Apr)	43	9,861
II (May–Aug)	17	3,898
III (Sep–Dec)	40	9,173

2020 Butterfish Specifications

This action also maintains the previously approved projected 2020 butterfish specifications outlined in Table 4, as initially implemented on March 1, 2018 (83 FR 8764). The background for these specifications is discussed in the proposed rule to implement 2019 squid and butterfish specifications (December 13, 2017; 82 FR 58583) and is not repeated here. In summary, the 2020 butterfish specifications are based on long-term recruitment estimates and include a 7.5 percent management uncertainty buffer and an estimated discard rate of 2.4 percent. These specifications maintain the existing butterfish mortality cap in the longfin squid fishery (3,884 mt) and the existing allocation of the butterfish mortality cap among longfin squid trimesters (Table 5).

TABLE 4—2020 BUTTERFISH SPECIFICATIONS IN METRIC TONS (mt)

OFL	39,592
ACL = ABC	32,063
Commercial ACT (ABC − management uncertainty buffers for each year)	28,857
DAH (ACT minus butterfish cap and discards)	23,752
Directed Fishery closure limit (DAH − 1,000 mt incidental landings buffer)	22,752
Butterfish Cap (in the longfin squid fishery)	3,884

TABLE 5—TRIMESTER ALLOCATION OF BUTTERFISH MORTALITY CAP ON THE LONGFIN SQUID FISHERY FOR 2020

Trimester	Percent	Metric tons
I (Jan–Apr)	43	1,670
II (May–Aug)	17	660
III (Sep–Dec)	40	1,554

TABLE 5—TRIMESTER ALLOCATION OF BUTTERFISH MORTALITY CAP ON THE LONGFIN SQUID FISHERY FOR 2020—Continued

Trimester	Percent	Metric tons
Total	100	3,844

2020 Illex Squid Specifications

This action also maintains the previously approved 2019 *Illex* squid specifications for 2020, outlined in Table 6, as implemented on August 2, 2019 (84 FR 37778). The background for these specifications is discussed in the proposed rule to implement the 2019 *Illex* squid, longfin squid, and butterfish specifications (May 1, 2019, 84 FR 18471). The Council will set specifications for 2021 and beyond in 2020.

TABLE 6—PROPOSED 2020 ILLEX SQUID SPECIFICATIONS IN METRIC TONS (mt)

OFL	Unknown
ABC	26,000
IOY	24,825
DAH/DAP	24,825

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Atlantic Mackerel, Squid, and Butterfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This action is exempt from review under Executive Order 12866. This proposed rule is not subject to Executive Order 13771 because this proposed rule is exempt from Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The purpose, context, and statutory basis for this action is described above and not repeated here. Business entities affected by this action include vessels that are issued limited access Atlantic mackerel, longfin squid, *Illex* squid, and butterfish permits. Although vessels issued open access incidental catch permits for these species are also potentially affected by this action, because these vessels land only small amounts of squid and butterfish and this action would not revise the amount of squid and butterfish that these vessels can land, these entities would not be affected by this proposed rule.

For purposes of complying with the Regulatory Flexibility Act, commercial fishing entities with combined annual fishery landing receipts less than $11 million are considered to be small entities (80 FR 81194, December 29, 2015). The changes to existing mackerel specifications proposed in this action apply to the vessels that hold limited access permits for Atlantic mackerel. There were 126 separate vessels that held limited access Atlantic mackerel permits in 2018, owned by 100 entities. Ninety-three of those are small business entities, four of which had no revenues. For the remainder, the average revenue was $1.6 million in 2018.

Based on recent squid and butterfish landings, the proposed measures would not reduce fishing opportunities, change any entity's access to these resources, or impose any costs to affected entities. Therefore, this action would not reduce revenues or profit for affected entities compared to recent levels. Based on the above justification, the proposed action is not expected to have a significant economic impact on a substantial number of small entities.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 12, 2019.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2019–27152 Filed 12–16–19; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 84, No. 242

Tuesday, December 17, 2019

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Meeting Notice of the National Agricultural Research, Extension, Education, and Economics Advisory Board

AGENCY: Research, Education, and Economics, USDA.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act of the National Agricultural Research, Extension, and Teaching Policy Act, and the Agriculture Improvement Act of 2018, the United States Department of Agriculture (USDA) announces a meeting of the National Agricultural Research, Extension, Education, and Economics Advisory Board.

DATES: The National Agricultural Research, Extension, Education, and Economics Advisory Board will meet January 28th–30th, 2030. The public may file written comments up to two Weeks after the meeting with the contact person, February 13, 2020.

ADDRESSES: The meeting will take place at USDA–ARS Jornada Experimental Range, 2995 Knox St., Las Cruces, NM, in Wooton Hall on the New Mexico State University campus. Written comments may be sent to: The National Agricultural Research, Extension, Education, and Economics Advisory Board Office, Room 332A, Whitten Building, United States Department of Agriculture, STOP 0321, 1400 Independence Avenue SW, Washington, DC 20250–0321.

FOR FURTHER INFORMATION CONTACT: Michele Esch, Executive Director/Designated Federal Officer, or Shirley Morgan-Jordan, Program Support Coordinator, National Agricultural Research, Extension, Education and Economics Advisory Board, Telephone: (202) 720–3684, fax: (202) 720–6199, or email: *nareee@ars.usda.gov*.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The Board will meet to provide advice and recommendations on The top priorities and policies for food and agricultural research, education, extension, and economics. The main focus of this meeting will be to look at programs and activities in Ag Climate Adoption, including landscape-scale conservation and management and climate research and resiliency. The Board will discuss priority setting for the Research, Education, and Economics (REE) mission area, including reviewing the draft USDA Science Plan and Strategic Programmatic themes. The Board will also receive updates from the REE Deputy Under Secretary and the leadership from the REE agencies. A detailed agenda may be received from the contact person identified in this notice or at *https://nareeeab.rec.usda.gov/meetings/general-meetings*.

On Tuesday, January 28, 2020, the Advisory Board will convene from 8:00 a.m.–5:00 p.m. MST. On Wednesday, January 29, 2020, the Advisory Board will reconvene from 8:00 a.m.–5:00 p.m. MST. And on Thursday, January 30, 2020, the Board will begin at 8:00 a.m. MST and adjourn by 12:00 p.m. (noon) MST.

Public Participation: This meeting is open to the public and any interested individuals wishing to attend. Opportunity for the public comment will be offered each day of the meeting. To attend the meeting and/or make oral statements regarding any items on the agenda, you must contact Michele Esch or Shirley Morgan-Jordan at 202–720–3684: email: *nareee@ars.usda.gov* at least 5 business days prior to the meeting. Members of the public will be heard in the order in which they signup at the beginning of the meeting. The Chair will conduct the meeting to facilitate the orderly conduct of business. Written comments by attendees or other interested stakeholders will be welcomed for the public record before and up two weeks following the Board meeting (or by close of business Thursday, February 13, 2020). All written statements must be sent to Michele Esch, Designated Federal Officer and Executive Director, National Agricultural Research, Extension, Education, and Economics Advisory Board, U.S. Department of Agriculture, Room 332A, Jamie L. Whitten Building, Mail Stop 0321, 1400 Independence Avenue SW, Washington, DC 20250–0321, or mail: *nareee@ars.usda.gov*. All statements will become a part of the official record of the National Agricultural Research, Extension, Education, and Economics Advisory Board and will be kept on file for public review in the Research, Education, and Economics Advisory Board Office.

Done at Washington, DC, this day November 25, 2019.

Steve Censky,

Deputy Secretary, U.S. Department of Agriculture.

[FR Doc. 2019–27109 Filed 12–16–19; 8:45 am]

BILLING CODE 3410–03–P

CIVIL RIGHTS COMMISSION

Sunshine Act Meeting

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission public business meeting.

DATES: Friday, December 20, 2019, 10:00 a.m. ET.

ADDRESSES: Meeting to take place by telephone.

FOR FURTHER INFORMATION CONTACT: Brian Walch: (202) 376–8371; TTY: (202) 376–8116; *publicaffairs@usccr.gov.*

SUPPLEMENTARY INFORMATION: This business meeting is open to the public by telephone only: 866–556–2519, Conference ID 536–6190. Persons with disabilities who need accommodation should contact Pamela Dunston at (202) 376–8105 or at *access@usccr.gov* at least seven (7) business days before the scheduled date of the meeting.

Meeting Agenda

I. Approval of Agenda

II. Subcommittee Meeting

- Planning for site visits to inform the Commission's project on subminimum wages paid to people with disabilities under Section 14(c) of the Fair Labor Standards Act.

III. Adjourn Meeting

Dated: December 13, 2019.

Brian Walch,

Director, Communications and Public Engagement.

[FR Doc. 2019–27230 Filed 12–13–19; 11:15 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–69–2018]

Foreign-Trade Zone (FTZ) 203—Moses Lake, Washington; Authorization of Production Activity; Joyson Safety Systems Acquisition, LLC; (Automotive Airbag Inflators and Propellants); Moses Lake, Washington

On October 30, 2018, Joyson Safety Systems Acquisition, LLC submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 203A, in Moses Lake, Washington.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (83 FR 55690, November 7, 2018). On April 8, 2019, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: December 12, 2019.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2019–27132 Filed 12–16–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–602–809]

Certain Hot-Rolled Steel Flat Products From Australia: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that sales of certain hot-rolled steel flat products from Australia were made at less than normal value during the period of review (POR) October 1, 2017 through September 30, 2018. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 17, 2019.

FOR FURTHER INFORMATION CONTACT: Rachel Greenberg, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0652.

SUPPLEMENTARY INFORMATION:

Background

On December 11, 2018, Commerce initiated the administrative review of the antidumping duty order on certain hot-rolled steel flat products (hot-rolled steel) from Australia in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).[1] This review covers one producer/exporter of subject merchandise, the collapsed entity, BlueScope Steel (AIS) Pty Ltd., BlueScope Steel Ltd., and BlueScope Steel Distribution Pty Ltd. (collectively, BlueScope).[2] Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018 through the resumption of operations on January 29, 2019, resulting in a revised deadline for these preliminary results.[3] Additionally, Commerce exercised its discretion to extend the deadline for the preliminary results until December 10, 2019.[4]

Scope of the Order [5]

The products covered by this order are certain hot-rolled, flat-rolled steel products. For a full description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum.[6] A list of the topics included in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and it is available to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum is available at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Partial Adverse Facts Available

BlueScope failed to provide all necessary information and failed to cooperate by not acting to the best of its ability to comply with Commerce's request for information in this review. As a result, we preliminary determine to apply facts otherwise available with an adverse inference to BlueScope, in accordance with sections 776(a)(2)(A), (B), and (C) and section 776(b) of the Act. For further discussion, *see* Preliminary Decision Memorandum.

Preliminary Results of Review

We preliminarily determine that the following weighted-average dumping margin exists for the period October 1, 2017 through September 30, 2018:

Exporter/producer	Weighted-average dumping margin (percent)
BlueScope Steel (AIS) Pty Ltd, BlueScope Steel Ltd., and BlueScope Steel Distribution Pty Ltd.	15.13

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 63615 (December 11, 2018) (*Initiation Notice*).

[2] We note that in the *Initiation Notice,* we initiated this review on BlueScope Steel Ltd., BlueScope Steel Americas, Inc. (BSA), and Steelscape LLC (Steelscape). However, this was an error, and the calculated margin is only applicable to the BlueScope collapsed entity, as an exporter, because BSA is an importer of subject merchandise and Steelscape is a further manufacturer of subject merchandise in the United States. Accordingly, consistent with the underlying investigation and the first administrative review, we reviewed the responses from the BlueScope collapsed entity, which included responses from BSA and Steelscape as required by our requests for information.

[3] *See* Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Partial Shutdown of the Federal Government,'' dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

[4] *See* Memorandum, ''Certain Hot-Rolled Steel Flat Products from Australia: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated July 1, 2019.

[5] *See Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders,* 81 FR 67962 (October 3, 2016) (*Order*).

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Certain Hot-Rolled Steel Flat Products from Australia; 2017–2018,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Assessment Rates

Upon completion of this administrative review, Commerce shall determine, and Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. If BlueScope's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis.* If BlueScope's weighted-average dumping margin is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[7]

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by BlueScope for which it did not know that the merchandise was destined to the United States, we will instruct CBP to liquidate those entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[8]

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the finals results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for BlueScope in the final results of review will be equal to the weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which they were reviewed; (3) if the exporter is not a firm covered in this review or the original investigation but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 29.58 percent, the all-others rate established in the less-than-fair-value investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days after public announcement of the preliminary results.[9] Commerce will establish a deadline for interested parties to submit case briefs and rebuttal briefs at a later date.[10] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities.[11] Case and rebuttal briefs should be filed using ACCESS[12] and must be served on interested parties.[13] Executive summaries should be limited to five pages total, including footnotes.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 10, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Affiliation
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

[FR Doc. 2019–27161 Filed 12–16–19; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Scope Rulings, Anti-Circumvention Determinations, and Correction

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable December 17, 2019.

SUMMARY: The Department of Commerce (Commerce) hereby publishes a list of scope rulings and anti-circumvention determinations made during the period January 1, 2019 through March 31, 2019. We intend to publish future lists after the close of the next calendar quarter.

FOR FURTHER INFORMATION CONTACT: Marcia E. Short, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue

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[7] *See* section 751(a)(2)(C) of the Act.

[8] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[9] *See* 19 CFR 351.224(b).

[10] *See* 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

[11] *See* 19 CFR 351.309(c)(2) and (d)(2).

[12] *See generally* 19 CFR 351.303.

[13] *See* 19 CFR 351.303(f).

NW, Washington, DC 20230; telephone: 202–482–1560.

SUPPLEMENTARY INFORMATION:

Background

Commerce regulations provide that it will publish in the **Federal Register** a list of scope rulings on a quarterly basis.[1] Our most recent notification of scope rulings was published on September 25, 2019.[2] This current notice covers all scope rulings and anti-circumvention determinations made by Enforcement and Compliance between January 1, 2019 through March 31, 2019.

Scope Rulings Made January 1, 2019 Through March 31, 2019:

Italy

A–475–818 and C–475–819: Certain Pasta From Italy

Requestor: European Imports, Inc. Nine gnocchi potato dumpling varieties are outside the scope of the antidumping and countervailing duty orders on certain pasta from Italy because the antidumping and countervailing duty orders pertain to non-egg *dry* pasta, which does not include the nine gnocchi potato dumpling varieties that European Imports distributes; January 30, 2019.

People's Republic of China (China)

A–570–967 and C–570–968: Aluminum Extrusions From China

Requestor: Tosoh SMD, Inc. The requestor's sputtering target backing plates are not covered by the scope of the antidumping and countervailing duty orders on aluminum extrusions from China, because they contain no extruded aluminum; January 31, 2019.

A–570–899: Artist Canvas From China

Requestors: Impact Images. Polyester fabric coated with flame retardant and polyurethane (PFCPU) imported by Impact Images is outside the scope of the order, because it is not primed/coated with a solution designed to promote the adherence of artist materials, such as paint or ink, to the fabric. Specifically, PFCPU is coated only with flame retardant and polyurethane, which do not promote the adherence of artistic materials, such as paint or ink, to the fabric. The priming/coating material, and the application thereof, commonly known as 'gesso' or 'gessoing', is a requisite component of the subject merchandise and, therefore, the PFCPU imported by Impact Images is not within the scope of the antidumping duty order on certain artist canvas from China; February 8, 2019.

A–570–922 and C–570–923: Raw Flexible Magnets From China; A–583–842: Raw Flexible Magnets From Taiwan

Requestor: Magnum Magnetics Corporation. Granulated flexible magnets are outside the scope of the orders on raw flexible magnets from China and Taiwan because the product cannot be bent, folded, or manipulated and, thus, are not flexible; March 14, 2019.

Anti-Circumvention Determinations Made January 1, 2019 Through March 31, 2019

Mexico

A–201–830: Carbon and Certain Alloy Steel Wire Rod From Mexico

Requestor: Nucor Corporation. Wire rod produced and/or exported by Deacero S.A.P.I. de CV with an actual diameter less than 4.75 millimeters, and otherwise meeting the description of the scope of the order constitutes merchandise altered in form or appearance in minor respects from in-scope merchandise and is subject to the antidumping duty order on carbon and certainly alloy steel wire rod from Mexico; March 13, 2019.

Correction

A–570–814: Carbon Steel Butt-Weld Pipe Fittings from China [3]

Requestor: SIGMA Corporation. SAFELET and UNILET fire-protection weld outlets it imports from China are subject to the China carbon steel butt-weld order because both products feature a beveled end, each has a single butt-welded connection, and they otherwise meet the physical description of merchandise covered by the scope; December 11, 2018.

Notification to Interested Parties

Interested parties are invited to comment on the completeness of this list of completed scope inquiries and anti-circumvention determinations made during the period January 1, 2019 through March 31, 2019. Any comments should be submitted to the Deputy Assistant Secretary for AD/CVD Operations, Enforcement and Compliance, International Trade Administration, 1401 Constitution Avenue NW, APO/Dockets Unit, Room 18022, Washington, DC 20230.

This notice is published in accordance with 19 CFR 351.225(o).

Dated: December 11, 2019.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2019–27135 Filed 12–16–19; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See* 19 CFR 351.225(o).

[2] *See Notice of Scope Rulings,* 84 FR 50385 (September 25, 2019).

[3] In the scope rulings notice that published on September 25, 2019 (84 FR 50385) covering scope rulings and anti-circumvention decisions that were signed or published between October 1, 2018 and December 31, 2018, the notice inadvertently stated that Commerce determined that the SAFELET and UNILET fire-protection weld outlets were outside the scope of the antidumping duty order on carbon steel butt-weld pipe fittings from China. Instead, Commerce determined that the merchandise under review was covered by the scope of the order. This is a correction to the September 25, 2019, notice.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–826]

Certain Hot-Rolled Steel Flat Products From Republic of Turkey: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that Colakoglu Metalurji A.S. and Colakoglu Dis Ticaret A.S. (collectively, Colakoglu), a producer and exporter of certain hot-rolled steel flat products (hot-rolled steel) from the Republic of Turkey (Turkey), sold subject merchandise in the United States at prices below normal value during the period of review (POR) October 1, 2017 through September 30, 2018. In addition, Commerce preliminarily determines that Eregli Demir ve Celik Fabrikalari T.A.S. and Iskenderun Iron & Steel Works Co. (collectively, Erdemir Group) had no shipments during the POR. We invite all interested parties to comment on these preliminary results.

DATES: Applicable December 17, 2019.

FOR FURTHER INFORMATION CONTACT: Lingjun Wang, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2316.

SUPPLEMENTARY INFORMATION:

Background

Commerce is conducting an administrative review of the antidumping duty order on hot-rolled steel from Turkey in accordance with section 751(a)(1)(B) of Tariff Act of

1930, as amended (the Act).[1] On December 11, 2018, in accordance with 19 CFR 351.221(c)(1)(i), we initiated this administrative review of the *Order* covering thirteen producers and/or exporters of the subject merchandise.[2]

Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018 through the resumption of operations on January 28, 2019.[3] On August 6, 2019, we postponed the deadline for the preliminary results of this review until November 8, 2019.[4] On November 4, 2019, we postponed the preliminary results of this review until December 10, 2019.[5] For a detailed description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum, dated concurrently with these preliminary results and hereby adopted by this notice.[6]

Scope of the Order

The merchandise covered by the *Order* is certain hot-rolled steel flat products. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.[7]

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. Constructed export prices are calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice.

The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov,* and to all parties in the Central Records Unit, Room B8024 of the main Commerce building. The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Determination of No Shipments

Among the companies under review, Eregli Demir ve Celik Fabrikalari T.A.S. and Iskenderun Iron & Steel Works Co. (collectively, the Erdemir Group) properly filed a certification reporting that they made no shipments of subject merchandise to the United States during the POR.[8] Based on the certification submitted and our analysis of Customs and Border Protection (CBP) information, we preliminarily determine that the Erdemir Group had no shipments during the POR.[9] Consistent with our standard practice,[10] Commerce finds that it is not appropriate to rescind the review with respect to Erdemir Group, but rather to complete the review and issue appropriate instructions to CBP based on the final results of this review.

Rate for Non-Examined Companies

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

In this review, we have preliminarily calculated a weighted-average dumping margin for Colakoglu that is not zero, *de minimis,* or determined entirely on the basis of facts available. Accordingly, we have preliminarily assigned to the companies not individually examined a margin of 2.55 percent, which is Colakoglu's weighted-average dumping margin.

Preliminary Results

We preliminarily determine the following weighted-average dumping margins for the period October 1, 2017 through September 30, 2018:

Exporter or producer	Weighted-average dumping margin (percent)
Colakoglu Metalurji A.S. and Colakoglu Dis Ticaret A.S	2.55

[1] *See Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders,* 81 FR 67962 (October 3, 2016) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 63615 (December 11, 2018). The thirteen producers and/or exporters are: (1) Agir Haddecilik A.S.; (2) Cag Celik Demir ve Celik; (3) Colakoglu Dis Ticaret AS; (4) Colakoglu Metalurji, AS; (5) Eregli Demir ve Celik Fabrikalari T.A.S.; (6) Gazi Metal Mamulleri Sanayi Ve Ticaret A.S.; (7) Habas Industrial and Medical Gases Production Industries Inc.; (8) Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi; (9) Iskenderun Iron & Steel Works Co.; (10) MMK Atakas Metalurji; (11) Ozkan Iron and Steel Ind.; (12) Seametal San ve Dis Tic; and (13) Tosyali Holding (Toscelik Profile and Sheet Ind. Co., Toscelik Profil ve Sac).

[3] *See* Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Partial Shutdown of the Federal Government,'' dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

[4] *See* Memorandum, ''Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review; 2017–2018,'' dated August 6, 2019.

[5] *See* Memorandum, ''Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: 2nd Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review; 2017–2018,'' dated November 4, 2019.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments: Certain Hot-Rolled Steel Flat Products from Turkey; 2017–2018,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *Id.*

[8] In the underlying investigation, Commerce collapsed Eregrli Demir ve Celik Fabrikalari T.A.S. and Iskenderun Iron & Steel Works Co. (collectively, Erdemir Group) as a single entity. *See Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 81 FR 15231 (March 22, 2016), and accompanying Preliminary Decision Memorandum at 6 unchanged in *Certain Hot-Rolled Steel Flat Products From the Republic of Turkey: Final Determination of Sales at Less Than Fair Value,* 81 FR 53428 (August 12, 2016).

[9] *See* Preliminary Decision Memorandum.

[10] *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018,* 84 FR 34863 (July 19, 2019), and accompanying Preliminary Decision Memorandum at 4.

Exporter or producer	Weighted-average dumping margin (percent)
Agir Haddecilik A.S	2.55
Cag Celik Demir ve Celik	2.55
Gazi Metal Mamulleri Sanayi Ve Ticaret A.S	2.55
Habas Industrial and Medical Gases Production Industries Inc	2.55
Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi	2.55
MMK Atakas Metalurji	2.55
Ozkan Iron and Steel Ind	2.55
Seametal San ve Dis Tic	2.55
Tosyali Holding (Toscelik Profile and Sheet Ind. Co., Toscelik Profil ve Sac)	2.55

Assessment Rates

Upon issuance of the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. Pursuant to 19 CFR 351.212(b)(1), we calculated an importer-specific *ad valorem* duty assessment rate based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of those sales. Where the mandatory respondent did not report entered value, we calculated the entered value in order to calculate the assessment rate. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For the companies which were not selected for individual review, we will assign an assessment rate equal to the weighted-average dumping margin determined for the non-examined companies in the final results of this review.

For entries of subject merchandise during the POR produced by the respondent for which it did not know that its merchandise was destined for the United States, including for the Erdemir Group (which we have preliminarily found had no shipments during the POR), we will instruct CBP to liquidate such unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[11]

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

[11] *See* section 751(a)(2)(C) of the Act.

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each specific company listed above will be equal to each company's weighted-average dumping margin established in the final results of this review, except if the rate is less than 0.50 percent, and therefore *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated companies not participating in this review, the cash deposit will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, or the underlying investigation, but the producer is, then the cash deposit rate will be the rate established for the completed segment for the most recent POR for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 6.41 percent, the all-others rate established in the underlying investigation.[12] These deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days after the date of publication of this notice.[13]

Interested parties may submit case briefs not later than 30 days after the date of publication of this notice.[14] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the time limit for filing case briefs.[15] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[16] Case and rebuttal briefs should be filed using ACCESS.[17]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically-filed request for a hearing must be received successfully in its entirety by ACCESS by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.[18] Hearing requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.[19]

Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the publication of these preliminary results in the **Federal Register**, unless otherwise extended.[20]

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's

[12] *See Order,* 81 FR at 67965.

[13] *See* 19 CFR 351.224(b).

[14] *See* 19 CFR 351.309(c)(1)(ii); *see also* 19 CFR 351.303 (for general filing requirements).

[15] *See* 19 CFR 351.309(d)(1).

[16] *See* 19 CFR 351.309(c)(2) and (d)(2).

[17] *See* 19 CFR 351.303.

[18] *See* 19 CFR 351.310(c); *see also* 19 CFR 351.303(b)(1).

[19] *See* 19 CFR 351.310(c).

[20] *See* section 751(a)(3)(A) of the Act.

presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 10, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Companies Not Selected for Individual Examination
V. Preliminary Determination of No Shipments
VI. Comparisons to Normal Value
VII. Date of Sale
VIII. Constructed Export Price
IX. Normal Value
X. Currency Conversion
XI. Recommendation

[FR Doc. 2019–27137 Filed 12–16–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–904]

Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that Datong Juqiang Activated Carbon Co., Ltd. (Datong Juqiang) and Carbon Activated Tianjin Co., Ltd. (Carbon Activated) sold certain activated carbon from the People's Republic of China (China) at less than normal value during the period of review (POR) April 1, 2017 through March 31, 2018.

DATES: Applicable December 17, 2019.

FOR FURTHER INFORMATION CONTACT: Bob Palmer or Jinny Ahn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0968 or (202) 482–0339, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* [1] on June 14, 2019. For events subsequent to the *Preliminary Results, see* the Issues and Decision Memorandum.[2] On September 20, 2019,[3] in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), Commerce extended the deadline for issuing the final results until December 11, 2019.

Scope of the Order

The merchandise subject to the *Order* [4] is certain activated carbon. The products are currently classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) subheading 3802.1000. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the *Order* remains dispositive.[5]

Analysis of Comments Received

In the Issues and Decision Memorandum, we addressed all issues raised in the interested parties' case and rebuttal briefs. In Appendix I to this notice, we provided a list of the issues raised by the parties. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit (CRU), Room B8024 of the main Commerce building, as well as electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov* and to all parties in the CRU. In addition, parties can directly access a complete version of the Issues and Decision Memorandum on the internet at *http://enforcement.trade.gov/frn/index.html.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Verification

Pursuant to section 782(i) of the Act, and 19 CFR 351.307(b)(iv), we conducted verification of the questionnaire responses of Carbon Activated.[6]

Changes Since the Preliminary Results

Based on our review of the record and comments received from interested parties regarding our *Preliminary Results,* we made certain revisions to the margin calculations for Carbon Activated and Datong Juqiang,[7] and consequently, to the rate assigned to the non-examined, separate rate respondents. The Issues and Decision Memorandum contains additional details of these revisions.[8]

Final Determination of No Shipments

In the *Preliminary Results,* we preliminarily determined that Charter Link Logistics Limited, Datong Municipal Yunguang Activated Carbon Co., Ltd., Jilin Bright Future Chemicals Co., Ltd., Shanxi Dapu International Trade Co., Ltd., Shanxi Industry Technology Trading Co., Ltd., Shanxi Tianxi Purification Filter Co., Ltd., and Tianjin Channel Filters Co., Ltd. had no shipments of subject merchandise to the United States during the POR.[9] We received no information to contradict this determination. Therefore, we continue to find that these companies had no shipments of subject merchandise during the POR and will issue appropriate liquidation instructions that are consistent with our ''automatic assessment'' clarification for these final results.[10]

[1] *See Certain Activated Carbon from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018,* 84 FR 27758 (June 14, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Certain Activated Carbon from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Eleventh Antidumping Duty Administrative Review,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Activated Carbon from the People's Republic of China: Extension of Deadline for Final Results of 2017–2018 Antidumping Duty Administrative Review,'' dated September 20, 2019.

[4] *See Notice of Antidumping Duty Order: Certain Activated Carbon from the People's Republic of China,* 72 FR 20988 (April 27, 2007) (*Order*).

[5] *See* Issues and Decision Memorandum for a complete description of the scope of the *Order.*

[6] *See* Memoranda, ''Verification of the Questionnaire Responses of Carbon Activated Tianjin Co., Ltd.'s Supplier in the Antidumping Administrative Review of Certain Activated Carbon from the People's Republic of China,'' and ''Verification of the Questionnaire Responses of Carbon Activated Tianjin Co., Ltd.'s Supplier in the Antidumping Administrative Review of Certain Activated Carbon from the People's Republic of China,'' both dated September 27, 2019.

[7] *See* Memoranda, ''Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results Calculation Memorandum for Carbon Activated'' (Carbon Activated's Final Calculation Memorandum), and ''Antidumping Duty Administrative Review of Certain Activated Carbon the People's Republic of China: Final Results Calculation Memorandum for Datong Juqiang Activated Carbon Co., Ltd.'' (Datong Juqiang's Final Calculation Memorandum), both dated concurrently with this memorandum; *see also* Memorandum, ''Eleventh Administrative Review of Certain Activated Carbon from the People's Republic of China: Surrogate Values for the Final Results,'' dated concurrently with this memorandum.

[8] *See* Issues and Decisions Memorandum at 3–4 for a summary of these revisions.

[9] *See Preliminary Results,* 84 FR at 27758.

[10] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76

Continued

Separate Rate Respondents

In our *Preliminary Results,* we determined that Carbon Activated, Datong Juqiang, and six other companies demonstrated their eligibility for separate rates.[11] We received no comments or argument since the issuance of the *Preliminary Results* that provide a basis for reconsideration of these determinations. Therefore, for these final results, we continue to find that the eight companies listed in the table in the ''Final Results'' section of this notice are eligible for a separate rate.

Rate for Non-Examined Separate Rate Respondents

In the *Preliminary Results,*[12] and consistent with Commerce's practice,[13] we assigned the non-examined, separate rate companies a rate equal to the weighted average of the calculated weighted-average dumping margins for the mandatory respondents that are not zero, *de minimis* (*i.e.,* less than 0.5 percent), or based entirely on facts available, weighted by the total U.S. sales quantities from the public version of the submissions from the mandatory respondents.[14] No parties commented on the methodology for calculating this separate rate. For the final results, we continue to apply this approach, as it is consistent with the intent of, and our use of, section 735(c)(5)(A) of the Act.[15]

Final Results of the Review

For companies subject to this review, which established their eligibility for a separate rate, Commerce determines that the following weighted-average dumping margins exist for the POR from April 1, 2017 through March 31, 2018:

Exporter	Weighted-average dumping margin (USD/kg) [16]
Beijing Pacific Activated Carbon Products Co., Ltd	0.89
Carbon Activated Tianjin Co., Ltd	1.02
Datong Juqiang Activated Carbon Co., Ltd	0.86
Jacobi Carbons AB [17]	0.89
Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd	0.89
Ningxia Huahui Activated Carbon Co., Ltd	0.89
Ningxia Mineral & Chemical Limited	0.89
Shanxi Sincere Industrial Co., Ltd	0.89

In the *Preliminary Results,* Commerce found that 239 companies for which a review was requested did not establish eligibility for a separate rate because they did not file a separate rate application or a separate rate certification, as appropriate.[18] No interested party commented on Commerce's preliminary determination with respect to these 239 companies. Therefore, for these final results we determine these companies to be part of the China-wide entity. Because no party requested a review of the China-wide entity, and Commerce no longer considers the China-wide entity as an exporter conditionally subject to administrative reviews,[19] we did not conduct a review of the China-wide entity. Thus, the weighted-average dumping margin for the China-wide entity (*i.e.,* 2.42 USD/kg) [20] is not subject to change as a result of this review.

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce has determined, and U.S Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. We intend to issue assessment instructions to CBP 15 days after the publication date of these final results of review.

For each individually-examined respondent in this review which has a final weighted-average dumping margin that is not zero or *de minimis* (*i.e.,* less than 0.5 percent), we will calculate importer- (or customer-) specific per-unit duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's (or customer's) examined sales to the total sales quantity associated with those sales, in accordance with 19 CFR 351.212(b)(1).[21] We will also calculate (estimated) *ad valorem* importer-specific assessment rates with which to determine whether the per-unit assessment rates are *de minimis.*[22] Where either the respondent's weighted-average dumping margin is zero or *de minimis,* or an importer- (or customer) specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.[23]

For the respondents which were not selected for individual examination in this administrative review and which qualified for a separate rate, the

FR 65694 (October 24, 2011) (*Assessment Practice Refinement*).

[11] *See Preliminary Results* PDM at 4–8.

[12] *Id.* at 10–11.

[13] *See, e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 76 FR 56158, 56160 (September 12, 2011) (*Vietnam Shrimp*).

[14] *See* Memorandum, ''Certain Activated Carbon from the People's Republic of China: Calculation of Margin for Respondents Not Selected for Individual Examination,'' dated concurrently with this notice.

[15] *See Vietnam Shrimp,* 76 FR at 56160.

[16] In the second administrative review of the *Order,* Commerce determined that it would calculate per-unit weighted-average dumping margins and assessment rates for all future reviews. *See Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review,* 75 FR 70208, 70211 (November 17, 2010) (*AR2 Carbon*), and accompanying Issues and Decision Memorandum (IDM) at Comment 3.

[17] In the third administrative review of the *Order,* Commerce found that Jacobi Carbons AB, Tianjin Jacobi International Trading Co. Ltd., and Jacobi Carbons Industry (Tianjin) should be treated as a single entity, and because there were no facts presented on the record of this review which would call into question our prior finding, we continue to treat these companies as part of a single entity for this administrative review, pursuant to sections 771(33)(E), (F), and (G) of the Act, and 19 CFR 351.401(f). *See Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Third Antidumping Duty Administrative Review,* 76 FR 67142, 67145, n.25 (October 31, 2011); *see also Preliminary Results* PDM.

[18] *See Preliminary Results* PDM at 8.

[19] *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, 65969–70 (November 4, 2013).

[20] *See, e.g., Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013,* 79 FR 70163, 70165 (November 25, 2014).

[21] *See AR2 Carbon* IDM at Comment 3.

[22] For calculated (estimated) *ad valorem* importer-specific assessment rates used in determining whether the per-unit assessment rate is *de minimis, see* Carbon Activated's Final Calculation Memorandum and Datong Juqiang's Final Calculation Memorandum and attached Margin Calculation Program Logs and Outputs.

[23] *See* 19 CFR 351.106(c)(2).

assessment rate will be equal to the rate assigned to them for the final results (*i.e.,* 0.89 USD/kg).

For the companies identified as part of the China-wide entity, we will instruct CBP to apply a per-unit assessment rate of 2.42 USD/kg to all entries of subject merchandise during the POR which were produced or exported by those companies.

Pursuant to a refinement in our non-market economy practice, for sales that were not reported in the U.S. sales data submitted by companies individually examined during this review, we will instruct CBP to liquidate entries associated with those sales at the rate for the China-wide entity. Furthermore, where we found that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's cash deposit rate) will be liquidated at the rate for the China-wide entity.[24]

Cash Deposit Requirements

The following per-unit cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For Carbon Activated, Datong Juqiang, and the non-examined separate rate respondents the cash deposit rate will be equal to their weighted-average dumping margins established in the final results of this review; (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding in which they were reviewed; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin for the China-wide entity (*i.e.,* 2.42 USD/kg); and (4) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter(s) that supplied that non-Chinese exporter. These per-unit cash deposit requirements, when imposed, shall remain in effect until further notice.

[24] For a full discussion of this practice, *see Assessment Practice Refinement,* 76 FR at 65694.

Disclosure

We intend to disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results of administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: December 11, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
  Comment 1: Selection of the Primary Surrogate Country
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  Comment 3: Coal Tar Surrogate Value
  Comment 4: Calculation of Surrogate Financial Ratios
  Comment 5: Application of Adverse Facts Available for Merchandise Produced by Certain Suppliers of Carbon Activated
  Comment 6: Selection of Appropriate Factors of Production Database for Carbon Activated
  Comment 7: Correction of Preliminary Results Calculation Error
  Comment 8: Treatment of Tancarb Activated Carbon Co., Ltd.
VI. Recommendation

[FR Doc. 2019–27134 Filed 12–16–19; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–816]

Certain Oil Country Tubular Goods From Turkey: Rescission of Antidumping Duty Administrative Review; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty order on certain oil country tubular goods (OCTG) from Turkey for the period September 1, 2018, through August 31, 2019.

DATES: Applicable December 17, 2019.

FOR FURTHER INFORMATION CONTACT: Lochard Philozin, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4260.

SUPPLEMENTARY INFORMATION:

Background

On September 3, 2019, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on OCTG from Turkey for the period of review September 1, 2018, through August 31, 2019.[1] On September 30, 2019, the petitioners [2] timely requested an administrative review of the order with respect to certain companies.[3] On

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 84 FR 45949 (September 3, 2019).

[2] The petitioners are United States Steel Corporation, Maverick Tube Corporation, Tenaris Bay City, Inc., TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA.

[3] *See* the petitioners' Letter, ''Oil Country Tubular Goods from Turkey: Request for Administrative Review of Antidumping Duty Order,'' dated September 30, 2019. The petitioners requested a review of the following companies: Bakır Grup Makine İmalat Bakım Montaj Demontaj Sanayi ve Ticaret Ltd. Şti., Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. and its affiliates (collectively, Borusan), Cayirova Boru Sanayi ve Ticaret A.S.,

Continued

October 11, 2019, Borusan Mannesmann Boru Sanayi ve Ticaret and Borusan Istikbal Ticaret submitted a request asking Commerce to reject the petitioners' request for an administrative review with respect to Borusan, maintaining that Borusan was specifically excluded from the antidumping order on OCTG and, thus, should not be part of the administrative review.[4] Subsequently, on October 30, 2019, the petitioners timely withdrew their request of an administrative review with regard to entries by Borusan Mannesmann Boru Sanayi ve Ticaret, Borusan Istikbal Ticaret, Borusan Mannesmann Boru Yatirim Holding, and Borusan Lojistik Dag. Deg. Tas Ve (collectively, Borusan).[5] On November 12, 2019, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.221(c)(1)(i), Commerce initiated an administrative review of the antidumping duty order on OCTG from Turkey with respect to 12 companies.[6]

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review ''in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review.'' On November 26, 2019, the petitioners timely withdrew their request for review of all remaining companies.[7] Because we received no other requests for review of Bakır Grup Makine İmalat Bakım Montaj Demontaj Sanayi ve Ticaret Ltd. Şti., Cayirova Boru Sanayi ve Ticaret A.S., Hydra İnşaat Sanayi ve Ticaret Anonim Şirketi, Kalibre Boru Sanayi ve Ticaret, NETBORU San. ve Dış. Tic. Koll. Şti., Tosçelik, Yılmaz Pipo, and Yucel Boru Ithalat-Ihracat ve Pazarlama A.S., we are rescinding the administrative review of OCTG from Turkey covering the period September 1, 2018, through August 31, 2019, in its entirety, in accordance with 19 CFR 351.213(d)(1).

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of OCTG from Turkey during the period September 1, 2018, through August 31, 2019, at rates equal to the cash deposit rate of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(d)(4).

Dated: December 11, 2019.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2019–27136 Filed 12–16–19; 8:45 am]

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Hydra İnşaat Sanayi ve Ticaret Anonim Şirketi, Kalibre Boru Sanayi ve Ticaret, NETBORU San. ve Dış. Tic. Koll. Şti., Tosçelik Profil ve Sac Endustrisi A.S. and its affiliates (collectively, Tosçelik), Yılmaz Pipo, and Yucel Boru Ithalat-Ihracat ve Pazarlama A.S.

[4] *See* Borusan's Letter to Commerce, ''*Oil Country Tubular Goods from Turkey, Case No. A–489–816: Request to Reject Petitioners' Request for Administrative Review,*'' dated October 11, 2019.

[5] *See* the petitioners' Letter to Commerce, ''*Oil Country Tubular Goods from Turkey: Withdrawal of Request for Administrative Review of Antidumping Duty Order Re: Borusan,*'' dated October 30, 2019.

[6] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 61011 (November 12, 2019) (*Initiation Notice*).

[7] *See* petitioners' Letter to Commerce, ''*Oil Country Tubular Goods from Turkey: Withdrawal of Request for Administrative Review of Antidumping Duty Order,*'' date November 26, 2019.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–859]

Steel Concrete Reinforcing Bar From Taiwan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that Power Steel Co., Ltd. (Power Steel), an exporter of steel concrete reinforcing bar (rebar) from Taiwan, sold subject merchandise in the United States at prices below normal value during the period of review (POR) March 7, 2017 through September 30, 2018. We invite all interested parties to comment on these preliminary results.

DATES: Applicable December 17, 2019.

FOR FURTHER INFORMATION CONTACT: Kathryn Wallace and Leo Ayala, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6251 and (202) 482–3945, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce is conducting an administrative review of the antidumping duty order on rebar from Taiwan in accordance with section 751(a)(1)(B) of Tariff Act of 1930, as amended (the Act).[1] On December 11, 2018, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the *Order* covering two companies.[2] On December 18, 2019, we issued the standard antidumping duty questionnaire to Power Steel and Lo-Toun Steel and Iron Works Co., Ltd (Lo-Toun Steel).[3] On February 15, 2019, Lo-Toun Steel withdrew its self-request for administrative review.[4] Commerce exercised its discretion to toll all deadlines affected by the partial federal

[1] *See Steel Concrete Reinforcing Bar from Taiwan: Antidumping Duty Order,* 82 FR 45809 (October 2, 2017) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 63615 (December 11, 2018) (*Initiation Notice*).

[3] *See* Commerce's Letter, ''Antidumping Duty Questionnaire,'' dated December 18, 2019.

[4] *See* Lo-Toun Steel's Letter, ''Withdrawal of Request for Administrative Review on behalf of Lo-Toun,'' dated February 15, 2019 (Lo-Toun Steel's Withdrawal).

government closure from December 22, 2018 through the resumption of operations on January 28, 2019.[5] On August 7 and October 8, 2019, Commerce postponed the preliminary results of this review.[6] Accordingly, the deadline for these preliminary results is December 10, 2019.

Scope of the Order

The product covered by the *Order* is steel concrete reinforcing bar from Taiwan. For a full description of the scope, *see* the Preliminary Decision Memorandum.[7]

Partial Rescission of Administrative Review

Commerce initiated a review of two companies in this proceeding: Power Steel and Lo-Toun Steel.[8] We are rescinding this administrative review with respect to Lo-Toun Steel, pursuant to 19 CFR 351.213(d)(1), because the sole review request for Lo-Toun Steel was timely withdrawn.[9] Accordingly, Power Steel is the only remaining company subject to this administrative review.

Methodology

Commerce is conducting this review in accordance with section 751 of the Act. Export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary results, *see* the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice.

The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results

We preliminarily determine that the following weighted-average dumping margin exists for the period of March 7, 2017 through September 30, 2018:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Power Steel Co., Ltd	4.01

Assessment Rates

Upon issuance of the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. If Power Steel's weighted-average dumping margin is above *de minimis* (*i.e.,* 0.50 percent), we will calculate an importer-specific *ad valorem* duty assessment rate based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[10] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis.* If Power Steel's weighted-average dumping margin is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review where applicable.

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by Power Steel for which the company did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate those entries at the all-others rate if there is no rate for the intermediate company involved in the transaction. We intend to issue instructions to CBP 15 days after the publication date of the final results of this review.

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Power Steel will be the rate established in the final results of this review (except, if the *ad valorem* rate is *de minimis,* then the cash deposit rate will be zero); (2) for previously reviewed or investigated companies not covered in this review, the cash deposit rate will continue to be the company-specific rate published for the most recently-completed segment of this proceeding in which the company was reviewed; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the producer is, then the cash deposit rate will be the rate established for the most recently-completed segment of this proceeding for the producer of subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 3.50 percent, the all-others rate established in the investigation.[11]

These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

Commerce intends to disclose its calculations and analysis performed within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties will have the opportunity to comment on the preliminary results and may submit case briefs and/or written comments 30 days following the publication of the preliminary results. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than five days after the deadline date for case briefs.[12] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this review are encouraged to submit with each argument: (1) A statement of

[5] *See* Memorandum, ''Deadlines Affected by the Partial Shutdown of the Federal Government,'' dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

[6] *See* Memorandum, ''Steel Concrete Reinforcing Bar from Taiwan: Extension of Deadline for the Preliminary Results of the Review,'' dated August 7, 2019; and Memorandum, ''Steel Concrete Reinforcing Bar from Taiwan: Second Extension of Deadline for the Preliminary Results of the Review,'' dated October 8, 2019.

[7] *See* Memorandum, ''Decision Memorandum for Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bar from Taiwan; 2017–2018'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[8] *See Initiation Notice.*

[9] *See* Lo-Toun Steel's Withdrawal.

[10] In these preliminary results, Commerce applied the assessment rate calculation methodology adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[11] *See Order,* 82 FR at 45810.

[12] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

the issue; (2) a brief summary of the argument; and (3) a table of authorities. Case and rebuttal briefs should be filed using ACCESS.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically-filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; (3) whether any participant is a foreign national; and (4) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs.[13] If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, at a time and date to be determined.[14] Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

These preliminary results of review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

[13] *See* 19 CFR 351.310(c).

[14] *See* 19 CFR 351.310(c).

Dated: December 10, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Partial Rescission of Administrative Review
V. Comparisons to Normal Value
VI. Date of Sale
VII. Export Price
VIII. Normal Value
IX. Currency Conversion
X. Recommendation

[FR Doc. 2019–27138 Filed 12–16–19; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XR067]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy 2020 Ice Exercise Activities in the Beaufort Sea and Arctic Ocean

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

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from the United States Department of the Navy (Navy) for authorization to take marine mammals incidental to Ice Exercise 2020 (ICEX20) north of Prudhoe Bay, Alaska. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in *Request for Public Comments* at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision. The Navy's activities are considered military readiness activities pursuant to the MMPA, as amended by the National Defense Authorization Act for Fiscal Year 2004 (NDAA).

DATES: Comments and information must be received no later than January 16, 2020.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Fowler@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Amy Fowler, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the "take" of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The NDAA (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations indicated above and amended the definition of ''harassment'' as it applies to a ''military readiness activity.'' The activity for which incidental take of marine mammals is being requested addressed here qualifies as a military readiness activity. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, we must review our proposed action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment. NMFS plans to adopt the Navy's Supplemental Environmental Assessment/Overseas Environmental Assessment for Ice Exercise (Supplemental EA/OEA), as we have preliminarily determined that it includes adequate information analyzing the effects on the human environment of issuing the IHA. The Navy's Supplemental EA/OEA is posted online at *http://www.nepa.navy.mil/icex.* We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On July 3, 2019, NMFS received a request from the Navy for an IHA to take marine mammals incidental to submarine training and testing activities, including establishment of a tracking range on an ice floe in the Beaufort Sea and Arctic Ocean north of Prudhoe Bay, Alaska. The application was deemed adequate and complete on November 22, 2019. The Navy's request is for take of a small number of ringed seals (*Pusa hispida hispida*) and bearded seals (*Erignathus barbatus*) by Level B harassment. Neither the Navy nor NMFS expect serious injury or mortality to result from this activity. Therefore, an IHA is appropriate.

NMFS previously issued an IHA to the Navy for similar activities conducted in 2018 (83 FR 6522; February 14, 2018). The Navy complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHA and information regarding their monitoring results may be found in the *Estimated Take* section.

Description of Proposed Activity

Overview

The Navy proposes to conduct submarine training and testing activities from an ice camp established on an ice floe in the Beaufort Sea and Arctic Ocean for approximately six weeks beginning in February 2020. Submarine active acoustic transmissions may result in occurrence of temporary hearing impairment (temporary threshold shift (TTS)) and behavioral harassment (Level B harassment) of ringed and bearded seals.

Dates and Duration

The proposed action would occur over approximately a six-week period from February through April 2020, including deployment and demobilization of the ice camp. The submarine training and testing activities would occur over approximately four weeks during the six-week period. The proposed IHA would be effective for a period of one year from February 1, 2020 through January 31, 2021.

Specific Geographic Region

The ice camp would be established approximately 100–200 nautical miles (nmi) north of Prudhoe Bay, Alaska. The exact location of the camp cannot be identified ahead of time as required conditions (*e.g.,* ice cover) cannot be forecasted until exercises are expected to commence. Prior to the establishment of the ice camp, reconnaissance flights would be conducted to locate suitable ice conditions. The reconnaissance flights would cover an area of approximately 70,374 square kilometers (km^2). The actual ice camp would be no more than 1.6 kilometers (km) in diameter (approximately 2 km^2 in area). The vast majority of submarine training and testing would occur near the ice camp, however some submarine training and testing may occur throughout the deep Arctic Ocean basin near the North Pole within the total study area of 2,874,520 km^2. The locations of the overall activity study area and ice camp study area are shown in Figure 2–1 of the Navy's application.

Detailed Description of Specific Activity

Ice Camp

ICEX20 includes the deployment of a temporary camp situated on an ice floe. Reconnaissance flights to search for suitable ice conditions for the ice camp would depart from the public airport in Deadhorse, Alaska. The camp generally consists of a command hut, dining hut, sleeping quarters, a powerhouse, runway, and helipad. The number of structures and tents ranges from 15–20, and each tent is typically 2 meters (m) by 6 m in size. The completed ice camp, including runway, is approximately 1.6 km in diameter. Support equipment for the ice camp includes snowmobiles, gas-powered augers and saws (for boring holes through ice), and diesel generators. All ice camp materials, fuel, and food would be transported from Prudhoe Bay, Alaska, and delivered by air-drop from military transport aircraft (*e.g.,* C–17 and C–130), or by landing at the ice camp runway (*e.g.,* small twin-engine aircraft and military and commercial helicopters). During flights between Deadhorse and the ice camp, aircraft would maintain an altitude of 1,000 ft (305 m) or greater. Transit of aircraft between the mainland and the ice camp, use of snowmobiles and other equipment, and the footprint of the ice camp are not expected to result in take of marine mammals.

A portable tracking range for submarine training and testing would be installed in the vicinity of the ice camp. Ten hydrophones, located on the ice and extending to 100 m below the ice, would be deployed by drilling or melting holes in the ice and lowering the cable down into the water column. Four hydrophones would be physically connected to the command hut via cables while the others would transmit data via radio frequencies. Additionally, tracking pingers would be configured aboard each submarine to continuously monitor the location of the submarines. Acoustic communications with the submarines would be used to coordinate the training and research schedule with the submarines. An underwater telephone would be used as a backup to the acoustic communications. The hydrophone network and acoustic communications between submarines and the ice camp are not expected to result in take of marine mammals.

Submarine Activities

Submarine activities associated with ICEX20 generally entail safety maneuvers and active sonar use. These maneuvers and sonar use are similar to submarine activities conducted in other undersea environments and are being conducted in the Arctic to test their performance in a cold environment. Submarine training and testing involves active acoustic transmissions, which have the potential to harass marine mammals. Navy acoustic sources are categorized into ''bins'' based on frequency, source level, and mode of usage (Department of the Navy 2015). The specifics of ICEX20 submarine acoustic sources are classified, including the designated bin(s).

Research Activities

Personnel and equipment proficiency testing and multiple research and development activities would be conducted as part of ICEX20. In-water device data collection and unmanned underwater vehicle testing involve active acoustic transmissions, which have the potential to harass marine mammals; however, the acoustic transmissions that would be used in ICEX20 for research activities are considered *de minimis. De minimis* sources have the following parameters: Low source levels, narrow beams, downward directed transmission, short pulse lengths, frequencies above (outside) known marine mammal hearing ranges, or some combination of these factors (Department of the Navy 2013). Additional information about ICEX20 research activities is located in Table 2–1 of the Navy's Supplemental EA/OEA. Research activities associated with ICEX20 are not expected to result in take of marine mammals and are not discussed further in this document.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see *Proposed Mitigation* and *Proposed Monitoring and Reporting*).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of ringed and bearded seals. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 1 lists all species with expected potential for occurrence in the project area and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2018). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality or serious injury is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this notice represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Alaska SARs (Muto *et al.,* 2019). All values presented in Table 1 are the most recent available at the time of publication and are available in the 2018 Alaska SARs (Muto *et al.,* 2019).

TABLE 1—MARINE MAMMAL SPECIES POTENTIALLY PRESENT IN THE PROJECT AREA

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenidai:						
Bowhead whale	*Balaena mysticetus*	Western Arctic	E/D;Y	16,982 (0.058, 16,091, 2011).	161	44
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Beluga whale	Delphinapterus leucas	Beaufort Sea	-/-;N	39,258 (0.229, 32,453, 1992).	649	166
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Ringed seal	*Pusa hispida hispida*	Alaska	T/D;Y	170,000 (-, 170,000, 2013) (Bering Sea and Sea of Okhotsk only).	5,100 (Bering Sea-U.S. portion only).	1,054
Bearded seal	Erignathus barbatus	Alaska	T/D;Y	299,174 (-, 273,676, 2012) (Bering Sea-U.S. portion only).	8,210 (Bering Sea-U.S. portion only).	557

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *www.nmfs.noaa.gov/pr/sars/.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

Note: *Italicized species are not expected to be taken or proposed for authorization.*

All species that could potentially occur in the proposed survey areas are included in Table 1. However, the temporal and/or spatial occurrence of bowhead whales and beluga whales is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. Bowhead whales migrate annually from wintering areas (December to March) in the northern Bering Sea, through the Chukchi Sea in the spring (April through May), to the eastern Beaufort Sea, where they spend much of the summer (June through early to mid-October) before returning again to the Bering Sea (Muto *et al.,* 2017). They are unlikely to be found in the ICEX20 study area during the February through April ICEX20 timeframe. Beluga whales follow a similar pattern, as they tend to spend winter months in the Bering Sea and migrate north to the eastern Beaufort Sea during the summer months.

In addition, the polar bear (*Ursus maritimus*) may be found in the project area. However, polar bears are managed by the U.S. Fish and Wildlife Service and are not considered further in this document.

Bearded Seal

Bearded seals are a boreoarctic species with circumpolar distribution (Burns 1967; Burns 1981; Burns and Frost 1979; Fedoseev 1965; Johnson *et al.,* 1966; Kelly 1988a; Smith 1981). Their normal range extends from the Arctic Ocean (85° N) south to Sakhalin Island (45° N) in the Pacific and south to Hudson Bay (55° N) in the Atlantic (Allen 1880; King 1983; Smith 1981). Bearded seals are widely distributed throughout the northern Bering, Chukchi, and Beaufort Seas and are most abundance north of the ice edge zone (Macintyre *et al.,* 2013). Bearded seals inhabit the seasonally ice-covered seas of the Northern Hemisphere, where they whelp and rear their pups and molt their coats on the ice in the spring and early summer. The overall summer distribution is quite broad, with seals rarely hauled out on land, and some seals, mostly juveniles, may not follow the ice northward but remain near the coasts of the Bering and Chukchi seas (Burns 1967; Burns 1981; Heptner *et al.,* 1976; Nelson 1981). As the ice forms again in the fall and winter, most seals move south with the advancing ice edge through the Bering Strait into the Bering Sea where they spend the winter (Boveng and Cameron 2013; Burns and Frost 1979; Cameron and Boveng 2007; Cameron and Boveng 2009; Frost *et al.,* 2005; Frost *et al.,* 2008). This southward migration is less noticeable and predictable than the northward movements in late spring and early summer (Burns 1981; Burns and Frost 1979; Kelly 1988a). During winter, the central and northern parts of the Bering Sea shelf have the highest densities of bearded seals (Braham *et al.,* 1981; Burns 1981; Burns and Frost 1979; Fay 1974; Heptner *et al.,* 1976; Nelson *et al.,* 1984). In late winter and early spring, bearded seals are widely but not uniformly distributed in the broken, drifting pack ice ranging from the Chukchi Sea south to the ice front in the Bering Sea. In these areas, they tend to avoid the coasts and areas of fast ice (Burns 1967; Burns and Frost 1979).

Bearded seals along the Alaskan coast tend to prefer areas where sea ice covers 70 to 90 percent of the surface, and are most abundant 20 to 100 nm (37 to 185 km) offshore during the spring season (Bengston *et al.,* 2000; Bengtson *et al.,* 2005; Simpkins *et al.,* 2003). In spring, bearded seals may also concentrate in nearshore pack ice habitats, where females give birth on the most stable areas of ice (Reeves *et al.,* 2002). Bearded seals haul out on spring pack ice (Simpkins *et al.,* 2003) and generally prefer to be near polynyas (areas of open water surrounded by sea ice) and other natural openings in the sea ice for breathing, hauling out, and prey access (Nelson *et al.,* 1984; Stirling 1997). While molting between April and August, bearded seals spend substantially more time hauled out then at other times of the year (Reeves *et al.,* 2002).

In their explorations of the Canada Basin, Harwood *et al.* (2005) observed bearded seals in waters of less than 200 m during the months from August to September. These sightings were east of 140° W. The Bureau of Ocean Energy Management conducted an aerial survey from June through October that covered the shallow Beaufort and Chukchi Sea shelf waters, and observed bearded seals from Point Barrow to the border of Canada (Clarke *et al.,* 2014). The farthest from shore that bearded seals were observed was the waters of the continental slope.

On December 28, 2012, NMFS listed both the Okhotsk and the Beringia distinct population segments (DPSs) of bearded seals as threatened under the ESA (77 FR 76740). The Alaska stock of bearded seals consists of only Beringia DPS seals.

Ringed Seal

Ringed seals are the most common pinniped in the study area and have wide distribution in seasonally and permanently ice-covered waters of the Northern Hemisphere (North Atlantic Marine Mammal Commission 2004). Throughout their range, ringed seals have an affinity for ice-covered waters and are well adapted to occupying both shore-fast and pack ice (Kelly 1988c). Ringed seals can be found further offshore than other pinnipeds since they can maintain breathing holes in ice thickness greater than 2 m (Smith and Stirling 1975). Breathing holes are maintained by ringed seals' sharp teeth and claws on their fore flippers. They remain in contact with ice most of the year and use it as a platform for molting in late spring to early summer, for pupping and nursing in late winter to early spring, and for resting at other times of the year.

Ringed seals have at least two distinct types of subnivean lairs: Haulout lairs and birthing lairs (Smith and Stirling 1975). Haulout lairs are typically single-chambered and offer protection from predators and cold weather. Birthing lairs are larger, multi-chambered areas that are used for pupping in addition to protection from predators. Ringed seal populations pup on both land-fast ice as well as stable pack ice. Lentfer (1972) found that ringed seals north of Barrow, Alaska (west of the ice camp), build their subnivean lairs on the pack ice near pressure ridges. Since subnivean lairs were found north of Barrow, Alaska, in pack ice, they are also assumed to be found within the sea ice in the ice camp proposed action area. Ringed seals excavate subnivean lairs in drifts over their breathing holes in the ice, in which they rest, give birth, and nurse their pups for five to nine weeks during late winter and spring (Chapskii 1940; McLaren 1958; Smith and Stirling 1975). Snow depths of at least 50–65 centimeters (cm) are required for functional birth lairs (Kelly 1988a; Lydersen 1998; Lydersen and Gjertz 1986; Smith and Stirling 1975), and such depths typically are found only where 20–30 cm or more of snow has accumulated on flat ice and then drifted along pressure ridges or ice hummocks (Hammill 2008; Lydersen *et al.,* 1990; Lydersen and Ryg 1991; Smith and Lydersen 1991). Ringed seals are born beginning in March, but the majority of births occur in early April. About a month after parturition, mating begins in late April and early May.

In Alaskan waters, during winter and early spring when sea ice is at its maximal extent, ringed seals are abundant in the northern Bering Sea, Norton and Kotzebue Sounds, and throughout the Chukchi and Beaufort Seas (Frost 1985; Kelly 1988b) and, therefore, are found in the study area (Figure 2–1 in Application). Passive acoustic monitoring of ringed seals from a high frequency recording package deployed at a depth of 240 m in the Chukchi Sea 120 km north-northwest of Barrow, Alaska, detected ringed seals in the area between mid-December and late May over the four year study (Jones *et al.,* 2014). With the onset of the fall freeze, ringed seal movements become increasingly restricted and seals will either move west and south with the advancing ice pack with many seals dispersing throughout the Chukchi and Bering Seas, or remain in the Beaufort Sea (Crawford *et al.,* 2012; Frost and Lowry 1984; Harwood *et al.,* 2012). Kelly *et al.* (2010) tracked home ranges for ringed seals in the subnivean period (using shorefast ice); the size of the home ranges varied from less than 1 up to 27.9 km^2; (median is 0.62 km^2 for adult males and 0.65 km^2 for adult females). Most (94 percent) of the home ranges were less than 3 km^2 during the subnivean period (Kelly *et al.,* 2010). Near large polynyas, ringed seals maintain ranges up to 7,000 km^2 during winter and 2,100 km^2 during spring (Born *et al.,* 2004). Some adult ringed seals return to the same small home ranges they occupied during the previous winter (Kelly *et al.,* 2010). The size of winter home ranges can, however, vary by up to a factor of 10 depending on the amount of fast ice; seal movements were more restricted during winters with extensive fast ice, and were much less restricted where fast ice did not form at high levels. Ringed seals may occur within the study area throughout the year and during the proposed action.

In general, ringed seals prey on fish and crustaceans. Ringed seals are known to consume up to 72 different species in their diet; their preferred prey species is the polar cod (Jefferson *et al.,* 2008). Ringed seals also prey upon a variety of other members of the cod family, including Arctic cod (Holst *et al.,* 2001) and saffron cod, with the latter particularly important during the summer months in Alaskan waters (Lowry *et al.,* 1980). Invertebrate prey seems to become prevalent in the ringed seals diet during the open-water season and often dominates the diet of young animals (Holst *et al.,* 2001; Lowry *et al.,* 1980). Large amphipods (*e.g., Themisto libellula*), krill (*e.g., Thysanoessa inermis*), mysids (*e.g., Mysis oculata*), shrimps (*e.g., Pandalus* spp., *Eualus* spp., *Lebbeus polaris,* and *Crangon septemspinosa*), and cephalopods (*e.g., Gonatus* spp.) are also consumed by ringed seals.

Most taxonomists recognize five subspecies of ringed seals. The Arctic ringed seal subspecies occurs in the Arctic Ocean and Bering Sea and is the only stock that occurs in U.S. waters (referred to as the Alaska stock). NMFS listed the Arctic ringed seal subspecies as threatened under the ESA on December 28, 2012 (77 FR 76706), primarily due to anticipated loss of sea ice through the end of the 21st century.

A comprehensive and reliable abundance estimate for the Alaska stock of ringed seals is not available. However, using data from surveys in the late 1990s and 2000 (Bengtson *et al.,* 2005; Frost *et al.,* 2004), Kelly *et al.* (2010) estimated the total population in the Alaska Chukchi and Beaufort seas to be at least 300,000 ringed seals. This is likely an underestimate since surveys in the Beaufort Sea were limited to within 40 km from shore (Muto *et al.,* 2017). Conn *et al.* (2014) calculated an abundance estimate of about 170,000 ringed seals for the U.S. portion of the Bering Sea. This estimate did not account for availability bias and did not include ringed seals in the shorefast ice zone, which were surveyed using a different method. Thus, the actual number of ringed seals in the U.S. sector of the Bering Sea is likely much higher, perhaps by a factor of two or more (Muto *et al.,* 2017).

Ice Seals Unusual Mortality Event (UME)

Since June 1, 2018, elevated strandings of ringed seals, bearded seals, and spotted seals (*Phoca largha*) have occurred in the Bering and Chukchi Seas. This event has been declared a UME. A UME is defined under the MMPA as a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response. From June 1, 2018 to November 22, 2019, there have been at least 284 dead seals reported, with 119 stranding in 2018 and 165 to date in 2019, which is nearly 10 times the average number of strandings of about 29 seals annually. All age classes of seals have been reported stranded, and a subset of seals have been sampled for genetics and harmful algal bloom exposure, with a few having histopathology collected. Results are pending, and the cause of the UME remains unknown.

There was a previous UME involving ice seals from 2011 to 2016, which was most active in 2011–2012. A minimum of 657 seals were affected. The UME investigation determined that some of the clinical signs were due to an abnormal molt, but a definitive cause of death for the UME was never determined. The number of stranded ice seals involved in this UME, and their physical characteristics, is not at all similar to the 2011–2016 UME, as the seals in 2018–2019 have not been exhibiting hair loss or skin lesions, which were a primary finding in the 2011–2016 UME. The investigation into the cause of the most recent UME is ongoing. More detailed information is available at: *https://www.fisheries.noaa.gov/national/marine-life-distress/2018-2019-ice-seal-unusual-mortality-event-alaska.*

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans).

Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS
[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall et al. 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Two species of phocid pinnipeds (ringed seal and bearded seal) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 1.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The *Estimated Take* section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The *Negligible Impact Analysis and Determination* section considers the content of this section, the *Estimated Take* section, and the *Proposed Mitigation* section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Description of Sound Sources

Here, we first provide background information on marine mammal hearing before discussing the potential effects of the use of active acoustic sources on marine mammals.

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in Hz or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds have longer wavelengths than higher frequency sounds and attenuate (decrease) more rapidly in shallower water. Amplitude is the height of the sound pressure wave or the 'loudness' of a sound and is typically measured using the dB scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to sound pressure levels (SPLs; the sound force per unit area), sound is referenced in the context of underwater sound pressure to 1 microPascal (μPa). One pascal is the pressure resulting from a force of one newton exerted over an area of one square meter. The source level (SL) represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position. Note that all underwater sound levels in this document are referenced to a pressure of 1 μPa.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. RMS is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick 1983). RMS accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in all directions away from the source (similar to ripples on the surface of a pond), except in cases where the source is directional. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction). A number of sources contribute to ambient sound, including the following (Richardson *et al.,* 1995):

- *Wind and waves:* The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient noise for frequencies between 200 Hz and 50 kHz (Mitson, 1995). Under sea ice, noise generated by ice deformation and ice fracturing may be caused by thermal, wind, drift and current stresses (Roth *et al.,* 2012);
- *Precipitation:* Sound from rain and hail impacting the water surface can become an important component of total noise at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times. In the ice-covered study area, precipitation is unlikely to impact ambient sound;
- *Biological:* Marine mammals can contribute significantly to ambient noise

levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz; and

- *Anthropogenic:* Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly (Richardson *et al.,* 1995). Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.,* a passing vessel) is sometimes termed background sound, as opposed to ambient sound. Anthropogenic sources are unlikely to significantly contribute to ambient underwater noise during the late winter and early spring in the study area as most anthropogenic activities will not be active due to ice cover (*e.g.,* seismic surveys, shipping) (Roth *et al.,* 2012).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

Underwater sounds fall into one of two general sound types: Impulsive and non-impulsive (defined in the following paragraphs). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see Southall *et al.,* (2007) for an in-depth discussion of these concepts.

Impulsive sound sources (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI 1986; Harris 1998; NIOSH 1998; ISO 2003; ANSI 2005) and occur either as isolated events or repeated in some succession. Impulsive sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features. There are no pulsed sound sources associated with any planned ICEX20 activities.

Non-impulsive sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI 1995; NIOSH 1998). Some of these non-impulsive sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-impulsive sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar sources (such as those planned for use by the U.S. Navy as part of the proposed action) that intentionally direct a sound signal at a target that is reflected back in order to discern physical details about the target.

Modern sonar technology includes a variety of sonar sensor and processing systems. In concept, the simplest active sonar emits sound waves, or ''pings,'' sent out in multiple directions, and the sound waves then reflect off of the target object in multiple directions. The sonar source calculates the time it takes for the reflected sound waves to return; this calculation determines the distance to the target object. More sophisticated active sonar systems emit a ping and then rapidly scan or listen to the sound waves in a specific area. This provides both distance to the target and directional information. Even more advanced sonar systems use multiple receivers to listen to echoes from several directions simultaneously and provide efficient detection of both direction and distance. In general, when sonar is in use, the sonar 'pings' occur at intervals, referred to as a duty cycle, and the signals themselves are very short in duration. For example, sonar that emits a 1-second ping every 10 seconds has a 10 percent duty cycle. The Navy's most powerful hull-mounted mid-frequency sonar source typically emits a 1-second ping every 50 seconds representing a 2 percent duty cycle. The Navy utilizes sonar systems and other acoustic sensors in support of a variety of mission requirements.

Acoustic Impacts

Please refer to the information given previously regarding sound, characteristics of sound types, and metrics used in this document. Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound from active acoustic sources can potentially result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007; Gotz *et al.,* 2009). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. In this section, we first describe specific manifestations of acoustic effects before providing discussion specific to the proposed activities in the next section.

Permanent Threshold Shift—Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Finneran 2015). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Repeated sound exposure that leads to TTS could cause PTS. In severe cases of PTS, there can be total or partial deafness, while in most cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter 1985).

When PTS occurs, there is physical damage to the sound receptors in the ear (*i.e.,* tissue damage), whereas TTS represents primarily tissue fatigue and is reversible (Southall *et al.,* 2007). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.,* Ward, 1997). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals—PTS data exists only for a single harbor seal (Kastak *et al.,* 2008)—but are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several decibels above (a 40-dB threshold shift approximates PTS onset; *e.g.,* Kryter *et al.,* 1966; Miller, 1974) that inducing mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.,* Southall *et al.,* 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulse sounds (such as impact pile driving pulses as received close to the source) are at least six dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level (SEL) thresholds are 15 to 20 dB higher than TTS cumulative SEL thresholds (Southall *et al.,* 2007).

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin (*Tursiops truncatus*), beluga whale, harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and three species of pinnipeds (northern elephant seal (*Mirounga angustirostris*), harbor seal, and California sea lion (*Zalophus californianus*)) exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran 2015). TTS was not observed in trained spotted and ringed seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species. Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), and Finneran (2015).

Behavioral effects—Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007; Weilgart, 2007; Archer *et al.,* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC 2003; Wartzok *et al.,* 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud impulsive sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds 2002; see also Richardson *et al.,* 1995; Nowacek *et al.,* 2007).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder 2007; Weilgart 2007; NRC 2003). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark 2000; Costa *et al.,* 2003; Ng and Leung, 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As with other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in potential feeding disruption in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2001, 2005b, 2006; Gailey *et al.,* 2007).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003; Foote *et al.,* 2004), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007b). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.,* 1994).

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.,* 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.,* 1994; Goold, 1996; Morton and Symonds, 2002; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.,* Beauchamp and Livoreil,1997; Fritz *et al.,* 2002; Purser and Radford 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch 1992; Daan *et al.,* 1996; Bradshaw *et al.,* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

For non-impulsive sounds (*i.e.,* similar to the sources used during the proposed specified activity), data suggest that exposures of pinnipeds to sources between 90 and 140 dB re 1 μPa do not elicit strong behavioral responses; no data were available for exposures at higher received levels for Southall *et al.* (2007) to include in the severity scale analysis. Reactions of harbor seals were the only available data for which the responses could be ranked on the severity scale. For reactions that were recorded, the majority (17 of 18 individuals/groups) were ranked on the severity scale as a 4 (defined as moderate change in movement, brief shift in group distribution, or moderate change in vocal behavior) or lower; the remaining response was ranked as a 6 (defined as minor or moderate avoidance of the sound source). Additional data on hooded seals (*Cystophora cristata*) indicate avoidance responses to signals above 160–170 dB re 1 μPa (Kvadsheim *et al.,* 2010), and data on grey (*Halichoerus grypus*) and harbor seals indicate avoidance response at received levels of 135–144 dB re 1 μPa (Götz *et al.,* 2010). In each instance where food was available, which provided the seals motivation to remain near the source, habituation to the signals occurred rapidly. In the same study, it was noted that habituation was not apparent in wild seals where no food source was available (Götz *et al.,* 2010). This implies that the motivation of the animal is necessary to consider in determining the potential for a reaction. In one study aimed to investigate the under-ice movements and sensory cues associated with under-ice navigation of ice seals, acoustic transmitters (60–69 kHz at 159 dB re 1 μPa at 1 m) were attached to ringed seals (Wartzok *et al.,* 1992a; Wartzok *et al.,* 1992b). An acoustic tracking system then was installed in the ice to receive the acoustic signals and provide real-time tracking of ice seal movements. Although the frequencies used in this study are at the upper limit of ringed seal hearing, the ringed seals appeared unaffected by the acoustic transmissions, as they were able to maintain normal behaviors (*e.g.,* finding breathing holes).

Seals exposed to non-impulsive sources with a received sound pressure level within the range of calculated exposures (142–193 dB re 1 μPa), have been shown to change their behavior by modifying diving activity and avoidance of the sound source (Götz *et al.,* 2010; Kvadsheim *et al.,* 2010). Although a minor change to a behavior may occur as a result of exposure to the sources in the proposed action, these changes would be within the normal range of behaviors for the animal (*e.g.,* the use of a breathing hole further from the source, rather than one closer to the source, would be within the normal range of behavior) (Kelly *et al.,* 1988).

Adult ringed seals spend up to 20 percent of the time in subnivean lairs during the winter season (Kelly *et al.,* 2010a). Ringed seal pups spend about 50 percent of their time in the lair during the nursing period (Lydersen and Hammill 1993). During the warm season both bearded seals and ringed seals haul out on the ice. In a study of ringed seal haulout activity by Born *et al.* (2002), ringed seals spent 25–57 percent of their time hauled out in June, which is during their molting season. Bearded seals also spend a large amount of time hauled out during the molting season between April and August (Reeves *et al.,* 2002). Ringed seal lairs are typically used by individual seals (haulout lairs) or by a mother with a pup (birthing lairs); large lairs used by many seals for hauling out are rare (Smith and Stirling 1975). If the non-impulsive acoustic transmissions are heard and are perceived as a threat, ringed seals within subnivean lairs could react to the sound in a similar fashion to their reaction to other threats, such as polar bears (their primary predators), although the type of sound may be novel to them. Responses of ringed seals to a variety of human-induced sounds (*e.g.,* helicopter noise, snowmobiles, dogs, people, and seismic activity) have been variable; some seals entered the water and some seals remained in the lair. However, in all instances in which observed seals departed lairs in response to noise disturbance, they subsequently reoccupied the lair (Kelly *et al.,* 1988).

Ringed seal mothers have a strong bond with their pups and may physically move their pups from the birth lair to an alternate lair to avoid predation, sometimes risking their lives to defend their pups from potential predators (Smith 1987). If a ringed seal mother perceives the proposed acoustic sources as a threat, the network of multiple birth and haulout lairs allows the mother and pup to move to a new lair (Smith and Hammill 1981; Smith and Stirling 1975). The acoustic sources and icebreaking noise from this proposed action are not likely to impede a ringed seal from finding a breathing hole or lair, as captive seals have been found to primarily use vision to locate breathing holes and no effect to ringed seal vision would occur from the acoustic disturbance (Elsner *et al.,* 1989; Wartzok *et al.,* 1992a). It is anticipated that a ringed seal would be able to relocate to a different breathing hole relatively easily without impacting their normal behavior patterns.

Stress responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle 1950; Moberg 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003).

Auditory masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is anthropogenic, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007b; Di Iorio and Clark, 2009; Holt *et al.,* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.,* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore, 2014). Masking can be tested directly in captive species (*e.g.,* Erbe 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.,* 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (*e.g.,* from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

Potential Effects of Sonar on Prey—Ringed and bearded seals feed on marine invertebrates and fish. Marine invertebrates occur in the world's oceans, from warm shallow waters to cold deep waters, and are the dominant animals in all habitats of the study area. Although most species are found within the benthic zone, marine invertebrates can be found in all zones (sympagic (within the sea ice), pelagic (open ocean), or benthic (bottom dwelling)) of the Beaufort Sea (Josefson *et al.,* 2013). The diverse range of species include oysters, crabs, worms, ghost shrimp, snails, sponges, sea fans, isopods, and stony corals (Chess and Hobson 1997; Dugan *et al.,* 2000; Proctor *et al.,* 1980).

Hearing capabilities of invertebrates are largely unknown (Lovell *et al.,* 2005; Popper and Schilt 2008). Outside of studies conducted to test the sensitivity of invertebrates to vibrations, very little is known on the effects of anthropogenic underwater noise on invertebrates (Edmonds *et al.,* 2016). While data are limited, research suggests that some of the major cephalopods and decapods may have limited hearing capabilities (Hanlon 1987; Offutt 1970), and may hear only low-frequency (less than 1 kHz) sources (Offutt 1970), which is most likely within the frequency band of biological signals (Hill 2009). In a review of crustacean sensitivity of high amplitude underwater noise by Edmonds *et al.* (2016), crustaceans may be able to hear the frequencies at which they produce sound, but it remains unclear which noises are incidentally produced and if there are any negative effects from masking them. Acoustic signals produced by crustaceans range from low frequency rumbles (20–60 Hz) to high frequency signals (20–55 kHz) (Henninger and Watson 2005; Patek and Caldwell 2006; Staaterman *et al.,* 2016). Aquatic invertebrates that can sense local water movements with ciliated cells include cnidarians, flatworms, segmented worms, urochordates (tunicates), mollusks, and arthropods (Budelmann 1992a, 1992b; Popper *et al.,* 2001). Some aquatic invertebrates have specialized organs called statocysts for determination of equilibrium and, in some cases, linear or angular acceleration. Statocysts allow an animal to sense movement and may enable some species, such as cephalopods and crustaceans, to be sensitive to water particle movements associated with sound (Goodall *et al.,* 1990; Hu *et al.,* 2009; Kaifu *et al.,* 2008; Montgomery *et al.,* 2006; Popper *et al.,* 2001; Roberts and Breithaupt 2016; Salmon 1971). Because any acoustic sensory capabilities, if present at all, are limited to detecting water motion, and water particle motion near a sound source falls off rapidly with distance, aquatic invertebrates are probably limited to detecting nearby sound sources rather than sound caused by pressure waves from distant sources.

Studies of sound energy effects on invertebrates are few, and identify only behavioral responses. Non-auditory injury, permanent threshold shift, temporary threshold shift, and masking studies have not been conducted for invertebrates. Both behavioral and auditory brainstem response studies suggest that crustaceans may sense frequencies up to 3 kHz, but best sensitivity is likely below 200 Hz (Goodall *et al.,* 1990; Lovell *et al.,* 2005; Lovell *et al.,* 2006). Most cephalopods likely sense low-frequency sound below 1 kHz, with best sensitivities at lower frequencies (Budelmann 2010; Mooney *et al.,* 2010; Offutt 1970). A few cephalopods may sense higher frequencies up to 1,500 Hz (Hu *et al.,* 2009).

It is expected that most marine invertebrates would not sense the frequencies of the sonar associated with the proposed action. Most marine invertebrates would not be close enough to active sonar systems to potentially experience impacts to sensory structures. Any marine invertebrate capable of sensing sound may alter its behavior if exposed to sonar. Although acoustic transmissions produced during the proposed action may briefly impact individuals, intermittent exposures to sonar are not expected to impact survival, growth, recruitment, or reproduction of widespread marine invertebrate populations.

The fish species located in the study area include those that are closely associated with the deep ocean habitat of the Beaufort Sea. Nearly 250 marine fish species have been described in the Arctic, excluding the larger parts of the sub-Arctic Bering, Barents, and Norwegian Seas (Mecklenburg *et al.,* 2011). However, only about 30 are known to occur in the Arctic waters of the Beaufort Sea (Christiansen and Reist

2013). Largely because of the difficulty of sampling in remote, ice-covered seas, many high-Arctic fish species are known only from rare or geographically patchy records (Mecklenburg *et al.,* 2011). Aquatic systems of the Arctic undergo extended seasonal periods of ice cover and other harsh environmental conditions. Fish inhabiting such systems must be biologically and ecologically adapted to surviving such conditions. Important environmental factors that Arctic fish must contend with include reduced light, seasonal darkness, ice cover, low biodiversity, and low seasonal productivity.

All fish have two sensory systems to detect sound in the water: The inner ear, which functions very much like the inner ear in other vertebrates, and the lateral line, which consists of a series of receptors along the fish's body (Popper and Fay 2010; Popper *et al.,* 2014). The inner ear generally detects relatively higher-frequency sounds, while the lateral line detects water motion at low frequencies (below a few hundred Hz) (Hastings and Popper 2005). Lateral line receptors respond to the relative motion between the body surface and surrounding water; this relative motion, however, only takes place very close to sound sources and most fish are unable to detect this motion at more than one to two body lengths distance away (Popper *et al.,* 2014). Although hearing capability data only exist for fewer than 100 of the 32,000 fish species, current data suggest that most species of fish detect sounds from 50 to 1,000 Hz, with few fish hearing sounds above 4 kHz (Popper 2008). It is believed that most fish have their best hearing sensitivity from 100 to 400 Hz (Popper 2003). Permanent hearing loss has not been documented in fish. A study by Halvorsen *et al.* (2012) found that for temporary hearing loss or similar negative impacts to occur, the noise needed to be within the fish's individual hearing frequency range; external factors, such as developmental history of the fish or environmental factors, may result in differing impacts to sound exposure in fish of the same species. The sensory hair cells of the inner ear in fish can regenerate after they are damaged, unlike in mammals where sensory hair cells loss is permanent (Lombarte *et al.,* 1993; Smith *et al.,* 2006). As a consequence, any hearing loss in fish may be as temporary as the timeframe required to repair or replace the sensory cells that were damaged or destroyed (Smith *et al.,* 2006), and no permanent loss of hearing in fish would result from exposure to sound.

Fish species in the study area are expected to hear the low-frequency sources associated with the proposed action, but most are not expected to detect sounds above this threshold. Only a few fish species are able to detect mid-frequency sonar above 1 kHz and could have behavioral reactions or experience auditory masking during these activities. These effects are expected to be transient and long-term consequences for the population are not expected. Fish with hearing specializations capable of detecting high-frequency sounds are not expected to be within the study area. If hearing specialists were present, they would have to be in close vicinity to the source to experience effects from the acoustic transmission. Human-generated sound could alter the behavior of a fish in a manner that would affect its way of living, such as where it tries to locate food or how well it can locate a potential mate; behavioral responses to loud noise could include a startle response, such as the fish swimming away from the source, the fish ''freezing'' and staying in place, or scattering (Popper 2003). Auditory masking could also interfere with a fish's ability to hear biologically relevant sounds, inhibiting the ability to detect both predators and prey, and impacting schooling, mating, and navigating (Popper 2003). If an individual fish comes into contact with low-frequency acoustic transmissions and is able to perceive the transmissions, they are expected to exhibit short-term behavioral reactions, when initially exposed to acoustic transmissions, which would not significantly alter breeding, foraging, or populations. Overall effects to fish from active sonar sources would be localized, temporary, and infrequent.

Effects to Physical and Foraging Habitat—Unless the sound source is stationary and/or continuous over a long duration in one area, neither of which applies to ICEX20 activities, the effects of the introduction of sound into the environment are generally considered to have a less severe impact on marine mammal habitat compared to any physical alteration of the habitat. Acoustic exposures are not expected to result in long-term physical alteration of the water column or bottom topography as the occurrences are of limited duration and would occur intermittently. Acoustic transmissions also would have no structural impact to subnivean lairs in the ice. Furthermore, since ice dampens acoustic transmissions (Richardson *et al.,* 1995), the level of sound energy that reaches the interior of a subnivean lair will be less than that ensonifying water under surrounding ice.

Non-acoustic Impacts—Deployment of the ice camp could potentially affect ringed seal habitat by physically damaging or crushing subnivean lairs. These non-acoustic impacts could result in ringed seal injury or mortality. However, seals usually choose to locate lairs near pressure ridges, and the ice camp will be deployed in an area without pressure ridges in order to allow operation of an aircraft runway. Further, portable tents will be erected for lodging and operations purposes. Tents do not require building materials or typical construction methods. The tents are relatively easy to mobilize and will not be situated near areas featuring pressure ridges. Finally, the camp buildup will be gradual, with activity increasing over the first five days. This approach allows seals to move to different lair locations outside the ice camp area. Based on this information, we do not anticipate any damage to subnivean lairs that could result in ringed seal injury or mortality.

ICEX20 personnel will be actively conducting testing and training operations on the sea ice and will travel around the camp area, including the runway, on snowmobiles. Although the Navy does not anticipate observing any seals on the ice, it is possible that the presence of active humans could behaviorally disturb ringed seals that are in lairs or on the ice. As discussed above, the camp will not be deployed in areas with pressure ridges and seals will have opportunity to move away from disturbances associated with human activity. Furthermore, camp personnel will maintain a 100-meter avoidance distance for all marine mammals on the ice. Based on this information, we do not believe the presence of humans on ice will result in take.

Our preliminary determination of effects to the physical environment includes minimal possible impacts to marine mammals and their habitat from camp operation or deployment activities. In summary, given the relatively short duration of submarine testing and training activities, relatively small area that would be affected, and lack of physical impacts to habitat, the proposed actions are not likely to have a permanent, adverse effect on populations of prey species or marine mammal habitat. Therefore, any impacts to marine mammal habitat are not expected to cause significant or long-term consequences for individual ringed or bearded seals or their respective populations.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. For this military readiness activity, the MMPA defines *harassment* as (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where the behavioral patterns are abandoned or significantly altered (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns and TTS, for individual marine mammals resulting from exposure to acoustic transmissions. Based on the nature of the activity, Level A harassment is neither anticipated nor proposed to be authorized, and described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take from exposure to sound by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. For the proposed IHA, the Navy employed a sophisticated model known as the Navy Acoustic Effects Model (NAEMO) for assessing the impacts of underwater sound.

Acoustic Thresholds

Using the best available science, NMFS applies acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—In coordination with NMFS, the Navy developed behavioral thresholds to support environmental analyses for the Navy's testing and training military readiness activities utilizing active sonar sources; these behavioral harassment thresholds are used here to evaluate the potential effects of the active sonar components of the proposed action. The response of a marine mammal to an anthropogenic sound will depend on the frequency, duration, temporal pattern and amplitude of the sound as well as the animal's prior experience with the sound and the context in which the sound is encountered (*i.e.,* what the animal is doing at the time of the exposure). The distance from the sound source and whether it is perceived as approaching or moving away can also affect the way an animal responds to a sound (Wartzok *et al.* 2003). For marine mammals, a review of responses to anthropogenic sound was first conducted by Richardson *et al.* (1995). Reviews by Nowacek *et al.* (2007) and Southall *et al.* (2007) address studies conducted since 1995 and focus on observations where the received sound level of the exposed marine mammal(s) was known or could be estimated.

Multi-year research efforts have conducted sonar exposure studies for odontocetes and mysticetes (Miller *et al.* 2012; Sivle *et al.* 2012). Several studies with captive animals have provided data under controlled circumstances for odontocetes and pinnipeds (Houser *et al.* 2013a; Houser *et al.* 2013b). Moretti *et al.* (2014) published a beaked whale dose-response curve based on passive acoustic monitoring of beaked whales during U.S. Navy training activity at Atlantic Underwater Test and Evaluation Center during actual Anti-Submarine Warfare exercises. This new information necessitated the update of the behavioral response criteria for the U.S. Navy's environmental analyses.

Southall *et al.* (2007) synthesized data from many past behavioral studies and observations to determine the likelihood of behavioral reactions at specific sound levels. While in general, the louder the sound source the more intense the behavioral response, it was clear that the proximity of a sound source and the animal's experience, motivation, and conditioning were also critical factors influencing the response (Southall *et al.* 2007). After examining all of the available data, the authors felt that the derivation of thresholds for behavioral response based solely on exposure level was not supported because context of the animal at the time of sound exposure was an important factor in estimating response. Nonetheless, in some conditions, consistent avoidance reactions were noted at higher sound levels depending on the marine mammal species or group allowing conclusions to be drawn. Phocid seals showed avoidance reactions at or below 190 dB re 1 µPa @1 m; thus, seals may actually receive levels adequate to produce TTS before avoiding the source.

The Navy's Phase III proposed pinniped behavioral threshold has been updated based on controlled exposure experiments on the following captive animals: Hooded seal, gray seal, and California sea lion (Götz *et al.* 2010; Houser *et al.* 2013a; Kvadsheim *et al.* 2010). Overall exposure levels were 110–170 dB re 1 µPa for hooded seals, 140–180 dB re 1 µPa for gray seals and 125–185 dB re 1 µPa for California sea lions; responses occurred at received levels ranging from 125 to 185 dB re 1 µPa. However, the means of the response data were between 159 and 170 dB re 1 µPa. Hooded seals were exposed to increasing levels of sonar until an avoidance response was observed, while the grey seals were exposed first to a single received level multiple times, then an increasing received level. Each individual California sea lion was exposed to the same received level ten times. These exposure sessions were combined into a single response value, with an overall response assumed if an animal responded in any single session. Because these data represent a dose-response type relationship between received level and a response, and because the means were all tightly clustered, the Bayesian biphasic Behavioral Response Function for pinnipeds most closely resembles a traditional sigmoidal dose-response function at the upper received levels and has a 50 percent probability of response at 166 dB re 1 µPa. Additionally, to account for proximity to the source discussed above and based on the best scientific information, a conservative distance of 10 km is used beyond which exposures would not constitute a take under the military readiness definition. NMFS is proposing the use of this dose response function to predict behavioral harassment of pinnipeds for this activity.

Level A harassment and TTS—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive).

These thresholds were developed by compiling the best available science and soliciting input multiple times from both the public and peer reviewers to inform the final product. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

The Navy's PTS/TTS analyses begins with mathematical modeling to predict the sound transmission patterns from Navy sources, including sonar. These data are then coupled with marine species distribution and abundance data to determine the sound levels likely to be received by various marine species. These criteria and thresholds are applied to estimate specific effects that animals exposed to Navy-generated sound may experience. For weighting function derivation, the most critical data required are TTS onset exposure levels as a function of exposure frequency. These values can be estimated from published literature by examining TTS as a function of sound exposure level (SEL) for various frequencies.

To estimate TTS onset values, only TTS data from behavioral hearing tests were used. To determine TTS onset for each subject, the amount of TTS observed after exposures with different SPLs and durations were combined to create a single TTS growth curve as a function of SEL. The use of (cumulative) SEL is a simplifying assumption to accommodate sounds of various SPLs, durations, and duty cycles. This is referred to as an ''equal energy'' approach, since SEL is related to the energy of the sound and this approach assumes exposures with equal SEL result in equal effects, regardless of the duration or duty cycle of the sound. It is well known that the equal energy rule will over-estimate the effects of intermittent noise, since the quiet periods between noise exposures will allow some recovery of hearing compared to noise that is continuously present with the same total SEL (Ward 1997). For continuous exposures with the same SEL but different durations, the exposure with the longer duration will also tend to produce more TTS (Finneran *et al.,* 2010; Kastak *et al.,* 2007; Mooney *et al.,* 2009a).

As in previous acoustic effects analysis (Finneran and Jenkins 2012; Southall *et al.,* 2007), the shape of the PTS exposure function for each species group is assumed to be identical to the TTS exposure function for each group. A difference of 20 dB between TTS onset and PTS onset is used for all marine mammals including pinnipeds. This is based on estimates of exposure levels actually required for PTS (*i.e.,* 40 dB of TTS) from the marine mammal TTS growth curves, which show differences of 13 to 37 dB between TTS and PTS onset in marine mammals. Details regarding these criteria and thresholds can be found in NMFS' Technical Guidance (NMFS 2016).

Table 3 below provides the weighted criteria and thresholds used in this analysis for estimating quantitative acoustic exposures of marine mammals from the proposed action.

TABLE 3—INJURY (PTS) AND DISTURBANCE (TTS, BEHAVIORAL) THRESHOLDS FOR UNDERWATER SOUNDS

Group	Species	Behavioral criteria	Physiological criteria	
			Onset TTS	Onset PTS
Phocid (in water)	Ringed/Bearded seal	Pinniped Dose Response Function.	181 dB SEL cumulative	201 dB SEL cumulative.

Quantitative Modeling

The Navy performed a quantitative analysis to estimate the number of mammals that could be harassed by the underwater acoustic transmissions during the proposed action. Inputs to the quantitative analysis included marine mammal density estimates, marine mammal depth occurrence distributions (U.S Department of the Navy, in prep), oceanographic and environmental data, marine mammal hearing data, and criteria and thresholds for levels of potential effects.

The density estimate used to estimate take is derived from habitat-based modeling by Kaschner *et al.* (2006) and Kaschner (2004). The area of the Arctic where the proposed action will occur (100–200 nm north of Prudhoe Bay, Alaska) has not been surveyed in a manner that supports quantifiable density estimation of marine mammals. In the absence of empirical survey data, information on known or inferred associations between marine habitat features and (the likelihood of) the presence of specific species have been used to predict densities using model-based approaches. These habitat suitability models include relative environmental suitability (RES) models. Habitat suitability models can be used to understand the possible extent and relative expected concentration of a marine species distribution. These models are derived from an assessment of the species occurrence in association with evaluated environmental explanatory variables that results in defining the RES suitability of a given environment. A fitted model that quantitatively describes the relationship of occurrence with the environmental variables can be used to estimate unknown occurrence in conjunction with known habitat suitability. Abundance can thus be estimated for each RES value based on the values of the environmental variables, providing a means to estimate density for areas that have not been surveyed. Use of the Kaschner's RES model resulted in a value of 0.3957 ringed seals per km² in the cold season (defined as December through May) and a maximum value of 0.0332 bearded seals per km² in the cold and warm seasons. The density numbers are assumed static throughout the ice camp proposed action area for this species. The density data generated for this species was based on environmental variables known to exist within the proposed ice camp action area during the late winter/early springtime period.

The quantitative analysis consists of computer modeled estimates and a post-model analysis to determine the number of potential animal exposures. The model calculates sound energy propagation from the proposed sonars, the sound received by animat (virtual animal) dosimeters representing marine mammals distributed in the area around the modeled activity, and whether the sound received by a marine mammal exceeds the thresholds for effects.

The Navy developed a set of software tools and compiled data for estimating acoustic effects on marine mammals without consideration of behavioral avoidance or Navy's standard mitigations. These tools and data sets serve are integral components of NAEMO. In NAEMO, animats are distributed non-uniformly based on species-specific density, depth distribution, and group size information, and animats record energy received at their location in the water column. A fully three-dimensional environment is used for calculating sound propagation and animat exposure in NAEMO. Site-specific bathymetry, sound speed profiles, wind speed, and bottom properties are incorporated into the propagation modeling process. NAEMO calculates the likely propagation for various levels of energy (sound or pressure) resulting from each source used during the training event.

NAEMO then records the energy received by each animat within the energy footprint of the event and calculates the number of animats having received levels of energy exposures that fall within defined impact thresholds. Predicted effects on the animats within a scenario are then tallied and the highest order effect (based on severity of criteria; *e.g.,* PTS over TTS) predicted for a given animat is assumed. Each scenario or each 24-hour period for scenarios lasting greater than 24 hours is independent of all others, and therefore, the same individual marine animal could be impacted during each independent scenario or 24-hour period. In few instances, although the activities themselves all occur within the study area, sound may propagate beyond the boundary of the study area. Any exposures occurring outside the boundary of the study area are counted as if they occurred within the study area boundary. NAEMO provides the initial estimated impacts on marine species with a static horizontal distribution.

There are limitations to the data used in the acoustic effects model, and the results must be interpreted within these context. While the most accurate data and input assumptions have been used in the modeling, when there is a lack of definitive data to support an aspect of the modeling, modeling assumptions believed to overestimate the number of exposures have been chosen:

- Animats are modeled as being underwater, stationary, and facing the source and therefore always predicted to receive the maximum sound level (*i.e.,* no porpoising or pinnipeds' heads above water);
- Animats do not move horizontally (but change their position vertically within the water column), which may overestimate physiological effects such as hearing loss, especially for slow moving or stationary sound sources in the model;
- Animats are stationary horizontally and therefore do not avoid the sound source, unlike in the wild where animals would most often avoid exposures at higher sound levels, especially those exposures that may result in PTS;
- Multiple exposures within any 24-hour period are considered one continuous exposure for the purposes of calculating the temporary or permanent hearing loss, because there are not sufficient data to estimate a hearing recovery function for the time between exposures; and
- Mitigation measures that are implemented were not considered in the model. In reality, sound-producing activities would be reduced, stopped, or delayed if marine mammals are detected by submarines via passive acoustic monitoring.

Because of these inherent model limitations and simplifications, model-estimated results must be further analyzed, considering such factors as the range to specific effects, avoidance, and the likelihood of successfully implementing mitigation measures. This analysis uses a number of factors in addition to the acoustic model results to predict effects on marine mammals.

For non-impulsive sources, NAEMO calculates the sound pressure level (SPL) and sound exposure level (SEL) for each active emission during an event. This is done by taking the following factors into account over the propagation paths: Bathymetric relief and bottom types, sound speed, and attenuation contributors such as absorption, bottom loss and surface loss. Platforms such as a ship using one or more sound sources are modeled in accordance with relevant vehicle dynamics and time durations by moving them across an area whose size is representative of the training event's operational area. Table 4 provides range to effects for active acoustic sources proposed for ICEX20 to phocid pinniped specific criteria. Phocids within these ranges would be predicted to receive the associated effect. Range to effects is important information in not only predicting acoustic impacts, but also in verifying the accuracy of model results against real-world situations and determining adequate mitigation ranges to avoid higher level effects, especially physiological effects to marine mammals.

TABLE 4—RANGE TO BEHAVIORAL EFFECTS, TTS, AND PTS IN THE ICEX STUDY AREA

Source/exercise	Range to effects (m)		
	Behavioral	TTS	PTS
Submarine Exercise	10,000 [a]	4,025	15

[a] Empirical evidence has not shown responses to sonar that would constitute take beyond a few km from an acoustic source, which is why NMFS and Navy conservatively set a distance cutoff of 10 km. Regardless of the source level at that distance, take is not estimated to occur beyond 10 km from the source.

As discussed above, within NAEMO animats do not move horizontally or react in any way to avoid sound. Furthermore, mitigation measures that are implemented during training or testing activities that reduce the likelihood of physiological impacts are not considered in quantitative analysis. Therefore, the current model overestimates acoustic impacts, especially physiological impacts near the sound source. The behavioral criteria used as a part of this analysis acknowledges that a behavioral reaction is likely to occur at levels below those required to cause hearing loss (TTS or PTS). At close ranges and high sound levels approaching those that could cause PTS, avoidance of the area immediately around the sound source is the assumed behavioral response for most cases.

In previous environmental analyses, the Navy has implemented analytical factors to account for avoidance behavior and the implementation of mitigation measures. The application of avoidance and mitigation factors has only been applied to model-estimated PTS exposures given the short distance over which PTS is estimated. Given that no PTS exposures were estimated during the modeling process for this proposed action, the implementation of avoidance and mitigation factors were not included in this analysis.

Table 5 shows the exposures expected for bearded and ringed seals based on NAEMO modeled results.

TABLE 5—QUANTITATIVE MODELING RESULTS OF POTENTIAL EXPOSURES FOR ICEX ACTIVITIES

Species	Level B harassment		Level A harassment	Total
	Behavioral	TTS		
Bearded seal	3	1	0	4
Ringed seal	1,395	11	0	1,406

Effects of Specified Activities on Subsistence Uses of Marine Mammals

Subsistence hunting is important for many Alaska Native communities. A study of the North Slope villages of Nuiqsut, Kaktovik, and Barrow identified the primary resources used for subsistence and the locations for harvest (Stephen R. Braund & Associates 2010), including terrestrial mammals (caribou, moose, wolf, and wolverine), birds (geese and eider), fish (Arctic cisco, Arctic char/Dolly Varden trout, and broad whitefish), and marine mammals (bowhead whale, ringed seal, bearded seal, and walrus). Of these species, only bearded and ringed seals would be located within the study area during the proposed action.

The study area is at least 100–150 mi (161–241 km) from land, well seaward of known subsistence use areas and the planned activities would conclude prior to the start of the summer months, during which the majority of subsistence hunting would occur. In addition, the specified activity would not remove individuals from the population, therefore there would be no impacts caused by this action to the availability of bearded seals or ringed seals for subsistence hunting. Therefore, subsistence uses of marine mammals would not be impacted by this action.

Proposed Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)). The NDAA for FY 2004 amended the MMPA as it relates to military readiness activities and the incidental take authorization process such that ''least practicable impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat, as well as subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Mitigation for Marine Mammals and Their Habitat

The following general mitigation actions are proposed for ICEX20 to minimize impacts on ringed and bearded seals on the ice floe:

- Camp deployment would begin in mid-February and would be completed by March 15. Based on the best available science, Arctic ringed seal whelping is not expected to occur prior to mid-March. Construction of the ice camp would be completed prior to whelping in the area of ICEX20. As such, pups are not anticipated to be in the vicinity of the camp at commencement, and mothers would not need to move newborn pups due to construction of the camp. Additionally, if a seal had a lair in the area they would be able to relocate. Completing camp deployment before ringed seal pupping begins will allow ringed seals to avoid the camp area prior to pupping and mating seasons, reducing potential impacts;
- Camp location will not be in proximity to pressure ridges in order to allow camp deployment and operation of an aircraft runway. This will minimize physical impacts to subnivean lairs;
- Camp deployment will gradually increase over five days, allowing seals to relocate to lairs that are not in the immediate vicinity of the camp;
- Personnel on all on-ice vehicles would observe for marine and terrestrial animals; any marine or terrestrial animal observed on the ice would be avoided by 328 ft (100 m). On-ice vehicles would not be used to follow any animal, with the exception of actively deterring polar bears if the situation requires;
- Personnel operating on-ice vehicles would avoid areas of deep snowdrifts near pressure ridges, which are preferred areas for subnivean lair development; and
- All material (*e.g.,* tents, unused food, excess fuel) and wastes (*e.g.,* solid waste, hazardous waste) would be removed from the ice floe upon completion of ICEX20.

The following mitigation actions are proposed for ICEX20 activities involving acoustic transmissions:

- For activities involving active acoustic transmissions from submarines and torpedoes, passive acoustic sensors on the submarines will listen for vocalizing marine mammals for 15 minutes prior to the initiation of exercise activities. If a marine mammal is detected, the submarine will delay active transmissions, and not restart until after 15 minutes have passed with no marine mammal detections. If there are no animal detections, it may be assumed that the vocalizing animal is no longer in the immediate area and is unlikely to be subject to harassment. Ramp up procedures are not proposed as Navy determined, and NMFS accepts, that they would result in an unacceptable impact on readiness and on the realism of training.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

The U.S. Navy has coordinated with NMFS to develop an overarching program plan in which specific monitoring would occur. This plan is called the Integrated Comprehensive Monitoring Program (ICMP) (U.S. Department of the Navy 2011). The ICMP was created in direct response to Navy permitting requirements established in various MMPA rules, ESA consultations, and applicable regulations. As a framework document, the ICMP applies by regulation to those activities on ranges and operating areas for which the Navy is seeking or has sought incidental take authorizations. The ICMP is intended to coordinate monitoring efforts across all regions and to allocate the most appropriate level and type of effort based on set of standardized research goals, and in acknowledgement of regional scientific value and resource availability.

The ICMP is focused on Navy training and testing ranges where the majority of Navy activities occur regularly as those areas have the greatest potential for being impacted. ICEX20 in comparison is a short duration exercise that occurs approximately every other year. Due to the location and expeditionary nature of the ice camp, the number of personnel onsite is extremely limited and is constrained by the requirement to be able to evacuate all personnel in a single day with small planes. As such, a dedicated monitoring project would not be feasible as it would require additional personnel and equipment to locate, tag and monitor the seals.

The Navy is committed to documenting and reporting relevant aspects of training and research activities to verify implementation of mitigation, comply with current permits, and improve future environmental assessments. All sonar usage will be collected via the Navy's Sonar Positional Reporting System database and reported. If any injury or death of a marine mammal is observed during the ICEX20activity, the Navy will immediately halt the activity and report the incident to the Office of Protected Resources, NMFS, and the Alaska Regional Stranding Coordinator, NMFS. The following information must be provided:

- Time, date, and location of the discovery;
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal(s) was discovered (*e.g.,* during submarine activities, observed on ice floe, or by transiting vessel).

The Navy will provide NMFS with a draft exercise monitoring report within 90 days of the conclusion of the planned activity. The draft exercise monitoring report will include data regarding sonar use and any mammal sightings or detection will be documented. The report will also include information on the number of sonar shutdowns recorded. If no comments are received from NMFS within 30 days of submission of the draft final report, the draft final report will constitute the final report. If comments are received, a final report must be submitted within 30 days after receipt of comments.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

Underwater acoustic transmissions associated with ICEX20, as outlined previously, have the potential to result in Level B harassment of ringed and bearded seals in the form of TTS and behavioral disturbance. No serious injury, mortality or Level A takes are anticipated to result from this activity. At close ranges and high sound levels approaching those that could cause PTS, avoidance of the area immediately around the sound source would be seals' likely behavioral response.

NMFS estimates 11 takes of ringed seals and 1 take of bearded seals due to TTS from the submarine activities. TTS is a temporary impairment of hearing and TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, however, hearing sensitivity recovers rapidly after exposure to the sound ends. This activity has the potential to result in only minor levels of TTS, and hearing sensitivity of affected animals would be expected to recover quickly. Though TTS may occur in up to 11 ringed seals and 1 bearded seal, the overall fitness of these individuals is unlikely to be affected and negative impacts to the entire stocks are not anticipated.

Effects on individuals that are taken by Level B harassment could include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight. More severe behavioral responses are not anticipated due to the localized, intermittent use of active acoustic sources and mitigation by passive acoustic monitoring which will limit exposure to sound sources. Most likely, individuals will be temporarily displaced by moving away from the sound source. As described previously in the behavioral effects section, seals exposed to non-impulsive sources with a received sound pressure level within the range of calculated exposures, (142–193 dB re 1 μPa), have been shown to change their behavior by modifying diving activity and avoidance of the sound source (Götz *et al.,* 2010; Kvadsheim *et al.,* 2010). Although a minor change to a behavior may occur as a result of exposure to the sound sources associated with the planned action, these changes would be within the normal range of behaviors for the animal (*e.g.,* the use of a breathing hole further from the source, rather than one closer to the source, would be within the normal range of behavior). Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in fitness for the affected individuals, and would not result in any adverse impact to the stock as a whole.

The Navy's planned activities are localized and of relatively short duration. While the total project area is large, the Navy expects that most activities will occur within the ice camp action area in relatively close proximity to the ice camp. The larger study area depicts the range where submarines may maneuver during the exercise. The ice camp will be in existence for up to six weeks with acoustic transmission occurring intermittently over approximately four weeks.

The project is not expected to have significant adverse effects on marine mammal habitat. The project activities are limited in time and would not modify physical marine mammal habitat. While the activities may cause some fish to leave a specific area ensonified by acoustic transmissions, temporarily impacting marine mammals' foraging opportunities, these fish would likely return to the affected area. As such, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

For on-ice activity, serious injury and mortality are not anticipated. Level B harassment could occur but is unlikely due to mitigation measures followed during the exercise. Foot and snowmobile movement on the ice will be designed to avoid pressure ridges, where ringed seals build their lairs; runways will be built in areas without pressure ridges; snowmobiles will follow established routes; and camp buildup is gradual, with activity increasing over the first five days providing seals the opportunity to move to a different lair outside the ice camp area. The Navy will also employ its standard 100-m avoidance distance from any arctic animals. Implementation of these measures should ensure that ringed seal lairs are not crushed or damaged during ICEX20 activities and minimize the potential for seals and pups to abandon lairs and relocate.

The ringed seal pupping season on the ice lasts for five to nine weeks during late winter and spring. Ice camp deployment would begin in mid-February and be completed by March 15, before the pupping season. This will allow ringed seals to avoid the ice camp area once the pupping season begins, thereby reducing potential impacts to nursing mothers and pups. Furthermore, ringed seal mothers are known to physically move pups from the birth lair to an alternate lair to avoid predation. If a ringed seal mother perceives the acoustic transmissions as a threat, the local network of multiple birth and haulout lairs would allow the mother and pup to move to a new lair.

There is an ongoing UME for ice seals, including ringed and bearded seals. Elevated strandings have occurred in the Bering and Chukchi Seas since June 2018. Though elevated numbers of seals have stranded during this UME, this event does not provide cause for concern regarding population-level impacts, as the population abundance estimates for each of the affected species number in the hundreds of thousands. The study area for ICEX20 activities is in the Beaufort Sea and Arctic Ocean, well north and east of the primary area where seals have stranded along the western coast of Alaska (see map of strandings at: *https://www.fisheries.noaa.gov/national/marine-life-distress/2018-2019-ice-seal-unusual-mortality-event-alaska*). The location of the ICEX20 activities, combined with the short duration and low-level potential effects on marine mammals, suggest that the proposed activities are not expected to contribute to the ongoing UME.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- Impacts will be limited to Level B harassment, primarily in the form of behavioral disturbance;
- TTS is expected to affect only a limited number of animals;
- The number of takes proposed to be authorized are low relative to the estimated abundances of the affected stocks;
- There will be no loss or modification of ringed or bearded seal habitat and minimal, temporary impacts on prey;
- Physical impacts to ringed seal subnivean lairs will be avoided; and
- Mitigation requirements for ice camp activities would minimize impacts to animals during the pupping season.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Unmitigable Adverse Impact Analysis and Determination

Impacts to subsistence uses of marine mammals resulting from the proposed action are not anticipated. The proposed action would occur outside of the primary subsistence use season (*i.e.,* summer months), and the study area is 100–150 mi (161–241 km) seaward of known subsistence use areas. Harvest locations for ringed seals extend up to 80 nmi (148 km) from shore during the summer months while winter harvest of ringed seals typically occurs closer to shore. Additionally, no mortality or serious injury is expected or proposed to be authorized, and therefore no marine mammals would be removed from availability for subsistence. Based on this information, NMFS has preliminarily determined that there will not be an unmitigable adverse impact on subsistence uses from the Navy's proposed activities.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Alaska Regional Office (AKR), whenever we propose to authorize take for endangered or threatened species.

NMFS is proposing to authorize take of ringed seals and bearded seals, which are listed under the ESA. The Permits and Conservation Division has requested initiation of section 7 consultation with the Protected Resources Division of AKR for the issuance of this IHA. NMFS will conclude the ESA consultation prior to reaching a determination regarding the proposed issuance of the authorization.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the Navy for conducting submarine training and testing activities in the Beaufort Sea and Arctic Ocean beginning in February 2020, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this Notice of Proposed IHA. We also request comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent renewal.

On a case-by-case basis, NMFS may issue a one-year IHA renewal with an additional 15 days for public comments when (1) another year of identical or nearly identical activities as described in the Specified Activities section of this notice is planned or (2) the activities as described in the Specified Activities section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the Dates and Duration section of this notice, provided all of the following conditions are met:

• A request for renewal is received no later than 60 days prior to expiration of the current IHA.

• The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested renewal are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take because only a subset of the initially analyzed activities remain to be completed under the Renewal); and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

• Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: December 12, 2019.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–27124 Filed 12–16–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Gear Marking Requirement for Atlantic Large Whale Take Reduction Plan.

OMB Control Number: 0648–0364.

Form Number(s): None.

Type of Request: Regular submission, extension of a current information collection.

Number of Respondents: 3,672 respondents.

Average Hours per Response: Each mark requires approximately 5 minutes of time and each respondent has an average of 47 new marks per year.

Burden Hours: 14,382 hours per year.

Needs and Uses: The gear marking requirements are designed to help NOAA's National Marine Fisheries Service (NMFS) improve the quality of information concerning the taking of endangered right, humpback, and fin whales incidental to commercial fishing operations. Specifically, information collected through gear marking assists NMFS and the Atlantic Large Whale Take Reduction Team (ALWTRT) identify the type of and general location of commercial fisheries that interact with federally protected marine mammals and may result in mortality and serious injury. Accordingly, this information will be used to tailor management measures to reduce the risk of mortality and serious injury of marine mammal incidentals to commercial fishing operations.

Affected Public: Primary respondents are business or other for-profit organizations (fishermen), and individuals or households.

Frequency: All gear must be marked and maintained so marks are visible. On average, gear is replaced every 5–6 years, at which time the new gear must be marked.

Respondent's Obligation: Mandatory.

This information collection request may be viewed at *reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2019–27091 Filed 12–16–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–49]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19–49 with attached Policy Justification and Sensitivity of Technology.

Dated: December 12, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

SEP 10 2019

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-49 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Poland for defense articles and services estimated to cost $6.5 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 19-49

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Poland

(ii) *Total Estimated Value:*

Major Defense Equipment *	$4.1 billion
Other	2.4 billion
TOTAL	6.5 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Thirty-two (32) F-35 Joint Strike Fighter Conventional Take Off and Landing (CTOL) Aircraft

Thirty-three (33) Pratt & Whitney F-135 Engines (32 installed, 1 spare)

Non-MDE: Also included are Electronic Warfare Systems; Command, Control, Communications, Computer, and Intelligence/Communications, Navigational, and Identification (C4I/CNI); Autonomic Logistics Global Support System (ALGS); Autonomic

Logistics Information System (ALIS); Full Mission Trainer; Weapons Employment Capability, and other Subsystems, Features, and Capabilities; F-35 unique infrared flares; reprogramming center; F-35 Performance Based Logistics; software development/integration; aircraft ferry and tanker support; support equipment; tools and test equipment; communications equipment; spares and repair parts; personnel training and training equipment; publications and technical documents; U.S. Government and contractor engineering, logistics, and personnel services; and other related elements of logistics and program support.

(iv) *Military Department:* Air Force (PL-D-SAI)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* September 10, 2019

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Poland—F-35 Joint Strike Fighter Aircraft

Poland has requested to buy thirty-two (32) F-35 Joint Strike Fighter Conventional Take Off and Landing (CTOL) Aircraft and thirty-three (33) Pratt & Whitney F-135 Engines. Also included are Electronic Warfare Systems; Command, Control, Communications, Computer, and Intelligence/Communications, Navigational, and Identification (C4I/CNI); Autonomic Logistics Global Support System (ALGS); Autonomic Logistics Information System (ALIS); Full Mission Trainer; Weapons Employment Capability, and other Subsystems, Features, and Capabilities; F-35 unique infrared flares; reprogramming center; F-35 Performance Based Logistics; software development/integration; aircraft ferry and tanker support; support equipment; tools and test equipment; communications equipment; spares and repair parts; personnel training and training equipment; publications and technical documents; U.S. Government and contractor engineering, logistics, and personnel services; and other related elements of logistics and program support. The estimated cost is $6.5 billion.

This proposed sale will support the foreign policy and national security of the United States by improving the security of a NATO ally, which is an important force for political stability and economic progress in Europe. This sale is consistent with U.S. initiatives to provide key allies in the region with modern systems that will enhance interoperability with U.S. forces and increase security.

This proposed sale of F-35s will provide Poland with a credible defense capability to deter aggression in the region and ensure interoperability with U.S. forces. The proposed sale will augment Poland's operational aircraft inventory and enhance its air-to-air and air-to-ground self-defense capability. The Polish Air Force's legacy MiG-29 and Su-22 fleet will be replaced with F-35s. Poland will have no difficulty absorbing these aircraft into its armed forces.

The proposed sale of this aircraft, systems and support will not alter the basic military balance in the region.

The prime contractors will be Lockheed Martin Aeronautics Company in Fort Worth, Texas; and Pratt &Whitney Military Engines in East Hartford, Connecticut. There are no known offset agreements proposed in connection with this potential sale. However, the purchaser typically requests offsets. Any offset agreements will be defined in negotiations between the purchaser and the contractor(s).

Implementation of this proposed sale will require multiple trips to Poland involving U.S. Government and contractor representatives for technical reviews/support, program management and training over the life of the program. U.S. contractor representatives will be required in Poland to conduct Contractor Engineering Technical Services (CETS) and Autonomic Logistics and Global Support (ALGS) for after aircraft delivery.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-49

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The F-35 Conventional Take-Off and Landing (CTOL) Block 4 aircraft is classified SECRET, except as noted below. It contains current technology representing the F-35 low observable airframe/outer mold line, Pratt & Whitney engine, radar, integrated core processor central computer, mission systems/electronic warfare suite, a multiple sensor suite, operational flight and maintenance trainers, technical data/documentation, and associated software. As the aircraft and its subsystems are under development, many specific identifying equipment/system nomenclatures have not been assigned to date. Sensitive and classified elements of the F-35 CTOL Block 4 aircraft include hardware, accessories, components, and associated software for the following major subsystems:

a. The Propulsion system is classified SECRET and contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET. The single 40,000-lb thrust class engine is designed for low observability and has been integrated into the aircraft system. Pratt & Whitney, with the F-135, is developing and producing engine turbo machinery compatible with the F-35 and assures highly reliable, affordable performance. The engine is designed to be utilized in all F-35 variants, providing unmatched commonality and supportability throughout the worldwide base of F-35 users. The CTOL propulsion configuration consists of a main engine, diverterless supersonic inlet, and a Low Observable Axisymmetric Nozzle (LOAN).

b. The AN/APG-81 Active Electronically Scanned Array (AESA) provides mission systems with air-to-air and air-to-ground tracks, which the mission system uses as a component to sensor fusion. The AESA allows the radar to direct RF energy in a way that does not expose the F-35, allowing it to maintain low observability in high-threat environments. The radar subsystem supports integrated system performance for airto-air missions by providing search, track, identification, and AIM-120 missile data link functionality. The radar also provides synthetic aperture radar mapping for locating surface targets and weather mapping for weather avoidance. The radarfunctions are tightly integrated, interleaved, and managed by an interface to sensor management functions within mission software. The hardware and software are classified SECRET.

c. The Electro Optical Targeting System (EOTS) contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET. The EOTS subsystem to the sensor suite provides long-range detection and tracking, Infrared Search and Track (IRST) capability, a Forward-Looking Infrared (FLIR) sensor for precision tracking, and Bomb Damage Indication (BDI) capability. EOTS replaces multiple separate internal or podded systems typically found on legacy aircraft. The functionality of the EOTS employs the following modes: Targeting FLIR; Laser Range-Finding and Target Designation; EO DAS and EOTS Performance.

d. The Electro-Optical Distributed Aperture System (EODAS) is a subsystem to the sensor suite and provides full spherical coverage for air-to-air and air-to-ground detection and Navigation Forward Looking Infrared (NFLIR) imaging. The system contains both SECRET and UNCLASSIFIED elements and contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET. The NFLIR capability provides infrared (IR) imagery directly to the pilot's Helmet-Mounted Display (HMD) for navigation in total darkness, including takeoff and landing, and provides a passive IR input to the F-35's sensor fusion algorithms. The all-aspect missile warning function provides time-critical warnings of incoming missiles and cues other subsystems to provide effective countermeasure employment. EODAS also provides an IRST function that can create and maintain Situational Awareness-quality tracks (SAIRST). EODAS is a midwave Infrared (IR) system consisting of six identical sensors distributed around the F-35 aircraft. Each sensor has a corresponding airframe window panel integrated with the aircraft structure to meet aerodynamic and stealth requirements.

e. The Electronic Warfare (EW) system contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET. Sensitive elements include: apertures; radio frequency (RF) and infrared (IR) countermeasures; and Electronic Countermeasures (ECM) techniques and features. The reprogrammable, integrated system provides radar warning and electronic support measures (ESM) along with a fully integrated countermeasures (CM) system. The EW system is the primary subsystem used to enhance situational awareness, targeting support and self-defense through the search, intercept, location and identification of in-band emitters and to automatically counter IR and RF threats. The IR and RF countermeasures are classified SECRET. This system uses low signature-embedded apertures, located in the aircraft control surface edges, to provide direction finding and identification of surface and airborne emitters and the geo location of surface emitters. The system is classified SECRET.

f. The Command, Control, Communications, Computers and Intelligence/ communications, Navigation, and Identification (C4I/CNI) system provides the pilot with unmatched connectivity to flight members, coalition forces, and the battlefield. It is an integrated subsystem designed to provide a broad spectrum of secure, antijam, covert voice and data communications, precision radio navigation and landing capability, self-identification, beyond visual range target identification, and connectivity with off-board sources of information. The functionality is tightly integrated within the mission system for enhanced efficiency and effectiveness in the areas of communications, navigation, identification, and sensor fusion. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET. The CNI function includes both SECRET and UNCLASSIFIED elements. Sensitive elements of the CNI subsystems include:

1. The VHF/UHF Voice and Data (Plain and Secure) Communication functionality includes air-to-air UHF/VHF voice and data, both clear and secure, to provide communications with other friendly and coalition aircraft, air-to ground UHF voice to provide communications with ground sites, and intercommunication voice and tone alerts to provide communications between the avionics system and the pilot. UHF/VHF downlink of air vehicle status and maintenance information is provided to notify the ground crews of the amounts and types of stores, fuel, and other supplies or equipment needed to quickly turn the aircraft for the next mission. The system contains both SECRET and UNCLASSIFIED elements and contains technology representing the latest state of-the-art in several areas. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET.

2. The Tactical Air Navigation (TACAN) functionality provides operational modes to identify ground station and to provide bearing-to-station, slant range-to ground station, bearing-to-airborne station and slant range to the nearest airborne station or aircraft. TACAN is not unique to the F-35 aircraft but is standard on most U.S. Air Force aircraft. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET.

3. The Identification Friend or Foe Interrogator and Transponder Identification functionality consists of integrated Mark XII Identification Friend or Foe (IFF) transponder capability to provide identification of other friendly forces. The CNI system supports sensor fusion by supplying data from IFF interrogations and offboard sources through the intra-flight data link. The system contains both SECRET and UNCLASSIFIED elements and contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET.

4. The Global Positioning System Navigation functionality includes the Global Positioning System (OPS) aided inertial navigation to provide high-quality positional navigation, and the Instrument Landing System (ILS)/ Tactical Air Control and Navigation (TACAN) to provide navigation and landing cues within controlled airspace. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET.

5. The Multi-Function Advanced Data Link (MADL) is used specifically for communications between F-35 aircraft and has a very low probability of intercept, contributing to covert operations. The system contains both SECRET and UNCLASSIFIED elements and contains technology representing the latest stateof-the-art in several areas. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET.

6. The Inertial Navigation System is an all-attitude, Ring Laser Gyro-based navigation system providing outputs of linear and angular acceleration, velocity, body angular rates, position, altitude (roll, pitch, and platform azimuth), magnetic and true heading, altitude, and time tags. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET.

7. The Radar Altimeter functionality is a module provided in the CNI system rack 3A and uses separate transmit and receive antennae. It measures and reports altitude, and altitude rate of change. Control data is transferred over

to a configurable avionics interface card, which translates the information to the F-35 aircraft computers. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET.

8. The Instrument Landing System (ILS) measures, and reports azimuth course and alignment, elevation course alignment, and distance to the runway. Data from the ILS is used to drive visual flight instrumentation. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET.

9. The Tactical Data Link is a secure broadcast Tactical Digital Information Link (TADIL) used for real-time voice/ data exchange for command and control, relative navigation, and Precise Position Location Identification (PPLI), providing Link-16 type capabilities. The system contains both SECRET and UNCLASSIFIED elements and contains technology representing the latest state of-the-art in several areas. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is classified SECRET.

g. The F-35 Autonomic Logistics Global Sustainment (ALGS) includes both SECRET and UNCLASSIFIED elements. It provides a fully integrated logistics management solution. ALGS integrates a number of functional areas, including supply chain management, repair, support equipment, engine support, and training. The ALGS infrastructure employs a state-of-the-art information system that provides real-time, decision-worthy information for sustainment decisions by flight line personnel. Prognostic health monitoring technology is integrated with the air system and is crucial to the predictive maintenance of vital components.

h. The F-35 Autonomic Logistics Information System (ALIS) includes both SECRET and UNCLASSIFIED elements. The ALIS provides an intelligent information infrastructure that binds all of the key concepts of ALGS into an effective support system. ALIS establishes the appropriate interfaces among the F-35 Air Vehicle, the warfighter, the training system, government information technology (IT) systems, JSF operations, and supporting commercial enterprise systems. Additionally, ALIS provides a comprehensive tool for data collection and analysis, decision support, and action tracking.

i. The F-35 Training System includes both SECRET and UNCLASSIFIED elements. The Training System includes several types of training devices, to provide for integrated training of both pilots and maintainers. The pilot training device includes a Full Mission Simulator (FMS). The maintainer training devices include an Aircraft Systems Maintenance Trainer (ASMT), Ejection System Maintenance Trainer (ESMT), and Weapons Loading Trainer (WLT). The F-35 Training System can be integrated, where both pilots and maintainers learn in the same Integrated Training Center (ITC). Alternatively, the pilots and maintainers can train in separate facilities (Pilot Training Center and Maintenance Training Center).

j. Weapons employment capability is SECRET and contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is SECRET. Software (object code) is classified SECRET. Sensitive elements include co-operative targeting.

k. Other Subsystems, Features, and Capabilities:

1. The Low Observable Air Frame is SECRET and contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is classified SECRET. Software (object code) is SECRET. Sensitive elements include: the Radar Cross Section and its corresponding plots, construction materials and fabrication.

2. The Integrated Core Processor (ICP) Central Computer is SECRET and contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is SECRET. Software (object code) is classified SECRET. Sensitive elements include: F-35 Integrated Core Processor utilizing Commercial Off-the-Shelf (COTS) Hardware and Module Design to maximize growth and allow for efficient management of DMS and Technology Insertion, if additional processing is needed, a second ICP will be installed in the space reserved for that purpose, more than doubling the current throughput and memory capacity.

3. The F-35 Helmet Mounted Display System (HMDS) is SECRET and contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is SECRET. Software (object code) is SECRET. Sensitive elements include: HMDS consists of the Display Management Computer-Helmet, a helmet shell/display module, a quick disconnect integrated as part of the ejection seat, helmet trackers and tracker processing, day- and night-vision camera functions, and dedicated system/graphics processing. The HMDS provides a fully sunlight readable, bi ocular display presentation of aircraft information projected onto the pilot's helmet visor. The use of a night vision camera integrated into the helmet eliminates the need for separate Night Vision Goggles (NVG). The camera video is integrated with EO and IR imaging inputs and displayed on the pilot's visor to provide a comprehensive night operational capability.

4. The Pilot Life Support System is SECRET and contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is SECRET. Software (object code) is SECRET. Sensitive elements include: a measure of Pilot Chemical, Biological, and Radiological Protection through use of an On-Board Oxygen Generating System (OBOGS); and an escape system that provide additional protection to the pilot. OBOGS takes the Power and Thermal Management System (PTMS) air and enriches it by removing gases (mainly nitrogen) by adsorption, thereby increasing the concentration of oxygen in the product gas and supplying breathable air to the pilot.

5. The Off-Board Mission Support System is SECRET and contains technology representing the latest state-of-the-art in several areas. Information on performance and inherent vulnerabilities is SECRET. Software (object code) is SECRET. Sensitive elements include: mission planning, mission briefing, maintenance/ intelligence/ tactical debriefing, sensor/ algorithm planning, EW system reprogramming, data debrief, etc.

l. Publications: Manuals are considered SECRET as they contain information on aircraft/system performance and inherent vulnerabilities.

2. The JSF Reprogramming Center is classified SECRET and contains technology representing the latest state-of-the-art in several areas. This hardware/software facility is located in the United States and provides F-35 customers a means to update JSF electronic warfare databases. Sensitive elements include: EW software databases and tools to modify these databases.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that Poland can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal are authorized for release and export to the Government of Poland.

[FR Doc. 2019–27133 Filed 12–16–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Notice of Intent To Prepare a Tiered Environmental Impact Statement for the New Jersey Back Bays Coastal Storm Risk Management Feasibility Study

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: Pursuant to the requirements of the National Environmental Policy Act (NEPA), the U.S. Army Corps of Engineers, Philadelphia District (Corps) is preparing an integrated Feasibility Report/Tiered Environmental Impact Statement (EIS) for the proposed New Jersey Back Bays (NJBB) Coastal Storm Risk Management (CSRM) Feasibility Study. The study is assessing the feasibility of coastal storm risk management alternatives to be implemented within the authorized study area with a specific emphasis on the back bay areas along the New Jersey Atlantic Coast extending from Cape May Inlet to Shark River Inlet including the NJ Coastal Lakes Area.

DATES: Comments and suggestions must be submitted by January 16, 2020.

ADDRESSES: Pertinent information about the study can be found at: *https://www.nap.usace.army.mil/Missions/Civil-Works/New-Jersey-Back-Bays-Study/*. Interested parties are welcome to send written comments and suggestions concerning the scope of issues to be evaluated within the Tiered EIS to Steven D. Allen, Environmental Resources Branch, Planning Division, U.S. Army Corps of Engineers, Philadelphia District. Mail: Steven D. Allen, U.S. Army Corps of Engineers, Philadelphia District, CENAP–PL–E, Wanamaker Building, 100 Penn Square East, Philadelphia, PA 19107–3390; phone: (215) 656–6559; email: *Steven.D.Allen@usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: Questions about the overall NJBB study should be directed to J.B. Smith, Project Manager, U.S. Army Corps of Engineers, Philadelphia District, Planning Division, Project Development Branch. Mail: J.B. Smith, U.S. Army Corps of Engineers, Philadelphia District, CENAP–PL–PC, Wanamaker Building, 100 Penn Square East, Philadelphia, PA 19107–3390; Phone: (215) 656–6579; email: *J.B.Smith@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

1. Background

The U.S. Army Corps of Engineers (Corps), in partnership with the New Jersey Department of Environmental Protection (NJDEP), as the non-federal sponsor, are undertaking this study. The NJBB CSRM Feasibility Study area is one of 9 focus areas with vulnerable coastal populations identified in the North Atlantic Coast Comprehensive Study (NACCS). The NACCS was conducted in response to Public Law 113–2 and the Water Resource and Reform Development Act (WRRDA) of 2014 following the devastation in the wake of Hurricane Sandy, which greatly affected the study area in October of 2012. The purpose of the NJBB CSRM Feasibility Study is to identify comprehensive CSRM strategies to increase coastal resilience, and to reduce flooding risk from future storms and impacts of sea level change. The objective of the Study is to investigate CSRM problems and solutions to reduce damages from coastal flooding that affect population, critical infrastructure, critical facilities, property, and ecosystems. The authority for the proposed project is the resolution adopted by the U.S. House of Representatives Committee on Public Works and Transportation and the U. S. Senate Committee on Environment and Public Works dated December 1987. A Feasibility Cost Sharing Agreement (FCSA) was executed in 2016 with the NJDEP.

2. Study Area

The study area encompasses approximately 950 square miles located behind the New Jersey barrier islands of Monmouth, Ocean, Burlington, Atlantic and Cape May Counties, and includes the set of interconnected water bodies and coastal lakes that are separated from the Atlantic Ocean.

3. Corps Decision Making

As required by Council on Environmental Quality's Principles, Requirements and Guidelines for Water and Land Related Resources Implementation Studies all reasonable alternatives to the proposed Federal action that meet the purpose and need will be considered in the Tiered EIS. Tiering, which is defined in 40 CFR 1508.28, is a means of making the environmental review process more efficient by allowing parties to ''eliminate repetitive discussions of the same issues and to focus on the actual issues suitable for decision at each level of environmental review'' (40 CFR 1502.20). The Study will consider the full array of structural, non-structural, and natural and nature-based measures, and will consider past, current, and future coastal storm risk management and resilience planning initiatives and projects underway by the USACE and other Federal, State, and local agencies.

4. Public Participation

The Corps and the NJDEP hosted two agency workshop meetings in June 2017, with representatives from federal and state agencies, counties, municipalities, non-governmental organizations (NGOs), elected officials and academia. The Corps initially announced the preparation of an integrated Feasibility Report/EIS for study in the December 27, 2017 **Federal Register**. Two public NEPA scoping meetings were later held in the southern and northern regions of the study area in September 2018. Subsequent to the publication of the December 27, 2017 NOI, the Study was granted an exemption from the requirement to complete the feasibility study within 3 years, as required in Section 1001(a) of the Water Resources Reform and Development Act of 2014. This exemption was granted on October 31, 2018 on an interim basis, and allowed for an additional 17 months to complete the Draft Integrated Feasibility Report and Tier 1 EIS. Therefore, in order to align the revised study schedule with Executive Order 13807, Notice to Withdraw the original NOI was published in the February 20, 2019 **Federal Register**. To further provide the public with study information, an Interim Feasibility Report and Environmental Scoping Document was released on February 28, 2019 that identified the preliminary economic, environmental, engineering and other studies performed to date of the above referenced alternatives. This report presented the selection of a focused array of alternatives for further evaluation. A webinar was later held on March 14, 2019 to present the findings of the report and to solicit comments from the general public and stakeholders. In addition, comments, concerns and information submitted to the Corps are being evaluated and considered during the development of the Draft EIS. Comments received are continuing to aid the study progress and included in the draft report and will be part of the administrative record

5. Lead and Cooperating Agencies

The U.S. Army Corps of Engineers is the lead federal agency for the preparation of a Tiered EIS in order to meet the requirements of the NEPA and the NEPA Implementing Regulations of the President's Council on Environmental Quality (40 CFR 1500–1508). The following agencies have accepted the invitation to be Cooperating Agencies: The U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. The preparation of a Tiered EIS will be coordinated with New Jersey State and local municipalities with discretionary authority relative to the proposed actions. The Draft Integrated Feasibility Report/Tiered EIS is currently scheduled for distribution to the public in March of 2020.

Dated: December 9, 2019.

Jeffrey L. Milhorn,

Major General, U.S. Army, Commander, North Atlantic Division.

[FR Doc. 2019–27122 Filed 12–16–19; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0154]

Agency Information Collection Activities; Comment Request; Foreign Gifts and Contracts Disclosures

AGENCY: Department of Education (ED), Office of the General Counsel (OGC)

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is requesting the Office of Management and Budget (OMB) to conduct an emergency review of a new information collection.

DATES: Approval by the OMB has been requested by January 2, 2020. Interested persons are invited to submit comments on or before December 27, 2019.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0154. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W–208D, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Hilary Malawer, Deputy General Counsel, 202–401–6148.

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: Foreign Gifts and Contracts Disclosures.

OMB Control Number: 1801–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Private and Public Institutions of Higher Education (IHEs).

Total Estimated Number of Annual Responses: 400.

Total Estimated Number of Annual Burden Hours: 8,000.

Abstract: Section 117 of the Higher Education Act of 1965 (HEA), as amended, provides that institutions of higher education must file a disclosure report with the Secretary of Education under the following circumstances: Whenever any institution is owned or controlled by a foreign source or receives a gift from or enters into a contract with a foreign source, the value of which is $250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year, the institution shall file a disclosure report with the Secretary on January 31 or July 31, whichever is sooner. (see *https://www.govinfo.gov/content/pkg/USCODE-2017-title20/pdf/USCODE-2017-title20-chap28-subchapI-partB-sec1011e.pdf*).

This collection of information is necessary to implement 20 U.S.C. 1011f.

Dated: December 13, 2019.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2019–27262 Filed 12–13–19; 4:15 pm]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Fulbright-Hays Group Projects Abroad Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education is issuing a notice inviting applications for fiscal year (FY) 2020 for the Fulbright-Hays Group Projects Abroad (GPA) Program, Catalog of Federal Domestic Assistance (CFDA) number 84.021A and 84.021B. This notice relates to the approved information collection under OMB control number 1840–0792.

DATES:

Applications Available: December 17, 2019.

Deadline for Transmittal of Applications: February 18, 2020.

Pre-Application Webinar information: The Department will hold a pre-application meeting via webinar for prospective applicants. Detailed information regarding this webinar will be provided on the Group Projects Abroad website at *www2.ed.gov/programs/iegpsgpa/index.html*.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf*.

FOR FURTHER INFORMATION CONTACT: Cory Neal, U.S. Department of Education, 400 Maryland Avenue SW, Room 258–12, Washington, DC 20202. Telephone: (202) 453–6137. Email: *GPA@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Fulbright-Hays GPA Program is to promote, improve, and develop the study of modern foreign languages and area studies at varying levels of education. The program provides opportunities for faculty, teachers, and undergraduate and graduate students to conduct individual and group projects overseas to carry out research and study in the fields of modern foreign languages and area studies.

This competition invites applicants to submit an application to request support for either a Fulbright-Hays GPA short-term project (GPA short-term projects 84.021A) or a Fulbright-Hays GPA long-term project (GPA long-term projects 84.021B). Applicants must clearly indicate on the SF 424, the Application for Federal Assistance cover sheet whether they are applying for support for a GPA short-term project (84.021A) or a GPA long-term project (84.021B). Additional submission details are included in the application package.

There are three types of GPA short-term projects: (1) Short-term seminar projects of four to six weeks in length designed to help integrate international studies into an institution's or school system's general curriculum by focusing on a particular aspect of area study, such as the culture of an area or country of study (34 CFR 664.11); (2) curriculum development projects of four to eight weeks in length that provide participants an opportunity to acquire resource materials for curriculum development in modern foreign language and area studies for use and dissemination in the United States (34 CFR 664.12); and (3) group research or study projects of three to twelve months in duration designed to give participants the opportunity to undertake research or study in a foreign country (34 CFR 664.13).

GPA long-term projects are advanced overseas intensive language projects that may be carried out during a full year, an academic year, a semester, a trimester, a quarter, or a summer. GPA long-term projects are designed to take advantage of the opportunities that exist in the foreign country for intensive advanced language training and for using the language while experiencing the culture in the foreign country. Participants should have successfully completed at least two academic years of training in the language to be studied to be eligible to participate in a GPA intensive advanced language training program. In addition, the language to be studied must be indigenous to the host country and maximum use must be made of local institutions and personnel (34 CFR 664.14).

Priorities: This notice contains one absolute priority and four competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(ii), the absolute priority is from the regulations for this program (34 CFR 664.32). Competitive Preference Priorities 1 and 2 are from the notice of final priorities and definitions published in the **Federal Register** on June 16, 2016 (81 FR 39196) (the 2016 NFP). Competitive Preference Priority 3 is from the regulations for this program (34 CFR 664.32), and Competitive Preference Priority 4 is from the notice of final priorities published in the **Federal Register** on September 24, 2010 (75 FR 59050) (the 2010 NFP).

Absolute Priority: For FY 2020 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Specific Geographic Regions of the World.

A group project that focuses on one or more of the following geographic regions of the world: Africa, East Asia, South Asia, Southeast Asia and the Pacific, the Western Hemisphere (Central and South America, Mexico, and the Caribbean), Eastern and Central Europe and Eurasia, and the Near East.

Competitive Preference Priorities: For FY 2020, there are four competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award three additional points to an application that meets Competitive Preference Priority 1; two additional points to an application that meets Competitive Preference Priority 2; two additional points to an application that meets Competitive Preference Priority 3; and two additional points to an application that meets Competitive Preference Priority 4. Applicants for GPA short-term projects may address Competitive Preference Priorities 1, 3, and 4. Applicants for GPA long-term projects may address Competitive Preference Priorities 2 and 3. In the application narrative, an applicant must indicate the priority or priorities being addressed and provide a substantive description of how the proposed activities support the applicant's selected priority or priorities and provide documentation supporting its claims.

These priorities are:

Competitive Preference Priority 1—Applications for GPA Short-term Projects from Selected Institutions and Organizations (3 Points).

Applications for GPA short-term projects from the following types of institutions and organizations:

- Minority-Serving Institutions (MSIs)(as defined in this notice).
- Community colleges (as defined in this notice).
- New applicants (as defined in this notice).
- State educational agencies (as defined in this notice).

Competitive Preference Priority 2—Applications for GPA Long-term Projects from MSIs (2 Points).

Applications for GPA long-term advanced overseas intensive language training projects from MSIs.

Competitive Preference Priority 3—Substantive Training and Thematic Focus on Less Commonly Taught Languages (2 Points).

Applications that propose GPA short-term projects or GPA long-term projects that provide substantive training and thematic focus on any modern foreign language except French, German, or Spanish.

Competitive Preference Priority 4—Inclusion of K–12 Educators (2 Points).

Applications that propose short-term projects abroad that develop and improve foreign language studies, area studies, or both at elementary and secondary schools by including K–12 teachers or K–12 administrators as at least 50 percent of the project participants.

Definitions:

The following definitions are from the 2016 NFP and are designed to provide clarity for applicants addressing the competitive preference priorities.

Community college means an institution that meets the definition in section 312(f) of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1058(f)); or an institution of higher education (IHE) (as defined in section 101 of the HEA (20 U.S.C. 1001)) that awards degrees and certificates, more than 50 percent of which are not bachelor's degrees (or an equivalent).

Minority-serving institution (MSI) means an institution that is eligible to receive assistance under sections 316 through 320 of part A of title III, under part B of title III, or under title V of the HEA.

New applicant means any applicant that has not received a discretionary grant from the Department of Education under the Fulbright-Hays Act prior to the deadline date for applications under this program.

State educational agency means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

Program Authority: 22 U.S.C. 2452(b)(6).

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 664. (e) The 2010 NFP. (f) The 2016 NFP.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration's budget request for FY 2020 does not include funds for this program. However, we are inviting applications to allow enough time to complete the grant process before the end of the current fiscal year, if Congress appropriates the funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2021 from the list of unfunded applications from this competition.

Estimated Range of Awards:

GPA short-term projects: $50,000–$100,000.

GPA long-term projects: $50,000–$250,000.

Estimated Average Size of Awards:

GPA short-term projects: $80,059.

GPA long-term projects: $185,025.

Maximum Award: We will not make a GPA short-term award exceeding $100,000 for a single project period of 18 months. We will not make a GPA long-term project award exceeding $250,000 for a single budget period of 24 months.

Estimated Number of Awards: 25.

GPA short-term projects: 10.

GPA long-term projects: 15.

Note: The Department is not bound by any estimates in this notice.

Project Period:

GPA short-term projects: Up to 18 months.

GPA long-term projects: Up to 24 months.

III. Eligibility Information

1. *Eligible Applicants:* (1) IHEs, (2) State educational agencies, (3) private nonprofit educational organizations, and (4) consortia of these entities.

Eligible Participants: Citizens, nationals, or permanent residents of the United States, who are (1) faculty members who teach modern foreign languages or area studies in an IHE, (2) teachers in elementary or secondary schools, (3) experienced education administrators responsible for planning, conducting, or supervising programs in modern foreign language or area studies at the elementary, secondary, or postsecondary levels, or (4) graduate students, or juniors or seniors in an IHE, who plan teaching careers in modern foreign languages or area studies.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

3. *Funding Restrictions:* We specify unallowable costs in 34 CFR 664.33. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative (Part III) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative [Part III] to no more than 40 pages and (2) use the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to Part I, the cover sheet; Part II, budget section, including the narrative budget justification; Part IV, the assurance and certifications; or the one-page abstract, the resumes, the biography, or letters of support. However, the recommended page limit does apply to all of the application narrative.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 664.31 and are as follows:

(a) *Plan of operation.* (20 points)

(1) The Secretary reviews each application for information to determine the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows—

(i) High quality in the design of the project;

(ii) An effective plan of management that insures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purpose of the program;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective; and

(v) A clear description of how the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or handicapping condition.

(b) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information to determine the quality of key personnel the applicant plans to use on the project.

(2) The Secretary looks for information that shows—

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (b)(2)(i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(3) To determine the qualifications of a person, the Secretary considers evidence of past experience and training in fields related to the objectives of the project as well as other information that the applicant provides.

(c) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows—

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(d) *Evaluation plan.* (20 points)

(1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project.

(2) The Secretary looks for information that shows that the methods of evaluation are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(e) *Adequacy of resources.* (5 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows that the facilities, equipment, and supplies that the applicant plans to use are adequate.

(f) *Specific Program Criteria.* (35 points)

(1) In addition to the general selection criteria contained in this section, the Secretary reviews each application for information that shows that the project meets the specific program criteria.

(2) The Secretary looks for information that shows—

(i) The potential impact of the project on the development of the study of modern foreign languages and area studies in American education. (15 points)

(ii) The project's relevance to the applicant's educational goals and its relationship to its program development in modern foreign languages and area studies. (10 points)

(iii) The extent to which direct experience abroad is necessary to achieve the project's objectives and the effectiveness with which relevant host country resources will be utilized. (10 points)

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For FY 2020, GPA short-term project applications will be reviewed by separate panels according to world area. GPA long-term project applications will be reviewed by one panel. Separate rank order slates for GPA short-term projects and for GPA long-term projects will be developed and used to make funding recommendations. Each slate will include the peer reviewers' scores from the highest score to the lowest score for each application.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html*.

5. *Performance Measures:* Under the Government Performance and Results Act of 1993, the following measure will be used by the Department to evaluate the success of the GPA short-term program: The percentage of GPA short-term project participants who disseminated information about or materials from their group project abroad through more than one outreach activity within six months of returning to their home institution. The following measure will be used by the Department to evaluate the success of the GPA long-term program: The percentage of GPA long-term project participants who increased their reading, writing, and/or listening/speaking foreign language scores by one proficiency level. The efficiency of the GPA long-term program will be measured by considering the cost per GPA participant who increased his/her foreign language score in reading, writing, and/or listening/speaking by at least one proficiency level.

The information provided by grantees in their performance reports submitted via the International Resource Information System (IRIS) will be the source of data for this measure. Reporting screens for institutions can be viewed at: *http://iris.ed.gov/iris/pdfs/gpa_director.pdf* and *http://iris.ed.gov/iris/pdfs/gpa_participant.pdf*.

VII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov*. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register** in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Robert L. King,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2019–27113 Filed 12–16–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Student Support Services Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2020 for the Student Support Services (SSS) Program, Catalog of Federal Domestic Assistance (CFDA) number 84.042A. This notice relates to the approved information collection under OMB control number 1840–0017.

DATES:

Applications Available: December 17, 2019.

Deadline for Transmittal of Applications: January 27, 2020.

Deadline for Intergovernmental Review: March 26, 2020.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf*.

FOR FURTHER INFORMATION CONTACT: Lavelle Wright, U.S. Department of Education, 400 Maryland Avenue SW, Room 268–24, Washington, DC 20202–4260. Telephone: (202) 453–7739. Email: *Lavelle.Wright@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the SSS Program is to increase the number of disadvantaged, low-income college students, first-generation college students, and college students with disabilities in the United States who successfully complete a program of study at the postsecondary level. The support services that are provided should increase the retention and graduation rates for these categories of students and facilitate their transfer from two-year to four-year colleges and universities. The support services should also foster an institutional climate that supports the success of students who are limited English proficient, students from groups that are historically underrepresented in postsecondary education, students with disabilities, students who are homeless children and youths, students who are in foster care or are aging out of the foster care system, and other disconnected students. Student support services should also improve the financial and economic literacy of students.

Priorities: This notice contains two competitive preference priorities. Competitive Preference Priorities 1 and

2 are from the Secretary's Notice of Final Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on March 2, 2018 (83 FR 9096) (Supplemental Priorities).

Note: Applicants must include, in the one-page abstract submitted with the application, a statement indicating which, if any, of the competitive preference priorities are addressed. If the applicant has addressed the competitive preference priorities, this information must also be listed on the SSS Program Profile Form.

Competitive Preference Priorities: For FY 2020 and any subsequent year for which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to an additional five points to an application, depending on how well the application meets these priorities.

These priorities are:

Competitive Preference Priority 1—Fostering Flexible and Affordable Paths to Obtaining Knowledge and Skills (up to 3 points).

Projects that are designed to address improving collaboration between education providers and employers to ensure student learning objectives are aligned with the skills or knowledge required for employment in in-demand industry sectors or occupations (as defined in section 3(23) of the Workforce Innovation and Opportunity Act of 2014).

Competitive Preference Priority 2—Fostering Knowledge and Promoting the Development of Skills That Prepare Students To Be Informed, Thoughtful, and Productive Individuals and Citizens (up to 2 points).

Projects that are designed to address supporting instruction in personal financial literacy, knowledge of markets and economics, knowledge of higher education financing and repayment (*e.g.,* college savings and student loans), or other skills aimed at building personal financial understanding and responsibility.

Note: For both priorities, the Department is sufficiently interested in these topics that we may later seek to partner with successful applicants to conduct research and evaluation.

Definitions: The definitions below are from 34 CFR 77.1(c).

Demonstrates a rationale means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

Logic model (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

Note: In developing logic models, applicants may want to use resources such as the Regional Educational Laboratory Program's (REL Pacific) Education Logic Model Application, available at *https://ies.ed.gov/ncee/edlabs/regions/pacific/elm.asp,* to help design their logic models. Other sources include: *https://ies.ed.gov/ncee/edlabs/regions/pacific/pdf/REL_2014025.pdf, https://ies.ed.gov/ncee/edlabs/regions/pacific/pdf/REL_2014007.pdf,* and *https://ies.ed.gov/ncee/edlabs/regions/northeast/pdf/REL_2015057.pdf.*

Program Authority: 20 U.S.C. 1070a–11 and 20 U.S.C. 1070a–14.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75 (except for 75.215 through 75.221), 77, 79, 82, 84, 86, 97, 98 and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 646. (e) The Supplemental Priorities.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: We intend to use an estimated $313,849,000 for new SSS awards under this competition. Note: The President's Budget for FY 2020 requested $950,000,000 for the Administration's proposal to reform the Federal TRIO programs. The actual level of funding and changes to the program, if any, depend on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for the Federal TRIO Programs. Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of unfunded applications from this competition.

Estimated Range of Awards: $149,482–$1,595,544.

Estimated Average Size of Awards: $311,977.

Maximum Award: The maximum award varies based on whether the applicant is currently receiving an SSS grant, as well as the type of project and number of students served.

For applicants not currently receiving an SSS Program grant, the maximum awards are as follows:

Type of Proposal	Maximum Amount *
Regular SSS Proposal Serving a Minimum of 140 Student Participants	$253,032
Regular SSS Proposal Serving a Minimum of 100 Student Participants who are Students with Disabilities	253,032
English as a Second Language (ESL) SSS Proposal Serving a Minimum of 140 Student Participants	253,032
Science, Technology, Engineering and Mathematics (STEM) and Health Science SSS Proposal Serving a Minimum of 120 Student Participants	253,032
Teacher Preparation SSS Proposal Serving a Minimum of 140 Student Participants	253,032
Veterans SSS Proposal Serving a Minimum of 120 Student Participants	253,032

For applicants proposing to serve fewer than the minimum number of student participants specified in the above table, the maximum award is an amount equal to: $1,807 per student participant for Regular, ESL, and Teacher Preparation proposals; $2,530 per student participant for projects serving Students with Disabilities (SWD proposals); and $2,109 per student participant for STEM (including Health Science) and Veterans proposals.

For applicants currently receiving an SSS program grant, the maximum award amount is the greater of (a) $253,032 or (b) 100 percent of the applicant's base award amount for FY 2019.

For any currently funded applicant that proposes to serve fewer students than it served in FY 2019, the maximum award is the amount that corresponds with the cost per participant previously established for the project in FY 2019.

Estimated Number of New Awards: 1,069.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs or combinations of IHEs.

2. *Cost Sharing or Matching:* Section 402D(d)(4) of the HEA requires that all successful applicants that use SSS Program funds to provide grant aid to students pursuant to section 402D(d)(1) of the HEA must provide matching funds, in cash, from non-Federal funds, in an amount that is not less than 33 percent of the total amount of the SSS Program funds used for this aid. This matching requirement does not apply to a grant recipient that is an IHE eligible to receive funds under part A or part B of title III or under title V of the HEA.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

4. *Other:* An applicant may submit multiple applications if each separate application describes a project that will serve a different campus or a different population (section 402A(c)(5) of the HEA).

Under section 402A(h)(1) of the HEA, the term ''different campus'' means a site of an IHE that—(a) is geographically apart from the main campus of the institution; (b) is permanent in nature; and (c) offers courses in educational programs leading to a degree, certificate, or other recognized educational credential.

Under section 402A(h)(2) of the HEA, the term ''different population'' means a group of individuals that an eligible entity desires to serve through an SSS grant that is separate and distinct from any other population that the entity has applied to serve using Federal TRIO Program funds, or, while sharing some of the same needs as another population that the eligible entity has applied to serve using Federal TRIO Program funds, has distinct needs for specialized services. To implement the requirement in section 402A(h)(2) of the HEA for this competition, the Secretary is designating the populations to be served as: Participants who meet the specific requirements for SSS services, participants who are students with disabilities, participants who need ESL services, participants receiving services in the STEM fields, participants receiving Teacher Preparation Services, and participants who have served in the armed forces. These different populations need different types of services. Accordingly, the Secretary has determined that projects serving these different populations should be subject to different standards for the minimum number of participants. An applicant may submit more than one application as long as each application proposes to serve a different population. For project types other than a regular SSS project, an applicant must propose to serve 100 percent of the students in the specific project type.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

3. *Funding Restrictions:* We specify unallowable costs in 34 CFR 646.31. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

4. *Recommended Page Limit:* The application narrative, Part III of the application, is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative, which includes the budget narrative, to no more than 65 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins.
- Double space all text in the application narrative, and single space titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a 12-point font.
- Use an easily readable font such as Times New Roman, Courier, Courier New, or Arial.

The recommended 65-page limit does not apply to Part I, the Application for Federal Assistance cover sheet (SF 424); Part II, the Budget Information Summary form (ED Form 524); Part III–A, the SSS Program Profile form; Part III–B, the one-page Project Abstract form; or Part IV, the assurances and certifications. The recommended page limit also does not apply to a table of contents, which you should include in the application narrative. You must include your complete response to the selection criteria in the application narrative.

We recommend that any application addressing the competitive preference priorities include no more than three additional pages each for priorities 1 and 2, if addressed.

Applications that do not follow the page limit and formatting recommendations will not be penalized.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 646.21 and 34 CFR 75.210.

We will award up to 105 points to an application under the selection criteria and up to 5 additional points to an application under the competitive preference priorities, for a total score of up to 110 points. The maximum number of points available for each criterion is indicated in parentheses.

(a) *Need for the project* (24 points). The Secretary evaluates the need for an SSS project proposed at the applicant institution on the basis of the extent to which the application contains clear evidence of—

(1) A high number or percentage, or both, of students enrolled or accepted for enrollment at the applicant institution who meet the eligibility requirements of 34 CFR 646.3 (8 points);

(2) The academic and other problems that eligible students encounter at the applicant institution (8 points); and

(3) The differences between eligible SSS students compared to an appropriate group, based on the following indicators:

(i) Retention and graduation rates.

(ii) Grade point averages.

(iii) Graduate and professional school enrollment rates (four-year colleges only).

(iv) Transfer rates from two-year to four-year institutions (two-year colleges only) (8 points).

(b) *Objectives* (8 points). The Secretary evaluates the quality of the applicant's proposed objectives in the following areas on the basis of the extent to which they are both ambitious, as related to the need data provided under paragraph (a) of this section, and attainable, given the project's plan of operation, budget, and other resources.

(1) Retention in postsecondary education (3 points).

(2) In good academic standing at grantee institution (2 points).

(3) Two-year institutions only. (i) Certificate or degree completion (1 point); and (ii) Certificate or degree completion and transfer to a four-year institution (2 points).

(4) Four-year institutions only. Completion of a baccalaureate degree (3 points).

(c) *Plan of operation* (30 points). The Secretary evaluates the quality of the applicant's plan of operation on the basis of the following:

(1) The plan to inform the institutional community (students, faculty, and staff) of the goals, objectives, and services of the project and the eligibility requirements for participation in the project (3 points).

(2) The plan to identify, select, and retain project participants with academic need (3 points).

(3) The plan for assessing each individual participant's need for specific services and monitoring his or her academic progress at the institution to ensure satisfactory academic progress (4 points).

(4) The plan to provide services that address the goals and objectives of the project (10 points).

(5) The applicant's plan to ensure proper and efficient administration of the project, including the organizational placement of the project; the time commitment of key project staff; the specific plans for financial management, student records management, and personnel management; and, where appropriate, its plan for coordination with other programs for disadvantaged students (10 points).

(d) *Institutional commitment* (16 points). The Secretary evaluates the institutional commitment to the proposed project on the basis of the extent to which the applicant has—

(1) Committed facilities, equipment, supplies, personnel, and other resources to supplement the grant and enhance project services (6 points);

(2) Established administrative and academic policies that enhance participants' retention at the institution and improve their chances of graduating from the institution (6 points);

(3) Demonstrated a commitment to minimize the dependence on student loans in developing financial aid packages for project participants by committing institutional resources to the extent possible (2 points); and

(4) Assured the full cooperation and support of the Admissions, Student Aid, Registrar and data collection and analysis components of the institution (2 points).

(e) *Quality of personnel* (9 points). To determine the quality of personnel the applicant plans to use, the Secretary looks for information that shows—

(1) The qualifications required of the project director, including formal education and training in fields related to the objectives of the project, and experience in designing, managing, or implementing SSS or similar projects (3 points);

(2) The qualifications required of other personnel to be used in the project, including formal education, training, and work experience in fields related to the objectives of the project (3 points); and

(3) The quality of the applicant's plan for employing personnel who have succeeded in overcoming barriers similar to those confronting the project's target population (3 points).

(f) *Budget* (5 points). The Secretary evaluates the extent to which the project budget is reasonable, cost-effective, and adequate to support the project.

(g) *Evaluation plan* (8 points). The Secretary evaluates the quality of the evaluation plan for the project on the basis of the extent to which—

(1) The applicant's methods for evaluation—

(i) Are appropriate to the project and include both quantitative and qualitative evaluation measures (2 points); and

(ii) Examine in specific and measurable ways, using appropriate baseline data, the success of the project in improving academic achievement, retention and graduation of project participants (2 points); and

(2) The applicant intends to use the results of an evaluation to make programmatic changes based upon the results of project evaluation (4 points).

(h) *Quality of the project design* (5 points). In determining the quality of the design of the proposed project, the Secretary considers the extent to which the proposed project demonstrates a rationale (as defined in this notice).

Note: Under the "Objectives" selection criterion in paragraph (b) above, applicants must address the standardized objectives in 34 CFR 646.21(b)(1) through (4) related to the participants' academic achievements, including retention, good academic standing, graduation, and transfer rates. The graduation objective should be measured by cohorts of students who become SSS Program participants in each year of the project and should be compared to a relevant and valid comparison group. The graduation, certificate, and transfer rates for two-year institutions should be measured over a four-year period and that of four-year institutions should be measured over a six-year period.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For this competition, a panel of non-Federal reviewers will review each application in accordance with the selection criteria in 34 CFR 646.21, 34 CFR 75.210, and the competitive preference priorities. The individual scores of the reviewers will be added and the sum divided by the number of reviewers to determine the peer review score received in the review process. Additionally, in accordance with 34 CFR 646.22, the Secretary will award prior experience points to applicants that have conducted an SSS Program project within the last three Federal government fiscal years, based on their documented experience. Prior experience points, if any, will be added to the application's averaged reader score to determine the total score for each application. If there are insufficient funds for all applications with the same total scores, the Secretary will choose among the tied applications so as to serve geographical areas that have been underserved by the SSS Program.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition, the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate

circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.205(a)(2), we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html*.

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* The success of the SSS Program is measured by the percentage of SSS participants that complete a program of postsecondary education. The following performance measures have been developed to track progress toward achieving program success:

(a) The percentage of first-time, full-time freshmen SSS Program participants who are still enrolled at the beginning of the next academic year or have earned a degree at a two-year grantee institution or transferred from a two-year to a four-year institution.

(b) The percentage of first-time, full-time freshmen SSS participants at four-year institutions who received a bachelor's degree from the grantee institution (Note: The Department will calculate this measure based both on 100 percent and 150 percent of normal completion time).

(c) The percentage of first-time, full-time SSS participants at two-year institutions who received an associate's degree and/or transferred to a four-year institution (Note: The Department will calculate this measure based both on 100 percent and 150 percent of normal completion time).

(d) The cost per successful outcome.

All SSS Program grantees are required to submit an annual performance report documenting the persistence and degree attainment of their participants. Since students take different amounts of time to complete their degrees, multiple years of performance report data are needed to determine the degree completion rates of SSS Program participants. The Department will aggregate the data provided in the annual performance reports from all grantees to determine the overall program accomplishment level.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov*. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Robert L. King,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2019–27115 Filed 12–16–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Fulbright-Hays Doctoral Dissertation Research Abroad Fellowship Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2020 for the Fulbright-Hays Doctoral Dissertation Research Abroad (DDRA) Fellowship Program, Catalog of Federal Domestic Assistance (CFDA) number 84.022A. This notice relates to the approved information collection under OMB control number 1840–0005.

DATES:

Applications Available: December 17, 2019.

Deadline for Transmittal of Applications: February 18, 2020.

ADDRESSES: The addresses pertinent to this competition—including the addresses for obtaining and submitting an application—can be found under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Dr. Pamela J. Maimer, U.S. Department of Education, 400 Maryland Avenue SW, Room 258–24, Washington, DC 20202. Telephone: (202) 453–6891. Email: *ddra@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Fulbright-Hays DDRA Fellowship Program provides opportunities to doctoral candidates to engage in dissertation research abroad in modern foreign languages and area studies. The program is designed to contribute to the development and improvement of the study of modern foreign languages and area studies in the United States.

Priorities: This notice contains one absolute priority and two competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(ii), the absolute and competitive preference priorities are from the regulations for this program (34 CFR 662.21(d)).

Absolute Priority: For FY 2020, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Specific Geographic Regions of the World.

A research project that focuses on one or more of the following geographic areas: Africa, East Asia, Southeast Asia and the Pacific Islands, South Asia, the Near East, Central and Eastern Europe and Eurasia, and the Western Hemisphere (excluding the United States and its territories).

Competitive Preference Priorities: For FY 2020, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award an additional two points to an application that meets Competitive Preference Priority 1 and three points to an application that meets Competitive Preference Priority 2 (up to 5 additional points possible).

These priorities are:

Competitive Preference Priority 1—Focus on Less Commonly Taught Languages (2 points).

A research project that focuses on any modern foreign language except French, German, or Spanish.

Competitive Preference Priority 2—Thematic Focus on Academic Fields (3 points).

A research project conducted in the field of science, technology, engineering, mathematics, computer science, education (comparative or international), international development, political science, public health, or economics.

Note: Applicants that address Competitive Preference Priority 2 must intend to engage in dissertation research abroad in modern foreign languages and area studies with a thematic focus on any one of the academic fields referenced above.

Program Authority: 22 U.S.C. 2452(b)(6).

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 662.

Note: The open licensing requirement in 2 CFR 3474.20 does not apply to this program.

II. Award Information

Type of Award: Discretionary grants redistributed as fellowships to individual beneficiaries.

Estimated Available Funds: The Administration's budget request for FY 2020 does not include funds for this program. However, we are inviting applications to allow enough time to complete the grant process before the end of the current fiscal year, if Congress appropriates the funds for this program.

Estimated Range of Awards: $15,000–60,000.

Estimated Average Size of Awards: $35,000.

Estimated Number of Awards: 100.

Note: The Department is not bound by any estimates in this notice.

Project Period: The institutional project period is 18 months. Students may request funding for a period of no less than six months and no more than 12 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education (IHEs). As part of the application process, students submit individual applications to the IHE. The IHE then officially submits all eligible individual student applications with its grant application to the Department.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

4. *Other:* Under 34 CFR 662.22(b), no student applicant may receive a grant

from the Fulbright U.S. Student Program (FUSP) and a grant from the Fulbright-Hays DDRA Fellowship Program concurrently. Once a candidate has accepted a fellowship award from the FUSP and the FUSP has expended funds to the student, the student is then ineligible for a grant under the Fulbright-Hays DDRA Fellowship Program. A student applying for a grant under the Fulbright-Hays DDRA Fellowship Program must indicate on the application if the student has currently applied for a FUSP grant. If, at any point, the candidate accepts a FUSP award prior to being notified of the candidate's status with the Fulbright-Hays DDRA Fellowship Program, the candidate should immediately notify the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. If, after consultation with FUSP, we determine that FUSP has expended funds on the student (*e.g.,* the candidate has attended the pre-departure orientation or was issued grant funds), the candidate will be considered ineligible for an award under the Fulbright-Hays DDRA Fellowship Program.

IV. Application and Submission Information

1. *Address to Request Application Package:* Both IHEs and student applicants can obtain an application package via the internet or from the Education Publications Center (ED PUBS). To obtain a copy via the internet, use the following address: *www.G5.gov.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a TDD or a TTY, call, toll free: 1–877–576–7734.

You can contact ED Pubs at its website, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program as follows: CFDA number 84.022A.

2. *Recommended Page Limits:* The application narrative is where the student applicant addresses the selection criteria that reviewers use to evaluate the application. We recommend that the student applicant (1) limit the application narrative to no more than 10 pages and the bibliography to no more than two pages; and (2) use the following standards:

• A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative and bibliography. However, student applicants may single space all text in charts, tables, figures, graphs, titles, headings, footnotes, endnotes, quotations, and captions.

• Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

• Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the Application for Federal Assistance face sheet (SF 424), the supplemental information form for the SF 424 required by the Department, or the assurances and certification. However, student applicants must include their complete responses to the selection criteria in the application narrative. The recommended page limits only apply to the application narrative and bibliography.

3. *Submission Dates and Times:* Submit applications for grants under the program electronically using G5.gov. For information (including dates and times) about how to submit your application electronically, please refer to 7. *Other Submission Requirements.*

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT**. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:*

To do business with the Department, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following website: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, it may be 24 to 48 hours before you can submit an application through G5.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a *SAM.gov* Tip Sheet, which you can find at: *www2.ed.gov/fund/grant/apply/sam-faqs.html.*

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless an IHE qualifies for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Submit applications for grants under the Fulbright-Hays DDRA Fellowship Program, CFDA number 84.022A, electronically using the G5 system, accessible through the Department's G5 site at: *www.G5.gov.* While completing the electronic application, both the IHE and the student applicant will be entering data online that will be saved into a database. Neither the IHE nor the student applicant may email an electronic copy of a grant application to us.

Please note the following:

- The process for submitting applications electronically under the Fulbright-Hays DDRA Fellowship Program has several steps. The following is a brief summary of the process; however, all applicants should review the detailed description of the application process in the application package. In summary, the major steps are:

(1) IHEs must email the name of the institution and the full name and email address of the project director to *ddra@ed.gov.* We suggest that applicant IHEs submit this information no later than two weeks prior to the application deadline date to ensure that they obtain access to G5 well before that date;

(2) Students must complete their individual applications and submit them to their IHE's project director using G5;

(3) Persons providing references for individual students must complete and submit reference forms for the students and submit them to the IHE's project director using G5; and

(4) The IHE's project director must officially submit the IHE's application, including all eligible individual student applications, reference forms, and other required forms, using G5.

- The IHE must complete the electronic submission of the grant application by 4:30:00 p.m., Eastern Time, on the application deadline date. G5 will not accept an application for this competition after 4:30:00 p.m., Eastern Time, on the application deadline date. Therefore, we strongly recommend that both the IHE and the student applicant not wait until the application deadline date to begin the application process.
- The hours of operation of the G5 website are 6:00 a.m. Monday until 9:00 p.m., Wednesday; and 6:00 a.m. Thursday until 3:00 p.m., Sunday, Eastern Time. Please note that, because of maintenance, the system is unavailable between 3:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 9:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Eastern Time. Any modifications to these hours are posted on the G5 website.
- Student applicants will not receive additional point value because the student submits his or her application in electronic format, nor will we penalize the IHE or student applicant if the applicant qualifies for an exception to the electronic submission requirement, as described elsewhere in this section, and submits an application in paper format.
- IHEs must submit all documents electronically, including all information typically provided on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- Both IHEs and student applicants must upload any narrative sections and all other attachments to their application as files in a read-only flattened Portable Document Format (PDF), meaning any fillable documents must be saved and submitted as non-fillable PDF files. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF (*e.g.,* Word, Excel, WordPerfect, etc.) or submit a password-protected file, we will be unable to review that material. Please note that this will likely result in your application not being considered for funding. The Department will not convert material from other formats to PDF.
- Submit student transcripts electronically through the G5 system.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.
- After the individual student applicant electronically submits his or her application to the student's IHE, the student will receive an automatic acknowledgment. After a person submits a reference electronically, he or she will receive an online confirmation. After the applicant IHE submits its application, including all eligible individual student applications, to the Department, the applicant IHE will receive an automatic acknowledgment that will include a unique PR/Award number for the IHE's application.
- Within three working days after submitting its electronic application the applicant IHE must—

(1) Print SF 424 from G5;

(2) Have its Authorizing Representative sign this form;

(3) Place the PR/Award number in the upper right-hand corner of the hard-copy signature page of the SF 424; and

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

- We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of System Unavailability: If an IHE is prevented from electronically submitting its application on the application deadline date because the G5 system is unavailable, we will grant the IHE an extension until 4:30:00 p.m., Eastern Time, the following business day to enable the IHE to transmit its application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) The IHE is a registered user of the G5 system and the IHE has initiated an electronic application for this competition; and

(2) (a) G5 is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Eastern Time, on the application deadline date; or

(b) G5 is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Eastern Time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting the IHE an extension. To request this extension or to confirm our acknowledgment of any system unavailability, an IHE may contact either (1) the person listed under **FOR FURTHER INFORMATION CONTACT** or (2) the e-Grants help desk at 1–888–336–8930. If G5 is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an email will be sent to all registered users who have initiated a G5 application. Extensions referred to in this section apply only to the unavailability of the G5 system.

b. *Submission of Paper Applications.* We discourage paper applications, but if electronic submission is not possible (*e.g.,* you do not have access to the internet), you must provide a written statement that you intend to submit a paper application. Send this written statement no later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday) to Dr. Pamela J. Maimer, U.S. Department of Education, 400 Maryland Ave. SW, Room 258–24, Washington, DC 20202–4260. Telephone: (202) 453–6891. Email: *ddra@ed.gov.*

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. Please send this statement to the person listed under **FOR FURTHER INFORMATION CONTACT**.

If you submit a paper application, you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.022A), LBJ Basement Level 1, 400 Maryland Avenue SW, Washington, DC 20202–4260.

The IHE must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If the IHE mails its application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, the IHE should check with its local post office.

We will not consider applications postmarked after the application deadline date.

c. *Note for Mail or Hand Delivery of Paper Applications:* If an IHE mails or hand delivers its application to the Department—

(1) The IHE must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which the IHE is submitting its application; and

(2) The Application Control Center will mail a notification of receipt of the IHE's grant application. If the IHE does not receive this grant notification within 15 business days from the application deadline date, the IHE should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from the regulations for this program in 34 CFR 662.21 and are as follows:

(a) *Quality of proposed project.* (60 points) The Secretary reviews each application to determine the quality of the research project proposed by the applicant. The Secretary considers—

(1) The statement of the major hypotheses to be tested or questions to be examined, and the description and justification of the research methods to be used;

(2) The relationship of the research to the literature on the topic and to major theoretical issues in the field, and the project's originality and importance in terms of the concerns of the discipline;

(3) The preliminary research already completed in the United States and overseas or plans for such research prior to going overseas, and the kinds, quality and availability of data for the research in the host country or countries;

(4) The justification for overseas field research and preparations to establish appropriate and sufficient research contacts and affiliations abroad;

(5) The applicant's plans to share the results of the research in progress and a copy of the dissertation with scholars and officials of the host country or countries; and

(6) The guidance and supervision of the dissertation advisor or committee at all stages of the project, including guidance in developing the project, understanding research conditions abroad, and acquainting the applicant with research in the field.

(b) *Qualifications of the applicant.* (40 points) The Secretary reviews each application to determine the qualifications of the applicant. The Secretary considers—

(1) The overall strength of the applicant's graduate academic record;

(2) The extent to which the applicant's academic record demonstrates strength in area studies relevant to the proposed project;

(3) The applicant's proficiency in one or more of the languages (other than English and the applicant's native language) of the country or countries of research, and the specific measures to be taken to overcome any anticipated language barriers; and

(4) The applicant's ability to conduct research in a foreign cultural context, as evidenced by the applicant's references or previous overseas experience, or both.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For FY 2020, student applications will be divided into seven categories based on the world area focus of their research projects, as described in the absolute priority. Language and area studies experts in discrete world area-based panels will review the student applications. Each panel will review, score, and rank its applications separately from the applications assigned to the other world area panels. However, all fellowship applications will be ranked together from the highest to lowest score for funding purposes.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this program the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If a student application is successful, we notify the IHE's U.S. Representative and U.S. Senators and send the IHE a Grant Award Notification (GAN); or we may send the IHE an email containing a link to access an electronic version of the GAN. We may notify the IHE informally, also.

If a student application is not evaluated or not selected for funding, we notify the IHE.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates the approved application as part of the binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. Grantees are required to use the electronic data instrument *International Resource Information System* (IRIS) to complete the final report. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the objective for the Fulbright-Hays DDRA Fellowship Program is to provide grants to colleges and universities to fund individual doctoral students to conduct research in other countries in modern foreign languages and area studies for periods of 6 to 12 months.

The Department will use the following measures to evaluate its success in meeting this objective:

DDRA GPRA Measure 1: The percentage of DDRA fellows who increased their foreign language scores in speaking, reading, or writing by at least one proficiency level.

DDRA GPRA Measure 2: The percentage of DDRA fellows who complete their degree in their program of study within four years of receipt of the fellowship.

DDRA GPRA Measure 3: The percentage of DDRA fellows who found employment that utilized their language and area studies skills within eight years of receiving their award.

DDRA GPRA Measure 4: Efficiency Measure—The cost per DDRA fellow who found employment that utilized their language and area studies skills within eight years.

The information provided by grantees in their performance report submitted via IRIS will be the source of data for these measures. Reporting screens for institutions and fellows may be viewed at:

http://iris.ed.gov/iris/pdfs/DDRA_director.pdf.

http://iris.ed.gov/iris/pdfs/DDRA_fellow.pdf.

VII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or PDF. To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Robert L. King,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2019–27120 Filed 12–16–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Nuclear Energy Advisory Committee

AGENCY: Office of Nuclear Energy, Department of Energy.

ACTION: Notice of renewal.

SUMMARY: Pursuant to the Federal Advisory Committee Act, and in accordance with Title 41 of the Code of Federal Regulations, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Nuclear Energy Advisory Committee (NEAC) will be renewed for a two-year period beginning on December 11, 2019. The Committee will provide advice to the Department of Energy's Office of Nuclear Energy on complex science and technical issues that arise in the planning, managing, and implementation of DOE's nuclear energy program. Additionally, the renewal of the NEAC has been determined to be essential to conduct business of the Department of Energy and to be in the public interest in connection with the performance of duties imposed upon the Department of Energy, by law and agreement. The Committee will continue to operate in accordance with the provisions of the Federal Advisory Committee Act, adhering to the rules and regulations in implementation of that Act.

FOR FURTHER INFORMATION CONTACT: Robert Rova, Designated Federal Officer at (301) 903–9096; email: *robert.rova@nuclear.energy.gov.*

Signed in Washington DC, on December 11, 2019.

Rachael J. Beitler,

Acting Committee Management Officer.

[FR Doc. 2019–27126 Filed 12–16–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Biological and Environmental Research Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of renewal.

SUMMARY: Pursuant to the Federal Advisory Committee Act, App.2, and Code of Federal Regulations, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Biological and Environmental Research Advisory Committee's (BERAC) charter will be renewed for a two-year period. The Committee provides advice and

recommendations to the Director, Office of Science on the biological and environmental research programs. Additionally, the renewal of the BERAC has been determined to be essential to conduct business of the Department of Energy's mission and to be in the public interest in connection with the performance of duties imposed upon the Department of Energy by law and agreement. The Committee will operate in accordance with the provisions of the Federal Advisory Committee Act, and rules and regulations issued in implementation of that Act.

FOR FURTHER INFORMATION CONTACT: Dr. Tristram West at (301) 903–5155 or email: *tristram.west@science.doe.gov.*

Signed in Washington, DC, on December 11, 2019.

Rachael J. Beitler,

Acting Committee Management Officer.

[FR Doc. 2019–27125 Filed 12–16–19; 8:45 am]

BILLING CODE 6450–01–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: EC20–25–000.
Applicants: BP America Production Company.
Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of BP America Production Company.
Filed Date: 12/11/19.
Accession Number: 20191211–5061.
Comments Due: 5 p.m. ET 1/2/20

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER15–1882–004.
Applicants: PSEG Energy Resources & Trade LLC.
Description: Report Filing: Record Effective Date for Keystone and Conemaugh Cancellation to be effective N/A.
Filed Date: 10/17/19.
Accession Number: 20191017–5097.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER15–2013–009; ER15–2020–007.
Applicants: Talen Energy Marketing, LLC., Talen Montana, LLC.
Description: Notification of Change in Status of the Talen Northwest MBR Sellers.
Filed Date: 12/11/19.
Accession Number: 20191211–5045.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER19–2050–003.
Applicants: Midcontinent Independent System Operator, Inc., GridLiance Heartland LLC.
Description: Tariff Amendment: 2019–12–10_Deficiency Response GridLiance Heartland Attachment O to be effective 12/31/9998.
Filed Date: 12/10/19.
Accession Number: 20191210–5074.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER19–2567–001.
Applicants: FirstEnergy Solutions Corp.
Description: Compliance filing: Compliance Filing to Reflect Effective Date for Rate Schedule FERC No. 1 to be effective 11/7/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5143.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER19–90–004.
Applicants: Clean Energy Future—Lordstown, LLC.
Description: Report Filing: Refund Report to be effective N/A.
Filed Date: 12/10/19.
Accession Number: 20191210–5100.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER20–557–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Second Revised ISA No. 3767; Queue No. AC2–117 to be effective 11/10/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5188
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER20–558–000.
Applicants: Duke Energy Carolinas, LLC.
Description: § 205(d) Rate Filing: DEC–NCEMC NITSA Amendment (SA No. 210) to be effective 1/1/2020.
Filed Date: 12/11/19.
Accession Number: 20191211–5002.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–559–000.
Applicants: Duke Energy Progress, LLC.
Description: § 205(d) Rate Filing: DEP-City of Camden, SC Reimbursement Agmt (RS No. 378) to be effective 2/10/2020.
Filed Date: 12/11/19.
Accession Number: 20191211–5003.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–560–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3055R2 Associated Electric Cooperative, Inc. NITSA NOA to be effective 8/1/2019.
Filed Date: 12/11/19.
Accession Number: 20191211–5044.
Comments Due: 5 p.m. ET 1/2/20

Docket Numbers: ER20–561–000.
Applicants: Duke Energy Progress, LLC.
Description: § 205(d) Rate Filing: DEP Rate Schedule No. 381 (Nuclear Decomissioning) to be effective 1/1/2020.
Filed Date: 12/11/19.
Accession Number: 20191211–5066.
Comments Due: 5 p.m. ET 1/2/20

Docket Numbers: ER20–562–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX–LCRA TSC (Stafford Hill) Facility Development Agreement to be effective 12/4/2019.
Filed Date: 12/11/19.
Accession Number: 20191211–5092.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–563–000.
Applicants: San Diego Gas & Electric Company.
Description: § 205(d) Rate Filing: 2020 SDGE RS Annual Update to Transmission Owner Tariff to be effective 1/1/2020.
Filed Date: 12/11/19.
Accession Number: 20191211–5096.
Comments Due: 5 p.m. ET 1/2/20

Docket Numbers: ER20–564–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to Pinnacle ISA, SA No. 2432; Queue No. N47 (amend) to be effective 2/3/2010.
Filed Date: 12/11/19.
Accession Number: 20191211–5103.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–565–000.
Applicants: Louisville Gas and Electric Company.
Description: § 205(d) Rate Filing: Interconnection with Gridliance and notice of termination of EEI Interconnection to be effective 12/31/9998.
Filed Date: 12/11/19.
Accession Number: 20191211–5113.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–566–000.
Applicants: Kentucky Utilities Company.
Description: § 205(d) Rate Filing: KU Concurrence to Gridliance Rate Schedule 512 to be effective 12/31/9998.
Filed Date: 12/11/19.
Accession Number: 20191211–5123.
Comments Due: 5 p.m. ET 1/2/20

Docket Numbers: ER20–567–000.
Applicants: California Independent System Operator Corporation.
Description: § 205(d) Rate Filing: 2019–12–11 EIM Implementation Agreement with Avista Corporation to be effective 4/1/2020.

Filed Date: 12/11/19.
Accession Number: 20191211–5124.
Comments Due: 5 p.m. ET 1/2/20.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF20–388–000.
Applicants: Lancaster General Hospital.
Description: Form 556 of Lancaster General Hospital.
Filed Date: 12/11/19.
Accession Number: 20191211–5030.
Comments Due: None-Applicable.

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 11, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27146 Filed 12–16–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meeting

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

DATE AND TIME: December 19, 2019, 10:00 a.m.

PLACE: Room 2C, 888 First Street NE, Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

* NOTE—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Kimberly D. Bose, Secretary, Telephone (202) 502–8400.

For a recorded message listing items struck from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's website at *http://ferc.capitolconnection.org/* using the eLibrary link, or may be examined in the Commission's Public Reference Room.

1062TH—MEETING

[Open Meeting; December 19, 2019; 10:00 a.m.]

Item No.	Docket No.	Company
	ADMINISTRATIVE	
A–1	AD20–1–000	Agency Administrative Matters.
A–2	AD20–2–000	Customer Matters, Reliability, Security and Market Operations.
	ELECTRIC	
E–1	EL16–49–000, EL18–178–000, (Consolidated).	Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC v. PJM Interconnection, L.L.C.
E–2	OMITTED.	
E–3	OMITTED.	
E–4	OMITTED.	
E–5	ER19–1959–000	Avista Corporation.
E–6	ER19–1507–004	Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, and Duke Energy Florida, LLC.
E–7	ER19–1823–001, ER19–1960–000	Midcontinent Independent System Operator, Inc.
E–8	ER19–1948–000, ER19–1948–001	PacifiCorp.
E–9	ER19–1958–000	PJM Interconnection, L.L.C.
E–10	ER19–1955–000, ER19–1955–001	Public Service Company of New Mexico.
E–11	ER19–1864–001	Public Service Company of Colorado.
E–12	ER19–1957–000, ER19–1957–001	Alabama Power Company.
E–13	ER19–467–000, ER19–467–001, ER19–467–002.	New York Independent System Operator, Inc.
E–14	RM01–8–012	Revised Public Utility Filing Requirements for Electric Quarterly Reports.
E–15	AC19–75–000	Duke Energy Corporation.
E–16	EC19–100–000	Tucson Electric Power Company.
E–17	ER20–227–000	PJM Interconnection, L.L.C., Jersey Central Power & Light Company.
E–18	EL15–68–003, EL15–68–004	Midcontinent Independent System Operator, Inc.
	EL15–36–003, EL15–36–004	Otter Tail Power Company v. Midcontinent Independent System Operator, Inc.
	ER16–696–004, ER16–696–005, ER18–2513–000.	Midcontinent Independent System Operator, Inc.
E–19	ER19–2488–000	GridLiance Heartland LLC, GridLiance High Plains LLC, and GridLiance West LLC.
E–20	ER20–153–000	Exelon Corporation.
E–21	ER13–535–005	PJM Interconnection, L.L.C.

1062TH—MEETING—Continued

[Open Meeting; December 19, 2019; 10:00 a.m.]

Item No.	Docket No.	Company
E–22	EL19–11–001	American Wind Energy Association and The Wind Coalition v. Southwest Power Pool, Inc.
	ER19–2522–000, ER19–2523–000	Southwest Power Pool, Inc.
E–23	ER17–905–002	New York Independent System Operator, Inc. PJM Interconnection, L.L.C.
E–24	EL19–39–001	Light Power & Gas of NY LLC v. New York Independent System Operator, Inc.
E–25	EL18–189–000	Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc.
E–26	EL19–27–000	Independent Market Monitor for PJM Interconnection, L.L.C. v. PJM Interconnection, L.L.C.
E–27	EL05–121–013, ER18–2102–000, ER18–2102–001.	PJM Interconnection, L.L.C.
E–28	EL15–95–005	Delaware Public Service Commission and Maryland Public Service Commission v. PJM Interconnection, L.L.C. and Certain Transmission Owners Designated under CTOA RS FERC No. 42.
	ER19–1501–000	PJM Interconnection, L.L.C. and PECO Energy Company.
	GAS	
G–1	RP19–1598–000	Castex Offshore, Inc., EnVen Energy Ventures, LLC, Fieldwood Energy LLC, M21K, LLC, and W&T Offshore, Inc. v. Stingray Pipeline Company, L.L.C.
G–2	RP20–216–000, RP20–216–001	Trailblazer Pipeline Company LLC.
G–3	RP16–618–000, RP16–618–001	Algonquin Gas Transmission, LLC.
	HYDRO	
H–1	P–2829–005, P–2829–010	City of Loveland, Colorado.
H–2	P–12569–018	Public Utility District No. 1 of Okanogan County, Washington.
	CERTIFICATES	
C–1	CP19–191–000	Texas Eastern Transmission, LP.
C–2	CP19–31–000	Southern Star Central Gas Pipeline, Inc.
C–3	CP18–548–000	Eastern Shore Natural Gas Company.
C–4	CP19–26–000	Dominion Energy Transmission, Inc.
C–5	CP18–46–000, CP18–46–001	Adelphia Gateway, LLC.
C–6	CP19–7–000	Tennessee Gas Pipeline Company, L.L.C.

Issued: December 12, 2019.

Kimberly D. Bose,

Secretary.

A free webcast of this event is available through *http://ferc.capitolconnection.org/*. Anyone with internet access who desires to view this event can do so by navigating to *www.ferc.gov*'s Calendar of Events and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for the free webcasts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit *http://ferc.capitolconnection.org/* or contact Shirley Al-Jarani at 703–993–3104.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

[FR Doc. 2019–27324 Filed 12–13–19; 4:15 pm]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket No.	File date	Presenter or requester
Prohibited		
CP16–9–000	12–3–2019	Hingham 10 Persons Group.[1]
Exempt		
CP16–22–000	11–25–2019	U.S. Senator Sherrod Brown.
ER19–2760–000	12–2–2019	U.S. Senate.[2]
EC19–120–000	12–2–2019	U.S. Congresswoman Veronica Escobar.

Dated: December 11, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27149 Filed 12–16–19; 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: RP20–261–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Non-Conforming Agreements Filing (SWG_TEP) to be effective 1/1/2020.
Filed Date: 11/25/19.
Accession Number: 20191125–5261.
Comments Due: 5 p.m. ET 12/16/19.

Docket Number: PR20–2–001.
Applicants: Valley Crossing Pipeline, LLC.
Description: Tariff filing per 284.123(b),(e)+(g): Amended Petition for Rate Approval and Statement of Operating Conditions to be effective 10/18/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5169.
Comments Due: 5 p.m. ET 12/31/19.
284.123(g) Protests Due: 5 p.m. ET 2/10/20.

Docket Numbers: RP20–320–000.
Applicants: Trailblazer Pipeline Company LLC.
Description: § 4(d) Rate Filing: Neg Rates 2019–12–06 RP18–922 Settlement Ks to be effective 10/1/2019.
Filed Date: 12/9/19.
Accession Number: 20191209–5130.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: RP20–321–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: § 4(d) Rate Filing: ETNG Oglethorpe release to Ratio Energy eff 12–11–2019 to be effective 12/11/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5111.
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 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 11, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27147 Filed 12–16–19; 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: EC20–22–000.
Applicants: TWE Bowman Solar Project, LLC, PGR Lessee L, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of TWE Bowman Solar Project, LLC, et al.
Filed Date: 12/9/19.
Accession Number: 20191209–5021.
Comments Due: 5 p.m. ET 12/30/19.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER20–366–000.
Applicants: Genbright LLC.
Description: Proposed Form of Non-Disclosure Certificate of Genbright, LLC.
Filed Date: 12/6/19.
Accession Number: 20191206–5128.
Comments Due: 5 p.m. ET 12/13/19.

Docket Numbers: ER20–539–000.
Applicants: East Fork Wind Project, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization, Request for Related Waivers to be effective 1/15/2020.
Filed Date: 12/6/19.
Accession Number: 20191206–5185.
Comments Due: 5 p.m. ET 12/27/19.

Docket Numbers: ER20–540–000.
Applicants: Vineland Energy LLC.
Description: Tariff Cancellation: Vineland Energy LLC, Notice of

[1] Authorized Represenative Elizabeth Moulds, Jennifer Mathian, Olivia, Lana, Priya Howell, Katherine Rogers, Michael Mullaley, Heather Kaas, Katie McBride, Janice DeYoung, A. Silvia Fabrizio, and Kathleen Cronin.

[2] U.S. Senator James E. Risch, U.S. Senator Patty Murray, U.S. Senator Mike Crapo, U.S. Senator Ron Wyden, U.S. Senator Jeffrey A. Merkley.

Cancellation of Market-Based Rate Tariff to be effective 12/9/2019.

Filed Date: 12/6/19.

Accession Number: 20191206–5188.

Comments Due: 5 p.m. ET 12/27/19.

Docket Numbers: ER20–541–000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: Transmission Access Charge Balancing Account Adjustment (TACBAA) 2020 to be effective 3/1/2020.

Filed Date: 12/6/19.

Accession Number: 20191206–5192.

Comments Due: 5 p.m. ET 12/27/19.

Docket Numbers: ER20–542–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 3616 Iron Star Wind Project and ITC Great Plains E&P Agr to be effective 2/7/2020.

Filed Date: 12/9/19.

Accession Number: 20191209–5000.

Comments Due: 5 p.m. ET 12/30/19.

Docket Numbers: ER20–543–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of ISA, SA No. 3476, Queue Nos. R11/Z2–109/AC1–029 to be effective 11/27/2019.

Filed Date: 12/9/19.

Accession Number: 20191209–5030.

Comments Due: 5 p.m. ET 12/30/19.

Docket Numbers: ER20–544–000.

Applicants: Midcontinent Independent System Operator, Inc., Ameren Illinois Company.

Description: § 205(d) Rate Filing: 2019–12–09_Rate Schedule 55 Ameren-Prairie Power JPZ Revenue Allocation to be effective 1/1/2020.

Filed Date: 12/9/19.

Accession Number: 20191209–5057.

Comments Due: 5 p.m. ET 12/30/19.

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 9, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27083 Filed 12–16–19; 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: RP20–315–000.

Applicants: Equitrans, L.P.

Description: § 4(d) Rate Filing: Equitrans Clean Up Filing—December 2019 to be effective 1/5/2020.

Filed Date: 12/5/19.

Accession Number: 20191205–5085.

Comments Due: 5 p.m. ET 12/17/19.

Docket Numbers: RP20–316–000.

Applicants: Rager Mountain Storage Company LLC.

Description: § 4(d) Rate Filing: RMSC's Clean Up Filing—December 2019 to be effective 1/5/2020.

Filed Date: 12/5/19.

Accession Number: 20191205–5107.

Comments Due: 5 p.m. ET 12/17/19.

Docket Numbers: RP20–317–000.

Applicants: Gulf South Pipeline Company, LP.

Description: § 4(d) Rate Filing: Amendment to Neg Rate Agmt (BP 46444) to be effective 12/6/2019.

Filed Date: 12/5/19.

Accession Number: 20191205–5131.

Comments Due: 5 p.m. ET 12/17/19.

Docket Numbers: RP20–269–001.

Applicants: LA Storage, LLC.

Description: Tariff Amendment: Amendment to Correct Negotiated Non-Conforming Agreement to be effective 12/1/2019.

Filed Date: 12/6/19.

Accession Number: 20191206–5156.

Comments Due: 5 p.m. ET 12/18/19.

Docket Numbers: RP20–318–000.

Applicants: Colorado Interstate Gas Company, L.L.C.

Description: § 4(d) Rate Filing: ATC Update Filing—Young and Totem 2019–2020 to be effective 12/1/2019.

Filed Date: 12/6/19.

Accession Number: 20191206–5142.

Comments Due: 5 p.m. ET 12/18/19.

Docket Numbers: RP20–319–000.

Applicants: Rockies Express Pipeline LLC.

Description: § 4(d) Rate Filing: Neg Rate 2019–12–06 BP E2W to be effective 12/7/2019.

Filed Date: 12/6/19.

Accession Number: 20191206–5184.

Comments Due: 5 p.m. ET 12/18/19.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 9, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27085 Filed 12–16–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–539–000]

Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization; East Fork Wind Project, LLC

This is a supplemental notice in the above-referenced proceeding of East Fork Wind Project, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 30, 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 10, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27078 Filed 12–16–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC20–34–000]

Notice of Filing; Empire Pipeline, Inc.

Take notice that on December 6, 2019, Empire Pipeline, Inc. filed a Request for Waiver of Calendar Year Certified Public Accountant Certification for the 2019 FERC Form 2.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the eLibrary link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comments: 5:00 p.m. Eastern Time on December 27, 2019.

Dated: December 11, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27148 Filed 12–16–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–547–000]

Goldman Sachs Renewable Power Marketing LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Goldman Sachs Renewable Power Marketing 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 30, 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 10, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27088 Filed 12–16–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2712–092]

Black Bear Hydro Partners, LLC, Black Bear Development Holdings, LLC, and Black Bear SO, LLC; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Capacity Amendment of License.

b. *Project No:* 2712–092.
c. *Date Filed:* November 8, 2019.
d. *Applicant:* Black Bear Hydro Partners, LLC.
e. *Name of Project:* Stillwater Project.
f. *Location:* The Project is located on the Stillwater Branch of the Penobscot River in Penobscot County, Maine.
g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).
h. *Applicant Contact:* Kevin Bernier, Senior Compliance Specialist (207) 723–4341; *Kevin.Bernier@Brookfieldrenewable.com,* 1024 Central Street, Millinocket, Maine 04462.
i. *FERC Contact:* Holly Frank; (202) 502–6833; *holly.frank@ferc.gov.*
j. Deadline for filing comments, motions to intervene, and protests is 30 days from the issuance date of this notice by the Commission.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–2712–092. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* Black Bear Hydro Partners, LLC (applicant) requests an amendment of the minimum flow requirement pursuant to Article 402 of the Stillwater license. The current minimum flow requirement is 70 cubic feet per second (cfs), allocated such that a minimum flow of 20 cfs is conveyed to the west bypass channel and 50 cfs is conveyed to the east bypass channel. In order to facilitate upstream eel passage and protect downstream migrating fish, the applicant requests an amendment which would eliminate the specific minimum flow conveyance locations. The total minimum flow of 70 cfs would not be changed.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE, Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: December 9, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27086 Filed 12–16–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 9100–040]

Riverdale Power & Electric Co., Inc.; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for a subsequent license for the Riverdale Mills Hydroelectric Project, located on the Blackstone River in the town of Northbridge, Worcester County, Massachusetts, and has prepared an Environmental Assessment (EA) for the project.

The EA contains staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. 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–9100–040.

For further information, contact Michael Watts at (202) 502–6123 or by email at *michael.watts@ferc.gov.*

Dated: December 11, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27145 Filed 12–16–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: EC19–92–001.
Applicants: Broadlands Wind Farm LLC, Lexington Chenoa Wind Farm LLC.
Description: Notice of Change in Circumstances of Broadlands Wind Farm LLC, et al.
Filed Date: 12/10/19.
Accession Number: 20191210–5119.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: EC20–23–000.
Applicants: Russell City Energy Company, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Russell City Energy Company, LLC.
Filed Date: 12/10/19.
Accession Number: 20191210–5082.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: EC20–24–000.
Applicants: Central Maine Power Company.
Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Central Maine Power Company.
Filed Date: 12/10/19.
Accession Number: 20191210–5120.
Comments Due: 5 p.m. ET 12/31/19.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: ER10–1346–007; ER10–1348–007.
Applicants: Frederickson Power L.P., Manchief Power Company LLC.
Description: Updated Market Power Analysis of Frederickson Power L.P., et al.
Filed Date: 12/10/19.
Accession Number: 20191210–5127.
Comments Due: 5 p.m. ET 2/10/20.

Docket Numbers: ER19–13–000; ER19–1816–000.
Applicants: Pacific Gas and Electric Company.
Description: Annual Formula Transmission Rate Update Filing for Rate Year 2020 of Pacific Gas and Electric Company, et al.
Filed Date: 11/27/19.
Accession Number: 20191127–5053.
Comments Due: 5 p.m. ET 12/18/19.

Docket Numbers: ER20–550–000.
Applicants: Public Service Company of Colorado.
Description: § 205(d) Rate Filing: PSC–HLYCRS–ARRIBA–SISA–100MWCurtail–570–0.0.0 to be effective 12/11/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5001.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER20–551–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–12–10_SA 3387 ATXI-Prairie Wolf Solar GIA (J949) to be effective 11/22/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5002.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER20–552–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–12–10_SA 3388 ATXI-Orion Renewable Resources GIA (J844) to be effective 11/25/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5004.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER20–553–000.
Applicants: Sierra Pacific Power Company.
Description: § 205(d) Rate Filing: Service Agreement No. 16–00054; Battle Mountain LGIA to be effective 12/11/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5095.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER20–554–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3517R2 Plum Creek Wind, LLC GIA to be effective 11/27/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5097.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER20–555–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: First Revised ISA, SA No. 5481, Queue No. AC1–065/AC2–110/AD2–039/AE1–004 to be effective 11/10/2019.
Filed Date: 12/10/19.
Accession Number: 20191210–5101.
Comments Due: 5 p.m. ET 12/31/19.

Docket Numbers: ER20–556–000.
Applicants: San Diego Gas & Electric Company.
Description: § 205(d) Rate Filing: 2020 SDGE TACBAA Update to Transmission Owner Tariff Filing to be effective 1/1/2020.
Filed Date: 12/10/19.
Accession Number: 20191210–5113.
Comments Due: 5 p.m. ET 12/31/19.

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 10, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27090 Filed 12–16–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER15–2013–008; ER15–2020–006; ER19–2250–001.

Applicants: Talen Energy Marketing, LLC, Talen Montana, LLC, TrailStone Energy Marketing, LLC.

Description: Updated Market Power Analysis of Talen Energy Marketing, LLC, et al.

Filed Date: 12/9/19.

Accession Number: 20191209–5147.

Comments Due: 5 p.m. ET 2/7/20.

Docket Numbers: ER20–545–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: GIA & DSA Bates Ranch Deer Creek Hydro Project SA Nos. 1094–1095 to be effective 11/22/2019.

Filed Date: 12/9/19.

Accession Number: 20191209–5082.

Comments Due: 5 p.m. ET 12/30/19.

Docket Numbers: ER20–546–000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: Thundering Springs Solar LGIA Filing to be effective 11/25/2019.

Filed Date: 12/9/19.

Accession Number: 20191209–5095.

Comments Due: 5 p.m. ET 12/30/19.

Docket Numbers: ER20–547–000.

Applicants: Goldman Sachs Renewable Power Marketing LLC.

Description: Baseline eTariff Filing: MBR Application to be effective 1/2/2020.

Filed Date: 12/9/19.

Accession Number: 20191209–5113.

Comments Due: 5 p.m. ET 12/30/19.

Docket Numbers: ER20–548–000.

Applicants: California Independent System Operator Corporation.

Description: § 205(d) Rate Filing: 2019–12–09 Local Capacity Technical Study Criteria Update Tariff Amendment to be effective 2/1/2020.

Filed Date: 12/9/19.

Accession Number: 20191209–5114.

Comments Due: 5 p.m. ET 12/30/19.

Docket Numbers: ER20–549–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment of ISA SA No. 5220 (consent); ISA SA No. 5345; Queue No. W2–048/X2–022 to be effective 9/27/2018.

Filed Date: 12/9/19.

Accession Number: 20191209–5149.

Comments Due: 5 p.m. ET 12/30/19.

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 9, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27084 Filed 12–16–19; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2019–0683; FRL–10003–38–OGC]

Proposed Consent Decree; Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or the ''Act''), notice is given of a proposed consent decree in *Center for Biological Diversity, et al.,* v. *Wheeler,* No. 4:19–cv–01544 (N.D. Cal.). On June 26, 2019, the Center for Biological Diversity and Center for Environmental Health filed a complaint in the United States District Court for the Northern District of California alleging that the Administrator of the United States Environmental Protection Agency (''EPA'') failed to perform non-discretionary duties to make a determination whether the West Central Pinal nonattainment area attained the 2006 24-hour fine particulate matter (''$PM_{2.5}$'') national ambient air quality standard (''NAAQS'') by the attainment date and to take final action to promulgate a federal implementation plan (''FIP'') addressing certain deficiencies in the State of Arizona's new source review program. The EPA has already taken final action to find that the West Central Pinal nonattainment area attained the NAAQS. Thus, the proposed consent decree would establish deadlines for EPA to take specified actions as to the remaining claim.

DATES: Written comments on the proposed consent decree must be received by January 16, 2020.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2019–0683, online at *www.regulations.gov* (EPA's preferred method). For comments submitted at *www.regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.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, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Stephanie L. Hogan, Air and Radiation Law Office, Office of General Counsel, U.S. Environmental Protection Agency, Mail Code 2344A, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone: (202) 564–3244; email address: *hogan.stephanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

The consent decree would resolve a lawsuit filed by the Center for Biological Diversity and Center for Environmental Health seeking to compel the Administrator to make a determination under CAA section 179(c)(1) whether the West Central Pinal nonattainment area located in Arizona attained the 2006 $PM_{2.5}$ NAAQS by the attainment date and to take action under the Clean Air Act to take final action to promulgate a FIP under CAA section 110(c) addressing certain deficiencies in the State of Arizona's new source review program.

The EPA has already taken final action to find that the West Central Pinal nonattainment area attained the 2006 $PM_{2.5}$ NAAQS. *See* 84 FR 52766 (Oct. 3, 2019). Therefore, this claim in the lawsuit is moot. Under the terms of the proposed consent decree, EPA shall take actions regarding the remaining claim by the deadlines established in the proposed consent decree.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who are not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2019–0683) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: December 10, 2019.

Gautam Srinivasan,

Acting Associate General Counsel.

[FR Doc. 2019–27157 Filed 12–16–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10003–22–Region 4]

Public Water System Supervision Program Revision for the State of Tennessee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intended approval.

SUMMARY: Notice is hereby given that the State of Tennessee is revising its approved Public Water System Supervision Program. Tennessee has adopted drinking water regulations for the Revised Total Coliform Rule. The Environmental Protection Agency (EPA) has determined that Tennessee's regulations are no less stringent than the federal rule and the revision otherwise meets applicable Safe Drinking Water Act requirements. Therefore, EPA intends to approve this revision to the State of Tennessee's Public Water System Supervision Program.

DATES: Any interested person may request a public hearing. A request for a public hearing must be submitted by January 16, 2020, to the Regional Administrator at the EPA Region 4 street address shown below. The Regional Administrator may deny frivolous or insubstantial requests for a hearing. However, if a substantial request for a public hearing is made by January 16, 2020, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on her own motion, this determination shall become final and effective on January 16, 2020. Any request for a public hearing shall include the following information: The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; a brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement of the information that the requesting person intends to submit at such hearing; and the signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: Documents relating to this determination are available for inspection between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday (excluding legal holidays) at the following locations: The main office of the Division of Water Resources, Tennessee Department of Environment and Conservation, William R. Snodgrass—Tennessee Tower, 11th Floor, 312 Rosa L. Parks Avenue, Nashville, Tennessee 37243; and the Drinking Water Section, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303.

FOR FURTHER INFORMATION CONTACT: Dale Froneberger, EPA Region 4, Drinking Water Section, by mail at the Atlanta street address given above, by telephone at (404) 562–9446, or by email at *froneberger.dale@epa.gov.*

SUPPLEMENTARY INFORMATION: The State of Tennessee has submitted a request that EPA approve a revision to the State's Safe Drinking Water Act Public Water System Supervision Program to include the authority to implement and enforce the Revised Total Coliform Rule. For the request to be approved, EPA must find the state regulations codified at Tenn. Comp. R. & Regs. 0400–45–01 to be no less stringent than the federal rule codified at 40 CFR part 141. EPA reviewed Tennessee's application using the federal statutory provisions (Section 1413 of the Safe Drinking Water Act), federal regulations (at 40 CFR parts 141 and 142), state regulations, state policies and procedures for implementing the rule, regulatory crosswalk, and EPA regulatory guidance to determine whether the request for revision is approvable. EPA determined that the Tennessee regulations are no less stringent than the corresponding federal rule and the revision otherwise meets applicable Safe Drinking Water Act requirements. Therefore, EPA intends to approve this revision. If EPA does not receive a timely and appropriate request for a hearing and the Regional Administrator does not elect to hold a hearing on her own motion, this approval shall become final and effective on January 16, 2020.

Authority: Section 1413 of the Safe Drinking Water Act, as amended (1996), and 40 CFR part 142.

Dated: December 2, 2019.

Mary S. Walker,

Regional Administrator, Region 4.

[FR Doc. 2019–27156 Filed 12–16–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

TIME AND DATE: 3:49 p.m. on Thursday, December 12, 2019.

PLACE: The meeting was held in the Board Room located on the sixth floor of the FDIC Building located at 550 17th Street NW, Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED: In calling the meeting, the Board determined, on motion of Director Joseph M. Otting (Comptroller of the Currency), seconded by Director Martin J. Gruenberg, and concurred in by Director Kathleen L. Kraninger (Director, Consumer Financial Protection Bureau), and Chairman Jelena McWilliams, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B).

CONTACT PERSON FOR MORE INFORMATION: Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at 202–898–7043.

Dated at Washington, DC, on, December 12, 2019.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2019–27218 Filed 12–13–19; 11:15 am]

BILLING CODE 6714–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[CDC–2019–0111, NIOSH–332]

Request for Information on Toxicological and Physicochemical Data of Engineered Nanomaterials To Evaluate in Developing Categorical Occupational Exposure Limits (OELs)

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Request for information.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) intends to evaluate the scientific data on engineered nanomaterials (ENMs) to develop categorical occupational exposure limits (OELs) based on the available scientific evidence regarding the hazard or safety of these materials.

NIOSH seeks to obtain materials, including published and unpublished reports and research findings, to evaluate the possible adverse health risks of occupational exposure to ENMs.

DATES: Electronic or written comments must be received by February 18, 2020.

ADDRESSES: You may submit comments, identified by CDC–2019–0111 and Docket Number NIOSH–332, by either of the two following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* NIOSH Docket Office, Robert A. Taft Laboratories, MS–C34, 1090 Tusculum Avenue, Cincinnati, OH 45226.

Instructions: All information received in response to this notice must include the agency name and docket number [CDC–2019–0111; NIOSH–332]. All relevant comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. All electronic comments should be formatted in Microsoft Word. Please make reference to CDC–2019–0111 and Docket Number NIOSH–332.

FOR FURTHER INFORMATION CONTACT: Nathan M. Drew, MS, NIOSH, MS–C14, 1090 Tusculum Avenue, Cincinnati, OH 45226, telephone (513) 533–8352.

SUPPLEMENTARY INFORMATION: In 2017, NIOSH contributed to the International Organization for Standardization (ISO) technical report on frameworks for developing OELs for nano-objects [ISO 2016]. In 2019, NIOSH published a Technical Report on occupational exposure banding guidance [NIOSH 2019]. The information presented in these Technical Reports represents the most recent update of the scientific rationale and methodology for establishing hazard values for chemicals, which includes ENMs.

The development of an OEL for an individual chemical involves a critical review of the available scientific data in humans and animals to identify relevant studies and to characterize the various lines of evidence that can support the derivation of the OEL. NIOSH requests information for ENMs to include human, animal, and cellular toxicology data, including but not limited to: Acute, subchronic, or chronic data; the physicochemical characterization of those ENMs; and other information about the biological mechanisms and toxicological effects of ENMs. NIOSH is also seeking information on studies that include evaluating the dose-response relationships between exposure to ENMs and the development of adverse lung effects including inflammation, fibrosis, or neoplasia. Supporting information for published studies should include a full citation. For unpublished studies please include authors, affiliations, year, and any context on how the data were collected.

NIOSH will publish a Technical Report which describes the data, methods, and findings for the development of categorical OELs for ENMs, which may include relevant information submitted in response to this request. The draft Technical Report will be made available for public comment in a subsequent notice.

References

[ISO 2016] Nanotechnologies—Overview of available frameworks for the development of occupational exposure limits and bands for nano-objects and their aggregates and agglomerates (NOAAs). International Organization for Standardization (ISO) Technical Report. ISO/TR 18637, published November 21. ISO, Geneva, Switzerland.

[NIOSH 2019] Technical report: The NIOSH occupational exposure banding process for chemical risk management. By Lentz TJ, Seaton M, Rane P, Gilbert SJ, McKernan LT, Whittaker C. Cincinnati, OH: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication No. 2019–132

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2019–27169 Filed 12–16–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10638, CMS–R–5, CMS–287–19, and CMS–10088]

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 16, 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.*

1. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

2. 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:* Revision with change of a currently approved collection; *Title of Information Collection:* Application for New Medical Services and Technologies Seeking to Qualify for Add-On Payments Under the Hospital Inpatient Prospective Payment System; *Use:* Section 1886(d)(5)(K) authorizes the Secretary to establish a special payment methodology for new medical services and technologies used in inpatient procedures. To qualify for additional payments under this provision; a new technology must represent a substantial clinical improvement; data reflecting the cost of new technology must not yet be available in the data used to recalibrate the Medicare severity diagnosis-related groups (MS–DRGs); and the MS–DRG payment rate otherwise applicable to the new technology would be inadequate (see 42 CFR 412.87(b)). we are revising the estimated annual number of respondents from 32 to 62, based on the proposed alternative new technology add-on payment pathway for certain devices included in the FY 2020 IPPS proposed rule (CMS–1716–P). The existing regulations at 42 CFR 412.87 implement these provisions and specify three criteria for a new medical service or technology to receive the additional payment: (1) The medical service or technology must be new; (2) the medical service or technology must be costly such that the DRG rate otherwise applicable to discharges involving the medical service or technology is determined to be inadequate; and (3) the service or technology must demonstrate a substantial clinical improvement over existing services or technologies.

In the FY 2020 IPPS proposed rule (84 FR 19371—19373), we proposed an alternative new technology add-on payment pathway for certain devices. Specifically, for applications received for new technology add-on payments for FY 2021 and subsequent fiscal years, we proposed that a medical device that has received Federal Drug Administration (FDA) marketing authorization (that is, has been approved or cleared by, or had a De Novo classification request granted by, the FDA) and that is part of the FDA's Breakthrough Devices Program would need to meet the cost criterion (that is, the medical device must be costly such that the DRG rate otherwise applicable to discharges involving the medical device is determined to be inadequate). To implement this proposal, we proposed to revise the existing regulations at 42 CFR 412.87. We use the application in order to determine if a technology meets the new technology criteria under the existing pathway, and would revise the application to reflect the information required to determine if a device meets the new technology criteria the proposed alternative pathway for certain devices. The revise application that would be used if the proposed alternative new technology add-on payment pathway for certain devices is finalized in the FY 2020 IPPS final rule, which is expected to be issued by August 1, 2019. *Form Number:* CMS–10638 (OMB control number: 0938–1347); *Frequency:* Yearly; *Affected Public:* Private Sector: Business or Other for-profits, Not for-profit Institutions; *Number of Respondents:* 62; *Total Annual Responses:* 62; *Total Annual Hours:* 1,655. (For policy questions regarding this collection contact Michele Hudson at 410–786–5490.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Physician Certifications/Recertifications in Skilled Nursing Facilities Manual Instructions; *Use:* Section 1814(a) of the Social Security Act (the Act) requires specific certifications in order for Medicare payments to be made for certain services. Before the enactment of the Omnibus Budget Reconciliation Act of 1989 (OBRA1989, Pub. L. 101–239), section 1814(a)(2) of the Act required that, in the case of post-hospital extended care services, a physician certify that the services are or were required to be given because the individual needs or needed, on a daily basis, skilled nursing care (provided directly by or requiring the supervision of skilled nursing personnel) or other skilled rehabilitation services that, as a practical matter, can only be provided in a SNF on an inpatient basis. The physician certification requirements were included in the law to ensure that patients require a level of care that is covered by the Medicare program and because the physician is a key figure in determining the utilization of health services. In addition, it set forth qualification requirements that a nurse practitioner or clinical nurse specialist must meet in order to sign certification or recertification statements (these requirements were later revised in the Balanced Budget Act of 1997).

Effective with items and services furnished on or after January 1, 2011, section 3108 of the Affordable Care Act added physician assistants to the existing authority for nurse practitioners and clinical nurse specialists. Regulations implementing this provision were promulgated in the calendar year (CY) 2011 Medicare Physician Fee Schedule (MPFS) final rule with comment period (75 FR 73387, 73602, 73626–27, November 29, 2010). The requirements at 42 CFR 424.20(a) and (b) concern the initial certification of a beneficiary's need for a SNF level of care, which must be made upon admission or as soon thereafter as is reasonable and practicable. The requirements at 42 CFR 424.20(c) and (d) concern recertification of a beneficiary's need for continued SNF level of care, and also require an estimate of the time the individual will need to remain in the SNF, plans for home treatment, and, if appropriate, whether continued services are needed for a condition that occurred after admission to the SNF and while still receiving treatment for the condition for which he or she had received inpatient hospital services. These sections require recertification at specific intervals (the initial recertification must occur no later than the 14th day of SNF care, with subsequent recertification at least every 30 days thereafter) that posthospital SNF care is or was required because the individual needs or needed skilled care on a daily basis. The following CMS internet-Only Manuals provide more detailed instructions regarding the required certification and recertification of covered post-hospital extended care services for a Medicare beneficiary: Chapter 4, sections 40ff and 80 in the Medicare General Information, Eligibility, and Entitlement Manual (CMS Pub. 100–01), chapter 8, sections 40ff. in the Medicare Benefit Policy Manual (CMS Pub. 100–02), and chapter 6, section 6.3 in the Medicare Program Integrity Manual (CMS Pub. 100–08). *Form Number:* CMS–R–5 (OMB control number: 0938–0454); *Frequency:* Occasionally; *Affected Public:* Private Sector (Not-for-profit institutions); *Number of Respondents:* 2,746,550; *Total Annual Responses:* 2,746,550; *Total Annual Hours:* 615,149. (For policy questions regarding this collection contact Kia Sidbury at 410–786–7816.)

3. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Home Office Cost Statement; *Use:* Home offices of chain organizations vary greatly in size, number of locations, staff, mode of operations, and services furnished to the facilities in the chain. The home office of a chain is not in itself certified by Medicare. The relationship of the home office is that of a related organization to participating providers (See 42 CFR 413.17). When a provider claims costs on its cost report that are allocated from a home office, the Home Office Cost Statement constitutes the documentary support required of the provider to be reimbursed for home office costs in the provider's cost report. Each contractor servicing a provider in a chain must be furnished with a detailed Home Office Cost Statement as a basis for reimbursing the provider for cost allocations from a home office or chain organization. Home offices usually furnish central management and administrative services, *e.g.,* centralized accounting, purchasing, personnel services, management direction and control, and other services. To the extent that the home office furnishes services related to patient care to a provider, the reasonable costs of such services are included in the provider's cost report and are reimbursable as part of the provider's costs. If the home office of the chain provides no services related to patient care, the costs of the home office may not be recognized in determining the allowable costs of the providers in the chain. Under the authority of sections 1815(a) and 1833(e) of the Social Security Act (42 U.S.C. 1395g), CMS requires that providers of services participating in the Medicare program submit information to determine costs for health care services rendered to Medicare beneficiaries. CMS requires that providers follow reasonable cost principles under 1861(v)(1)(A) of the Act when completing the Medicare cost report. Under the regulations at 42 CFR 413.20 and 413.24, CMS defines adequate cost data and requires cost reports from providers on an annual basis. Providers receiving Medicare reimbursement must provide adequate cost data based on financial and statistical records, which can be verified by qualified auditors. The Form CMS–287–19 home office cost statement is needed to determine a provider's reasonable cost incurred in furnishing medical services to Medicare beneficiaries and reimbursement due to or from a provider. *Form Number:*

CMS–287–19 (OMB control number: 0938–0202); *Frequency:* Annually; *Affected Public:* Private Sector (Business or other for-profit and Not-for-profit institutions); *Number of Respondents:* 1,507; *Total Annual Responses:* 1,507; *Total Annual Hours:* 702,262. (For policy questions regarding this collection contact Yaakov Feinstein at 410–786–3137.)

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Notification of FLS and CMS of Co-Located Medicare Providers; *Use:* Many long-term care hospitals (LTCHs) are co-located with other Medicare providers (acute care hospitals, inpatient rehabilitation facilities (IRFs), skilled nursing facilities (SNFs), inpatient psychiatric facilities (IPFs)), which could lead to potential gaming of the Medicare system based on inappropriate patient shifting. In regulations at 42 CFR 412.22(e)(3) and (h)(6) CMS requires LTCHs to notify Medicare Administrative Contractors (MACs) and CMS of co-located providers. The requirement regarding collection of information at § 412.22 concerning a LTCH's (or a LTCH satellite's) notification to its MAC and CMS of its co-located status is needed in order for Medicare to appropriately pay co-located hospitals-within-hospitals (HwHs) and satellites. Under §§ 412.22(e)(3) and (h)(6), an LTCH or a satellite of an LTCH that occupies space in a building used by another hospital, or in one or more entire buildings located on the same campus as buildings used by another hospital must notify its MAC and CMS in writing of its co-location within 60 days of its first cost reporting period that began on or after October 1, 2002. *Form Number:* CMS–10088 (OMB control number: 0938–0897); *Frequency:* Yearly; *Affected Public:* Private Sector (Business or other for-profit, not-for-profit institutions); *Number of Respondents:* 25; *Total Annual Responses:* 25; *Total Annual Hours:* 6. (For policy questions regarding this collection contact Emily Lipkin at 410–786–3633.)

Dated: December 12, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–27139 Filed 12–16–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Request for Public Comment: 60-Day Information Collection: Application for Participation in the IHS Scholarship Program

AGENCY: Indian Health Service.

ACTION: Notice and request for comments. Request for extension of approval.

SUMMARY: In compliance the Paperwork Reduction Act of 1995, the Indian Health Service (IHS) invites the general public to comment on the information collection titled, ''Application for Participation in the IHS Scholarship Program,'' Office of Management and Budget (OMB) Control No. 0917–0006. IHS is requesting OMB to approve an extension for this collection, which expires on March 31, 2020.

DATES: *Comment Due Date:* February 18, 2020. Your comments regarding this information collection are best assured of having full effect if received within 60 days of the date of this publication.

ADDRESSES: Send your written comments, requests for more information on the collection, or requests to obtain a copy of the data collection instrument and instructions to Ms. Reta Brewer by one of the following methods:

- *Mail:* Reta Brewer, Branch Chief, Scholarship Programs, Division of Health Professions Support, Indian Health Service, 5600 Fishers Lane, Mail Stop: OHR 11E53A, Rockville, MD 20857.
- *Phone:* (301) 443–2349.
- *Email: reta.brewer@ihs.gov.*
- *Fax:* 301–443–6048.

SUPPLEMENTARY INFORMATION: This previously approved information collection project was last published in the **Federal Register** (81 FR 60368), on September 1, 2016 and allowed 30 days for public comment. No public comment was received in response to the notice. The purpose of this notice is to allow 60 days for public comment. A copy of the supporting statement is available at *www.regulations.gov* (see Docket ID IHS–2020–01).

Information Collection: Title: ''Application for Participation in the IHS Scholarship Program,'' OMB Control No. 0917–0006. *Type of Information Collection Request:* Extension of the currently approved information collection ''Application for Participation in the IHS Scholarship Program,'' OMB Control No. 0917–0006. *Form Number(s):* IHS–856–07 through 856–16, IHS–856–19 through 856–23, IHS–817, and IHS–818 are retained for use by the IHS Scholarship Program (IHSSP) as part of this current Information Collection Request. Reporting forms are found on the IHS website at *www.ihs.gov/scholarship.* Forms IHS–856–03, IHS–856–05, and IHS–856–06 have been moved to the online application process and can be found at *www.ihs.gov/scholarship/applynow/. Need and Use of Information Collection:* The IHS Scholarship Branch needs this information for program administration and uses the information to: Solicit, process, and award IHS Pre-graduate, Preparatory, and/or Health Professions Scholarship recipients; monitor the academic performance of recipients; and to place recipients at payback sites. The IHSSP application is electronically available on the internet at the IHS website at: *http://www.ihs.gov/scholarship/applynow/.*

Affected Public: Individuals, not-for-profit institutions and State, local or Tribal Governments. *Type of Respondents:* Students pursuing health care professions.

The table below provides: Types of data collection instruments, Estimated number of respondents, Number of responses per respondent, Annual number of responses, Average burden hour per response, and Total annual burden hours.

Data collection instrument(s)	Number of respondents	Responses per respondent	Total annual response	Burden hour per response *	Annual burden hours
Scholarship Online Application	850	1	850	1.00 (60 min)	850
Verification of Acceptance or Decline of Award (IHS–856–7).	300	1	300	0.13 (8 min)	39
Recipient's Initial Program Progress Report (IHS–856–8).	800	1	800	0.13 (8 min)	104
Notification of Academic Problem (IHS–856–9)	20	1	20	0.13 (8 min)	3
Change of Status (IHS–856–10)	50	1	50	.045 (25 min)	21

Data collection instrument(s)	Number of respondents	Responses per respondent	Total annual response	Burden hour per response *	Annual burden hours
Request for Approval of Deferment (IHS–856–11)	60	1	60	0.13 (8 min)	8
Preferred Placement (IHS–856–12)	150	1	150	0.50 (30 min)	75
Notice of Impending Graduation (IHS–856–13)	170	1	170	0.17 (10 min)	28
Notification of Deferment Program (IHS–856–14)	60	1	60	0.13 (8 min)	8
Placement Update (IHS–856–15)	170	1	170	0.18 (11 min)	31
Annual Status Report (IHS–856–16)	200	1	200	0.25 (15 min)	50
Lost Stipend Payment (IHS–856–19)	10	1	10	0.13 (8 min)	2
Summer School Request (IHS–856–21)	100	1	100	0.10 (6 min)	10
Change of Name or Address (IHS–856–22)	20	1	20	0.13 (8 min)	3
Request for Credit Validation (IHS–856–23)	30	1	30	0.10 (6 min)	3
Scholarship Program Agreement (IHS–817)	60	1	60	0.16 (10 min)	10
Health Professions Contract (IHS–818)	225	1	225	0.16 (10 min)	38
Total			3,275		1,283

* For ease of understanding, burden hours are also provided in actual minutes.

There are no direct costs to respondents other than their time to voluntarily complete the forms and submit them for consideration. The estimated cost for the federal government is $145,223.00 (contractor) to work on the program with IHS program staff.

Requests for Comments: Your written comments and/or suggestions are invited on one or more of the following points:

(a) Whether the information collection activity is necessary to carry out an agency function;

(b) whether the agency processes the information collected in a useful and timely fashion;

(c) the accuracy of the public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information);

(d) whether the methodology and assumptions used to determine the estimates are logical;

(e) ways to enhance the quality, utility, and clarity of the information being collected; and

(f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Chris Buchanan,

Assistant Surgeon General, USPHS, Deputy Director, Indian Health Service.

[FR Doc. 2019–27121 Filed 12–16–19; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 on Drug Abuse Special Emphasis Panel; PHASE I: NIDA Avant-Garde Award Program for HIV/AIDS and Drug Use Research (DP1) (Mail) and Phase II: NIDA Avant Garde Award Program for HIV/AIDs and Drug Use Research (DP1) (Interview).

Date: December 18, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Hiromi Ono, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 4238, MSC 9550, Bethesda, MD 20892, 301–402–6020, *hiromi.ono@nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the intramural research review cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Mechanism for Time-Sensitive Drug Abuse Research (R21 Clinical Trial Optional).

Date: December 20, 2019.

Time: 1:00 p.m. to 3:00 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: Susan O. McGuire, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Blvd., Room 4245, Rockville, MD 20852, 301–435–1426, *mcguireso@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. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 11, 2019.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27102 Filed 12–16–19; 8:45 am]

BILLING CODE 4140–01–P

INSTITUTE OF AMERICAN INDIAN AND ALASKA NATIVE CULTURE AND ARTS DEVELOPMENT

Request for Nominations to the Board of Trustees

AGENCY: Institute of American Indian and Alaska Native Culture and Arts Development (aka Institute of American Indian Arts).

ACTION: Notice; request for nominations.

SUMMARY: The Board directs the Administration of the Institute of American Indian and Alaska Native Culture and Arts Development, including soliciting, accepting, and disposing of gifts, bequests, and other properties for the benefit of the Institute. The Institute provides scholarly study of and instruction in Indian art and culture, and establishes programs which culminate in the awarding of degrees in the various fields of Indian art and culture. The Board consists of thirteen members appointed by the President of

the United States, by and with the consent of the U.S. Senate, who are American Indians or persons knowledgeable in the field of Indian art and culture. This notice requests nominations to fill three expiring terms on the Board of Trustees.

ADDRESSES: Institute of American Indian Arts, 83 Avan Nu Po Road, Santa Fe, New Mexico 87508.

FOR FURTHER INFORMATION CONTACT: Dr. Robert Martin, President, 505–424–2301.

Dated: December 9, 2019.

Robert Martin,

President.

[FR Doc. 2019–27155 Filed 12–16–19; 8:45 am]

BILLING CODE 4312–W4–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[OMB Control Number 1010–0114; Docket ID: BOEM–2017–0016]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Oil and Gas Production Requirements in the Outer Continental Shelf

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Ocean Energy Management (BOEM) is proposing to renew an information collection request with revisions.

DATES: Interested persons are invited to submit comments on or before January 16, 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 the BOEM Information Collection Clearance Officer, Anna Atkinson, Bureau of Ocean Energy Management, 45600 Woodland Road, Sterling, Virginia 20166; or by email to *anna.atkinson@boem.gov.* Please reference Office of Management and Budget (OMB) Control Number 1010–0114 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Anna Atkinson by email, or by telephone at 703–787–1025. 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, BOEM provides the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps BOEM assess the impact of the information collection requirements and minimize the public's reporting burden. It also helps the public understand BOEM's 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 proposed information collection request was published on September 9, 2019 (84 FR 47317). One comment was received that discussed protection of American citizens, and opposition to drilling surveys.

BOEM is again soliciting comments on the proposed ICR that is described below. BOEM is especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of BOEM; (2) what can BOEM do to ensure this information will be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might BOEM enhance the quality, utility, and clarity of the information to be collected; and (5) how might BOEM minimize the burden of this collection on the respondents, including minimizing the burden through the use of information technology?

Comments that you submit in response to this notice are a matter of public record. BOEM will include or summarize each comment in its request to the Office of Management and Budget (OMB) for approval of this ICR. You should be aware that your entire comment—including your address, phone number, email address, or other personal identifying information—may be made publicly available at any time. In order for BOEM to withhold from disclosure your personally identifiable information, you must identify any information contained in the submittal of your comments that, if released, would clearly constitute an unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequences of the disclosure of your information, such as embarrassment, injury, or other harm. While you can ask BOEM in your comment to withhold your personally identifiable information from public review, BOEM cannot guarantee that it will be able to do so.

BOEM protects proprietary information in accordance with the Freedom of Information Act (5 U.S.C. 552) and the Department of the Interior's implementing regulations (43 CFR part 2), and under regulations at 30 CFR parts 550 and 552 promulgated pursuant to the Outer Continental Shelf Lands Act (OCSLA) at 43 U.S.C. 1352(c).

Abstract: This information collection request concerns the paperwork requirements in the regulations in 30 CFR part 550, subparts A and K, which deal with regulatory requirements of oil, gas, and sulfur operations on the OCS. This request also covers the related Notices to Lessees and Operators (NTL) that BOEM issues to clarify and provide guidance on some aspects of our regulations, and forms BOEM–0127, BOEM–0140, BOEM–1123, and BOEM–1832.

The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior to prescribe rules and regulations to administer leasing of the OCS. Such rules and regulations apply to all operations conducted under a lease. Operations in the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources expeditiously available to meet the Nation's energy needs: To balance orderly energy resources development with protection of human, marine and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition. Section 1332(6) states that ''operations in the [O]uter Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control . . . physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.''

BOEM uses the information collected under the regulations affected by this ICR to ensure that operations in the OCS are carried out in a safe and environmentally sound manner, do not interfere with the rights of other users on the OCS, and balance the protection and development of OCS resources.

Title of Collection: 30 CFR 550, Subpart A, General, and Subpart K, Oil and Gas Production.

OMB Control Number: 1010–0114.

Form Number:

- BOEM–0127, Sensitive Reservoir Information Report;
- BOEM–0140, Bottomhole Pressure Survey Report;
- BOEM–1123, Designation of Operator; and
- BOEM–1832, Notification of Incident(s) of Noncompliance.

Type of Review: Revision of a currently approved information collection.

Respondents/Affected Public: Oil and gas and Sulphur lessees/operators.

Total Estimated Number of Annual Responses: 5,302 responses.

Total Estimated Number of Annual Burden Hours: 18,323 hours.

Respondent's Obligation: Mandatory.

Frequency of Collection: On occasion, monthly.

Total Estimated Annual Non-hour Burden Cost: $165,492.

Estimated Reporting and Recordkeeping Hour Burden: The current annual burden hours for this collection are 30,635 hours. BOEM proposes to reduce annual burden hours to 18,323 hours, which is a decrease of 12,312 annual burden hours. The annual burden hour reduction is related to adjustments in 30 CFR 550, subpart K, which include:

- For 30 CFR 550.1153, the regions re-evaluated the annual burden hours for static bottomhole pressure surveys. The average hour burden based on industry feedback is 15 hours instead of 14 hours. Also, BOEM on average reviews approximately 400 bottomhole pressure surveys per year instead of 1,161 surveys. The 2017 OMB approved annual burden hours included 3 years of data instead of annual data. Therefore, BOEM is reducing the number of respondents to correct this error. The annual burden hours for 30 CFR 55.1153 is decreasing from 16,254 hours to 6,000 hours (−10,254 hours).
- For 30 CFR 550.1153(d), BOEM is increasing the hour burden from 1 to 5 based on industry feedback. BOEM is currently reviewing fewer departures annually than previously recorded (decreasing number of departures from 200 to 100). With the increase in hour burdens and the decrease in respondents, the overall annual burden hour for 30 CFR 550.1153(d) will increase to 500 hours (+300 hours).
- For 30 CFR 550.1154 and 550.1167, BOEM is changing the hour burden from 1 to 5 hours based on industry feedback. However, the number of respondents is dropping by 2/3rds (from 15 requests to 5 requests). Therefore, the annual burden hour change will increase slightly from 15 hours to 25 hours (+10 hours).
- For 30 CFR 550.1155, based on outreach input, BOEM is increasing the hour burden for form BOEM–0127 from 3 hours to 6 hours. However, BOEM previously overestimated the number of forms submitted. BOEM is reducing the number of forms collected from 2,012 to 610 forms; therefore, the overall annual burden hours will decrease from 6,036 hours to 3,660 hours (−2,376 hours).
- For 30 CFR 550.1153–1167, BOEM is increasing the respondents from 2 to 10 due to an increase in annual departure requests. With changes in technology, operators are installing permanent downhole gauges in wells, which show continuous readings of the downhole pressure. Operators are submitting this type of data, as alternative compliance to static bottomhole pressure surveys, to meet the bottomhole pressure requirement. BOEM has seen an increase from 2 to 10 departure requests annually. This increase in respondents causes the annual burden hours to increase from 2 to 10 hours (+8 hours).

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.

Authority: The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Deanna Meyer-Pietruszka,

Chief, Office of Policy, Regulations, and Analysis.

[FR Doc. 2019–27079 Filed 12–16–19; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR83550000, 201R5065C6, RX.59389832.1009676]

Quarterly Status Report of Water Service, Repayment, and Other Water-Related Contract Actions

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of contract actions.

SUMMARY: Notice is hereby given of contractual actions that have been proposed to the Bureau of Reclamation (Reclamation) and are new, discontinued, or completed since the last publication of this notice. This notice is one of a variety of means used to inform the public about proposed contractual actions for capital recovery and management of project resources and facilities consistent with section 9(f) of the Reclamation Project Act of 1939. Additional announcements of individual contract actions may be published in the **Federal Register** and in newspapers of general circulation in the areas determined by Reclamation to be affected by the proposed action.

ADDRESSES: The identity of the approving officer and other information pertaining to a specific contract proposal may be obtained by calling or writing the appropriate regional office at the address and telephone number given for each region in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Michelle Kelly, Reclamation Law Administration Division, Bureau of Reclamation, P.O. Box 25007, Denver, Colorado 80225–0007; *mkelly@usbr.gov*; telephone 303–445–2888.

SUPPLEMENTARY INFORMATION: Consistent with section 9(f) of the Reclamation Project Act of *1939,* and the rules and regulations published in 52 FR 11954, April 13, 1987 (43 CFR 426.22), Reclamation will publish notice of proposed or amendatory contract actions for any contract for the delivery of project water for authorized uses in newspapers of general circulation in the affected area at least 60 days prior to contract execution. Announcements may be in the form of news releases, legal notices, official letters, memorandums, or other forms of written material. Meetings, workshops, and/or hearings may also be used, as appropriate, to provide local publicity. The public participation procedures do not apply to proposed contracts for the sale of surplus or interim irrigation water for a term of 1 year or less. Either of the contracting parties may invite the public to observe contract proceedings. All public participation procedures will be coordinated with those involved in complying with the National Environmental Policy Act. Pursuant to the ''Final Revised Public Participation Procedures'' for water resource-related contract negotiations, published in 47 FR 7763, February 22, 1982, a tabulation is provided of all proposed contractual actions in each of the five Reclamation regions. When contract negotiations are completed, and prior to execution, each proposed contract form must be approved by the Secretary of the Interior, or pursuant to delegated or redelegated authority, the Commissioner of Reclamation or one of the regional directors. In some instances, congressional review and approval of a report, water rate, or other terms and conditions of the contract may be involved.

Public participation in and receipt of comments on contract proposals will be facilitated by adherence to the following procedures:

1. Only persons authorized to act on behalf of the contracting entities may negotiate the terms and conditions of a specific contract proposal.

2. Advance notice of meetings or hearings will be furnished to those parties that have made a timely written request for such notice to the appropriate regional or project office of Reclamation.

3. Written correspondence regarding proposed contracts may be made available to the general public pursuant to the terms and procedures of the Freedom of Information Act, as amended.

4. Written comments on a proposed contract or contract action must be submitted to the appropriate regional officials at the locations and within the time limits set forth in the advance public notices.

5. All written comments received and testimony presented at any public hearings will be reviewed and summarized by the appropriate regional office for use by the contract approving authority.

6. Copies of specific proposed contracts may be obtained from the appropriate regional director or his or her designated public contact as they become available for review and comment.

7. In the event modifications are made in the form of a proposed contract, the appropriate regional director shall determine whether republication of the notice and/or extension of the comment period is necessary.

Factors considered in making such a determination shall include, but are not limited to, (i) the significance of the modification, and (ii) the degree of public interest which has been expressed over the course of the negotiations. At a minimum, the regional director will furnish revised contracts to all parties who requested the contract in response to the initial public notice.

Definitions of Abbreviations Used in the Reports

BCP Boulder Canyon Project
Reclamation Bureau of Reclamation
CAP Central Arizona Project
CUP Central Utah Project
CVP Central Valley Project
CRSP Colorado River Storage Project
EXM Emergency extraordinary maintenance
XM Extraordinary maintenance
FR Federal Register
IDD Irrigation and Drainage District
ID Irrigation District
M&I Municipal and Industrial
O&M Operation and Maintenance
OM&R Operation, Maintenance, and Replacement
P–SMBP Pick-Sloan Missouri Basin Program
SOD Safety of Dams
SRPA Small Reclamation Projects Act of 1956
USACE U.S. Army Corps of Engineers
WD Water District

Columbia-Pacific Northwest—Interior Region 9: Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, Idaho 83706–1234, telephone 208–378–5344.

New contract actions:

19. *Roza ID, Yakima Project, Washington:* Contract for use of water in dead space of Kachess Reservoir and construction of a pumping plant.

20. *Quincy-Columbia Basin ID, Columbia Basin Project, Washington:* Long-term contract to renew master water service contract No. 14–06–100–9166, as supplemented, to authorize the district to deliver project water to up to 10,000 First Phase Continuation Acres located within the district, and to deliver additional project water to land irrigated under the district's repayment contract during the peak period of irrigation water use annually.

Completed contract actions:

15. *Yakima Nation and Cascade ID, Yakima Project, Washington:* Long-term contract for an exchange of water and to authorize the use of capacity in Yakima Project facilities to convey up to 10 cubic feet per second of non-project water during the non-irrigation season for fish hatchery purposes. Contract executed on April 1, 2019.

17. *Cascade ID, Yakima Project, Washington:* Contract for Yakima Tribes use of Cascade ID's canal for Melvin R. Sampson Hatchery. Contract executed on April 1, 2019.

Discontinued contract action:

18. *Bitter Root ID, Bitter Root Project, Montana:* Amendment to SOD contract to extend repayment period.

California-Great Basin—Interior Region 10: Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825–1898, telephone 916–978–5250.

New contract actions:

53. *San Luis and Delta-Mendota Water Authority, CVP, California:* Renewal of OM&R contract.

54. *San Luis and Delta-Mendota Water Authority, CVP, California:* Contract for repayment for XM and replacement funded pursuant to Subtitle G of Public Law 111–11.

55. *City of West Sacramento, CVP, California:* Negotiation and execution of a 40-year long-term water service contract.

Completed contract actions:

8. *Casitas Municipal WD, Ventura Project, California:* Repayment contract for SOD work on Casitas Dam. Contract executed on October 6, 2014.

13. *Delta Lands Reclamation District No. 770, CVP, California:* Long-term Warren Act contract for conveyance of up to 300,000 acre-feet of non-project flood flows via the Friant-Kern Canal for flood control purposes. A contract with a 5-year term was executed on February 10, 2017.

20. *Goleta WD, Cachuma Project, California:* An agreement to transfer title of the federally owned distribution system to the Goleta WD subject to approved legislation. Contract executed on September 2019.

Lower Colorado Basin—Interior Region 8: Bureau of Reclamation, P.O. Box 61470 (Nevada Highway and Park Street), Boulder City, Nevada 89006–1470, telephone 702–293–8192.

New contract actions:

14. *Ehrenberg Improvement District, BCP, Arizona:* Assign Ehrenberg Improvement Association's Colorado River water delivery contract No. 8–07–30–W0006, as amended, for 650 acre-feet of water per year, to the district.

15. Western Water, LLC and Ehrenberg Improvement District, BCP, Arizona: Review and approve a proposed partial assignment and transfer of Arizona fourth-priority Colorado River water in the amount of 85 acre-feet of water per year from Western Water to the district, amend Western Water's Colorado River water delivery contract No. 16–XX–30–W0619 to decrease its Colorado River water entitlement by 85 acre-feet of water per year from 621.48 to 536.48 acre-feet of water per year, and amend the district's Colorado River water delivery contract No. 8–07–30–W0006 to increase the district's Colorado River water entitlement by 85 acre-feet of water per year from 650 to 735 acre-feet of water per year.

Completed contract actions:

3. *Bard WD, Yuma Project, California:* Consolidate Bard WD's O&M contracts for the Yuma Project, California, Reservation Division, Indian and Bard Units, to reflect updated Reclamation policy and procedures. Contract executed on May 28, 2019.

10. *San Carlos Apache and Pascua Yaqui Tribes, CAP, Arizona:* Execute a CAP water lease for the San Carlos Apache Tribe to lease 1,750 acre-feet of its CAP water to the Pascua Yaqui Tribe during calendar year 2019. Lease executed on May 6, 2019.

11. *San Carlos Apache Tribe and the Town of Gilbert, CAP, Arizona:* Execute a proposed 100-year lease not to exceed 5,925 acre-feet per year of CAP water from the Tribe to Gilbert. Lease executed June 12, 2019.

12. *San Carlos Apache Tribe and Freeport Minerals Corporation, CAP,*

Arizona: Execute a CAP water lease for the San Carlos Apache Tribe to lease 17,000 acre-feet of its CAP water to Freeport Minerals Corporation during calendar year 2019. Lease executed May 6, 2019.

Upper Colorado Basin—Interior Region 7: Bureau of Reclamation, 125 South State Street, Room 8100, Salt Lake City, Utah 84138–1102, telephone 801–524–3864.

New contract actions:

28. *Bostwick Park Water Conservancy District, Bostwick Park Project, Colorado:* Preliminary lease and funding agreement for development of the lease of power privilege for hydropower development on the Silver Jack Dam Bypass Pipeline. The purpose of this agreement is to receive funding from the district for Reclamation's assistance in the development of the lease of power privilege and identify timelines for the process.

29. *Emery Water Conservancy District, Emery Project, Utah:* The district is pursuing title transfer efforts for all of the Emery Project works including the dams, diversion facilities, conveyance facilities, and water rights. Reclamation and the district are discussing a memorandum of agreement to outline roles in this effort.

30. *Fort Sumner ID, Carlsbad Project, New Mexico:* Reclamation is pursuing negotiations with the district to contract with Reclamation with the intent that the district would refrain from calling for up to 3,500 acre-feet of water annually under its water right and make it available to Reclamation for storage in Sumner Reservoir for the purpose of maximizing the quantity of water available to the Carlsbad Project.

Missouri Basin—Interior Region 5: Bureau of Reclamation, P.O. Box 36900, Federal Building, 2021 4th Avenue North, Billings, Montana 59101, telephone 406–247–7752.

New contract actions:

35. *Webster ID No. 4; Solomon Division, P–SMBP; Kansas:* Consideration of a repayment contract for XM and replacement funded pursuant to Subtitle G of Pub. L. 111–11.

36. *Canyon Limited Liability; Boysen Unit, P–SMBP; Wyoming:* Consideration for renewal of contract No. 009E6A0035.

37. *North Dakota State Water Commission, Snake Creek Pumping Plant, North Dakota:* Consideration for a use-of-facilities contract.

38. *Goshen ID, North Platte Project:* EXM and replacement contract funded pursuant to Subtitle G of Pub. L. 111–11 for work on the Fort Laramie Canal and Tunnels.

39. *Garfield County, Colorado; Ruedi Reservoir, Fryingpan-Arkansas Project; Colorado:* Consideration for amendment to contract No. 139D6C0105 for an additional place of use.

40. *Ainsworth ID; Ainsworth Unit, P–SMBP; Nebraska:* Amendment of contract No. 17SD630055 for SOD modification costs associated with Merritt Dam.

41. *Lugert-Altus ID, W.C. Austin Project, Oklahoma:* Consideration for amendment to contract No. Ilr-1375.

42. *Ptarmigan Partners, LLC and Christine-Elliot Armstrong Revocable Trust and Andrew W. Armstrong Revocable Trust, Shoshone Project, Cody, Wyoming:* Consideration for amendment to contract No. 019E6A0227.

Completed contract actions:

16. *Glen Elder ID No. 8; Glen Elder Unit, P–SMBP; Kansas:* Consideration to renew long-term water service contract No. 2–07–60–W0855. Contract executed March 12, 2019.

21. *Town of Thermopolis; Boysen Unit, P–SMBP; Wyoming:* Consideration for renewal of long-term water service contract No. 8–07–WS050. Contract executed on May 13, 2019.

26. *Southeastern Colorado Water Conservancy District Acting by and through its Water Activity Enterprise, Fryingpan-Arkansas Project, Colorado:* Consideration to amend Pueblo Lease of Power Privilege contract No. 17XX650016. Contract executed on March 25, 2019.

38. *Goshen ID, North Platte Project:* EXM and replacement contract funded pursuant to Subtitle G of Pub. L. 111–11 for work on the Fort Laramie Canal and Tunnels. Contract executed August 26, 2019.

40. *Ainsworth ID; Ainsworth Unit, P–SMBP; Nebraska:* Amendment of contract No. 17SD630055 for SOD modification costs associated with Merritt Dam. Contract executed on July 15, 2019.

Discontinued contract action:

8. *Busk-Ivanhoe, Inc., Fryingpan-Arkansas Project, Colorado:* Contract for long-term carriage and storage, and/or a new contract for an additional use of water.

Gayle Kunkel-Shields,

Acting Director, Policy and Administration.

[FR Doc. 2019–27140 Filed 12–16–19; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR83550000, 201R5065C6, RX.59389832.1009676]

Change in Discount Rate for Water Resources Planning

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of change in discount rate.

SUMMARY: The Bureau of Reclamation is announcing the interest rate to be used by Federal agencies in the formulation and evaluation of plans for water and related land resources is 2.75 percent for fiscal year 2020. The prior fiscal year's rate as announced in the **Federal Register** (83 FR 64875) on December 18, 2018, was 2.875 percent for fiscal year 2019.

DATES: This discount rate is to be used for the period October 1, 2019, through and including September 30, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. William Taylor, Bureau of Reclamation, Reclamation Law Administration Division, P.O. Box 25007, Denver, Colorado 80225; telephone 303–445–2113.

SUPPLEMENTARY INFORMATION: The Water Resources Planning Act of 1965 and the Water Resources Development Act of 1974 require an annual determination of a discount rate for Federal water resources planning. The discount rate for Federal water resources planning for fiscal year 2020 is 2.750 percent. Discounting is to be used to convert future monetary values to present values.

This rate has been computed in accordance with Section 80(a), Public Law 93–251 (88 Stat. 34), and 18 CFR 704.39, which: (1) Specify that the rate will be based upon the average yield during the preceding fiscal year on interest-bearing marketable securities of the United States which, at the time the computation is made, have terms of 15 years or more remaining to maturity (average yield is rounded to nearest one-eighth percent); and (2) provide that the rate will not be raised or lowered more than one-quarter of 1 percent for any year. The U.S. Department of the Treasury calculated the specified average to be 2.7201 percent. This rate, rounded to the nearest one-eighth percent, is 2.75 percent, which is a change of less than the allowable one-quarter of 1 percent. Therefore, the fiscal year 2020 rate is 2.75 percent.

The rate of 2.75 percent will be used by all Federal agencies in the formulation and evaluation of water and related land resources plans for the purpose of discounting future benefits and computing costs or otherwise converting benefits and costs to a common-time basis.

Gayle Kunkel-Shields,

Acting Director, Policy and Administration.

[FR Doc. 2019–27167 Filed 12–16–19; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Wearable Monitoring Devices, Systems, and Components Thereof, DN 3423;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Philips North America, LLC and Koninklijke Philips, N.V., Inc. on December 10, 2019. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wearable monitoring devices, systems, and components thereof. The complaint names as respondents: Fitbit, Inc. of San Francisco, CA; Garmin International, Inc. of Olathe, KS; Garmin USA, Inc. of Olathe, KS; Garmin Ltd. d/b/a Garmin Switzerland GmbH of Switzerland; and Ingram Micro, Inc. of Irvine, CA. The complainant requests that the Commission issue a limited exclusion, a cease desist order and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3423'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: December 11, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–27100 Filed 12–16–19; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Dissolving Microneedle Patch Technology for Cosmetic and Pharmaceutical Use, Amended DN 3420;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of TheraJect, Inc. on December 10, 2019. The original complaint was filed on November 21, 2019 and a notice of receipt of complaint; solicitation of comments relating to the public interest published in the **Federal Register** on November 27, 2019. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of dissolving microneedle patch for cosmetic and pharmaceutical use. The complaint names as respondents: Raphas Co., Ltd of Korea; Raphas America Inc. of Wilmington, DE; eBay of San Jose, CA; and Amazon of Seattle, WA. The complainant requests that the Commission issue a limited exclusion, a cease desist order and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3420'') in a prominent place on the cover page and/ or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices,

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: December 10, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–27144 Filed 12–16–19; 8:45 am]

BILLING CODE 7020–02–P

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

On December 11, 2019, the Department of Justice filed a complaint and lodged a proposed Consent Decree with the United States District Court for the Western District of Michigan in the lawsuit entitled *United States of America and the State of Michigan* v. *NCR Corporation,* Civil Action No. 1:19–cv–01041.

The United States, on behalf of the United States Environmental Protection Agency (''EPA''), and the State of Michigan (the ''State''), on behalf Michigan Department of Environment, Great Lakes, and Energy (''EGLE''), filed suit against NCR Corporation (''NCR'') under the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA'') for the recovery of response costs and the performance of response work at the Allied Paper, Inc./Portage Creek/Kalamazoo River Superfund Site in Michigan (the ''Site''). Under the terms of the Consent Decree, NCR will perform an estimated $135.7 million in cleanup work on the Kalamazoo River and the adjacent banks and floodplains. NCR also will pay $76.5 million to EPA and $6 million to the State for past and future Site response costs. Further, NCR will pay $27 million dollars to the Kalamazoo River Natural Resources Trustee Council for natural resources damages and assessment costs. The Kalamazoo River Natural Resources Trustee Council includes both state and federal trustees. The federal trustees include the United States Department of Interior (acting through the Fish and Wildlife Service) and the Department of Commerce (acting through the National Oceanic and Atmospheric Administration). The state trustees include EGLE, the Michigan Department of Natural Resources, and the Michigan Department of the Attorney General. The Consent Decree therefore provides a total estimated value of more than $245 million for cleanup work and payments.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States of America and the State of Michigan* v. *NCR Corporation,* D.J. Ref. No. 90–11–2–07912/11. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.*

We will provide a paper copy of the proposed Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $57.25 (25 cents per page reproduction cost) payable to the United States Treasury.

Randall M. Stone,

Acting Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–27160 Filed 12–16–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0086]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of and Renewal of Previously Approved Collection; Comments Requested; Electronic Applications for the Attorney Student Loan Repayment Program

AGENCY: Office of Attorney Recruitment and Management, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Justice Management Division, Office of Attorney Recruitment and Management (OARM), 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 January 16, 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 Deana Willis, Assistant Director, Office of Attorney Recruitment and Management, 450 5th Street NW, Suite 10200, Washington, DC 20530; *Deana.Willis@usdoj.gov;* (202) 514–8902. Written comments and/or suggestions can also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and/or 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:

(1) Evaluate whether the proposed collection of information is necessary

for the proper performance of the functions of the Office of Attorney Recruitment and Management, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Evaluate whether, and if so, how, the quality, utility, and clarity of the information to be collected can be enhanced; 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:* Renewal of a Currently Approved Collection.

2. *The title of the form/collection:* Electronic Applications for the Attorney Student Loan Repayment Program.

3. *The agency form number, if any, and the applicable component of the department sponsoring the collection:* There is no agency form number for this collection. The applicable component within the Department of Justice is the Office of Attorney Recruitment and Management, Justice Management Division, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: None. The Department of Justice Attorney Student Loan Repayment Program (ASLRP) is an agency recruitment and retention incentive program based on 5 U.S.C. 5379, as amended, and 5 CFR part 537. Individuals currently employed as a DOJ attorney and incoming hires for attorney positions within the Department may request consideration for the ASLRP. The Department selects new participants during an annual open season each spring and renews current beneficiaries (DOJ employees) who remain qualified for these benefits, subject to availability of funds. There are two application forms—one for new requests, and the other for renewal requests. A justification form (applicable to new requests only) and a loan continuation form complete the collection. The ''new request'' form is submitted voluntarily, by current DOJ employees as well as by incoming DOJ attorney hires who, if selected, do not receive benefits until they are a DOJ employee. Renewal requests are submitted by only by current DOJ employees—no non-employees would qualify.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* The Department anticipates about 275 respondents annually will complete the new request form and justification form and apply for participation in the ASLRP. Of those, an average of 10 or less are incoming attorney hires who have not yet entered on duty with the DOJ. In addition, each year the Department expects to receive approximately 110 applications from current employees (DOJ attorneys) requesting renewal of the benefits they received in the preceding year. It is estimated that each new request (including justification) will take two (2) hours to complete, and each renewal request approximately 20 minutes to complete.

6. *An estimate of the total public burden (in hours) associated with the collection:*

a. The estimated burden associated with this collection is 586 hours, 40 minutes. It is estimated that new applicants will take 2 hours to complete the request form and justification and that previously selected recipients requesting continued funding will take 20 minutes to complete a renewal form. The burden hours for collecting respondent data, 586 hours, 40 minutes, are calculated as follows: 275 new respondents × 2 hours = 550 hours, plus 110 renewing respondents × 20 minutes = 36 hours, 40 minutes.

b. An estimate of the *public* burden focusing only incoming hires and excluding current DOJ employees is 20 hours, calculated as follows: 10 new respondents (incoming hires) × 2 hours = 20 hours.

If additional information is required, please contact: Melody Braswell, Department Clearance Officer, U.S. Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Room 3E.405B, Washington, DC 20530.

Dated: December 12, 2019.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2019–27123 Filed 12–16–19; 8:45 am]

BILLING CODE 4410–PF–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2018–0001]

State Plans: Coverage of the Aircrews in Aircraft Regulated by the Federal Aviation Administration—Changes to Level of Federal Enforcement for Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Notice.

SUMMARY: This document provides notice of the declination of coverage over the working conditions of aircraft cabin crewmembers onboard aircraft in operation by all twenty-two (22) OSHA-approved State Plans which cover the private sector. On March 26, 2014, OSHA began applying three safety and health standards to the working conditions of aircraft cabin crewmembers on aircraft in operation. Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 667 (OSH Act) grants the OSHA-approved State Plans the authority to regulate the working conditions of these employees to the extent consistent with the Federal Aviation Act. Subsequently, OSHA required the State Plans to either elect to amend their State Plans to cover aircraft cabin crewmembers on aircraft in operation, or to decline to exercise such authority, in which case coverage would remain a Federal OSHA responsibility. All affected State Plans declined. OSHA is hereby amending the State Plans' coverage in all of the twenty-two (22) OSHA-approved State Plans covering the private sector to reflect the declination of State Plan coverage, and the continuation of Federal OSHA enforcement authority over the working conditions of aircraft cabin crewmembers while they are onboard aircraft in operation, and notifying affected employers and employees of this action.

DATES: December 17, 2019.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Francis Meilinger, Director, OSHA Office of Communications; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

For general and technical information: Douglas J. Kalinowski,

Director, OSHA Directorate of Cooperative and State Programs; telephone: (202) 693–2200; email: *kalinowski.doug@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 18 of the OSH Act provides that State Plans that wish to assume responsibility for developing and enforcing their own occupational safety and health standards may do so by submitting and obtaining federal approval of a State Plan. State Plan approval occurs in stages that include initial approval under Section 18(c) and final approval under Section 18(e). The twenty-two (22) OSHA-approved State Plans that cover the private sector are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.[1]

II. The Federal Aviation Administration

Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1) provides that OSHA cannot regulate working conditions of employees with respect to which other Federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health. Pursuant to the Federal Aviation Act of 1958, the Federal Aviation Administration (FAA) is charged with the promotion of safe flight of civil aircraft in air commerce by prescribing regulations and minimum standards for practices, methods, and procedures the FAA Administrator finds necessary for safety in air commerce and national security. (49 U.S.C. 44701 *et seq.*). On July 10, 1975, FAA published a Notice in the **Federal Register** setting forth FAA's determination that its authority to promote the safety of civil aircraft operations ''completely encompass[ed] the safety and health aspects of the work environments of aircraft crewmembers,'' 40 FR 29114. Thus, OSHA was preempted from regulating the working conditions of aircraft cabin crewmembers onboard aircraft in operation.

On August 27, 2013, the FAA Administrator published in the **Federal Register** a Notice of Availability of a Policy Statement, that states FAA has not exercised statutory authority to cover all working conditions affecting aircraft cabin crewmembers while onboard aircraft in operation, 78 FR 52848. FAA stated that OSHA can apply three of its occupational safety and health standards to the working conditions of aircraft cabin crewmembers while they are onboard aircraft in operation (except flight crew members).

These standards are hazard communication (29 CFR 1910.1200), bloodborne pathogens exposure (29 CFR 1910.1030), and occupational noise exposure (29 CFR 1910.95). The working conditions addressed by these three standards are the only working conditions of aircraft cabin crewmembers while they are onboard aircraft in operation subject to OSHA enforcement. FAA continues to exercise its statutory authority over all other working conditions of aircraft cabin crewmembers while they are on aircraft in operation, and to fully cover flight deck crew occupational safety and health issues while they are on aircraft in operation.

For the purposes of Federal OSHA enforcement authority, an aircraft cabin crewmember means a person assigned to perform a duty in an aircraft cabin when the aircraft is in operation (other than flight crewmembers). For this purpose, an aircraft is ''in operation'' from the time it is first boarded by a crewmember, in preparation for a flight, to the time the last crewmember leaves the aircraft after completion of that flight, including stops on the ground during which at least one crewmember remains on the aircraft, even if the engines are shut down.

Separate from this FAA policy change, OSHA already has authority to enforce its regulations on recordkeeping, 29 CFR part 1904, and access to employee exposure and medical records, 29 CFR 1910.1020. These regulations are not subject to preemption by Section 4(b)(1) of the OSH Act. OSHA also already has the responsibility to investigate employee complaints of discrimination for engaging in protected activity related to safety or health in the workplace, under Section 11(c) of the OSH Act, 29 U.S.C. 660(c). Investigations of employee complaints of discrimination for providing information about alleged violations of FAA requirements or of any Federal law relating to air carrier safety are also OSHA's responsibility under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106–181, 49 U.S.C. 42121, which is the subject of a separate OSHA–FAA Memorandum of Understanding (MOU), 67 FR 55883 (Aug. 30, 2002).

Accordingly, OSHA assumed this authority for the enforcement of the hazard communication, bloodborne pathogens, and noise standard with respect to aircraft cabin crewmembers on aircraft in operation on March 26, 2014. It now enforces these three standards with respect to these employees. OSHA and FAA also entered into a MOU on August 26, 2014, to facilitate coordination and cooperation between the two agencies concerning OSHA's enforcement of these three standards for these employees.

III. OSHA-Approved State Plans

Section 18 of the OSH Act grants the OSHA-approved State Plans the authority to regulate the working conditions of employees. Thus, these agencies might cover aircraft cabin crewmembers while they are onboard aircraft in operation, to the extent consistent with the Federal Aviation Act. State Plans also have the ability to have safety and health standards that differ from Federal OSHA's, as long as those standards are at least as effective as Federal OSHA's, under Section 18(c)(2) of the OSH Act, 29 U.S.C. 667(c). However, FAA expressed concern about airlines being subject to different sets of rules as they fly into and out of different states. (78 FR 52848, 52850).

Subsequently, OSHA required the State Plans to either elect to amend their State Plans to cover aircraft cabin crewmembers or to decline to exercise such authority, in which case coverage would remain a Federal OSHA responsibility. All affected State Plans declined.

IV. Notice of Change in Coverage

OSHA is hereby amending the coverage of approved State Plans to reflect this declination of State coverage and the continuation of Federal OSHA enforcement authority over the enforcement of these three occupational safety and health standards for aircraft cabin crewmembers while they are onboard aircraft in operation in the twenty-two (22) OSHA-approved State Plans that cover the private sector. The State Plan web pages maintained by OSHA have been updated to reflect this notice.

V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, authorized the preparation of this notice. OSHA is issuing this notice under the authority

[1] Connecticut, New York, New Jersey, Illinois, Maine, and the Virgin Islands operate State Plans limited in coverage to State and local government employees and are not affected by this notice.

specified by Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667), Secretary of Labor's Order No. 1–2012 (77 FR 3912), and 29 CFR parts 1902 and 1953.

Signed in Washington, DC.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2019–27112 Filed 12–16–19; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0243]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

AGENCY: Nuclear Regulatory Commission.

ACTION: Biweekly notice.

SUMMARY: Pursuant to the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular biweekly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. This biweekly notice includes all amendments issued, or proposed to be issued, from November 19, 2019, to December 2, 2019. This notice also incorporates the revised biweekly format as noticed in the **Federal Register** on December 3, 2019. The last biweekly notice was published on December 3, 2019.

DATES: Comments must be filed by January 16, 2020. A request for a hearing or petitions for leave to intervene must be filed by February 18, 2020.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0243. 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(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lynn Ronewicz, Office of Nuclear Reactor Regulation, 301–415–1927, email: *Lynn.Ronewicz@nrc.gov,* U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0243, when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0243.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* 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.

B. Submitting Comments

Please include Docket ID NRC–2019–0243, facility name, unit nos. docket no., application date, and subject, in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Proposed No Significant Hazards Consideration Determination

For the facility-specific amendment requests shown below, the Commission finds that the licensee's analyses provided, consistent with title 10 of the *Code of Federal Regulations* (10 CFR) Section 50.91 is sufficient to support the proposed determination that these amendment requests involve No Significant Hazards Consideration (NSHC). Under the Commission's regulations in 10 CFR 50.92, operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves NSHC. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final NSHC determination, any hearing will take place after issuance. The Commission expects that the need to take action on an amendment before 60 days have elapsed will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *https://www.nrc.gov/reading-rm/doc-collections/cfr/.* Alternatively, a copy of the regulations is available at the NRC's Public Document Room, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (First Floor), Rockville, Maryland 20852. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The table below provides the plant name, docket number, date of application, ADAMS accession number, and location in the application of the licensee's proposed NSHC determination. For further details with respect to these license amendment applications, see the application for amendment which is available for public inspection in ADAMS and at the NRC's PDR. For additional direction on accessing information related to this document, see the ''Obtaining Information and Submitting Comments'' section of this document.

TABLE 1—LICENSE AMENDMENT REQUEST(S)

Entergy Operations, Inc.; Waterford Steam Electric Station, Unit 3; St. Charles Parish, LA	
Application Date	August 27, 2019.
ADAMS Accession No	ML19239A429.
Location in Application of NSHC	Enclosure, Page 4 of 6.
Brief Description of Amendments	The amendment would revise Technical Specification Surveillance Requirements 4.7.6.1.d.2 and 4.7.6.1.d.4 to add an exception for automatic dampers and valves that are locked or sealed. The revision would facilitate fuel movement with one train of the Control Room Emergency Air Filtration System inoperable.
Proposed Determination	NSHC.

TABLE 1—LICENSE AMENDMENT REQUEST(S)—Continued

Name of Attorney for Licensee, Mailing Address.	Anna Vinson Jones, Senior Counsel, Entergy Services, Inc., 101 Constitution Avenue NW, Suite 200 East, Washington, DC 20001.
Docket Nos	50–382.
NRC Project Manager, Telephone Number.	April Pulvirenti, 301–415–1390.
Entergy Operations, Inc.; Waterford Steam Electric Station, Unit 3; St. Charles Parish, LA	
Application Date	September 20, 2019.
ADAMS Accession No	ML19263F129.
Location in Application of NSHC	Enclosure, Page 11 of 13.
Brief Description of Amendments	The proposed change would revise the Waterford Steam Electric Station, Unit 3, Technical Specifications (TSs) to remove TSs 3.1.2.1 through 3.1.2.8, ''Boration Systems,'' and references to the TSs, and relocate the information to the licensee-controlled Technical Requirements Manual.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Anna Vinson Jones, Senior Counsel, Entergy Services, Inc., 101 Constitution Avenue NW, Suite 200 East, Washington, DC 20001.
Docket Nos	50–382.
NRC Project Manager, Telephone Number.	April Pulvirenti, 301–415–1390.
Entergy Operations, Inc.; Waterford Steam Electric Station, Unit 3; St. Charles Parish, LA	
Application Date	October 24, 2019.
ADAMS Accession No	ML19297H543.
Location in Application of NSHC	Page 13 of the Enclosure.
Brief Description of Amendments	The proposed change would revise Technical Specification 3/4.8.1, ''A.C. [Alternating Current] Sources—Operating,'' Surveillance Requirements to correct errors in some criteria for voltage and frequency. The changes would ensure compliance with the plant design basis and ensure that the Emergency Diesel Generators are capable of supplying power with the correct voltage and frequency to the required loads.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Anna Vinson Jones, Senior Counsel, Entergy Services, Inc., 101 Constitution Avenue NW, Suite 200 East, Washington, DC 20001.
Docket Nos	50–382.
NRC Project Manager, Telephone Number.	April Pulvirenti, 301–415–1390.
Exelon Generation Company, LLC; Braidwood Station, Units 1 and 2; Will County, IL	
Application Date	September 11, 2019.
ADAMS Accession No	ML19254D105.
Location in Application of NSHC	Attachment 1, Section 4.3, Pages 12 and 13.
Brief Description of Amendments	The amendment request proposes to revise the ultimate heat sink inventory verification (Technical Specification 3.7.9) from a level-based to volume-based verification.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.
Docket Nos	50–456, 50–457.
NRC Project Manager, Telephone Number.	Joel Wiebe, 301–415–6606.
Exelon Generation Company, LLC; Braidwood Station, Units 1 and 2, Will County, IL; Byron Station, Unit Nos. 1 and 2, Ogle County, IL	
Application Date	September 24, 2019.
ADAMS Accession No	ML19269C092.
Location in Application of NSHC	Attachment 1a, Section 4.3, Pages 140–142.
Brief Description of Amendments	The amendments would revise Braidwood Station Technical Specification 5.5.16, ''Containment Leakage Rate Testing Program,'' for permanent extension of Type A and Type C leak rate test frequencies.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.
Docket Nos	50–456, 50–457, 50–454, 50–455.
NRC Project Manager, Telephone Number.	Joel Wiebe, 301–415–6606.
Exelon Generation Company, LLC; Braidwood Station, Units 1 and 2, Will County, IL; Byron Station, Unit Nos. 1 and 2, Ogle County, IL	
Application Date	September 30, 2019.
ADAMS Accession No	ML19275E307.
Location in Application of NSHC	Attachment 1, Section 4.3, Pages 4 and 5.

TABLE 1—LICENSE AMENDMENT REQUEST(S)—Continued

Brief Description of Amendments	The amendment would revise Technical Specification 5.6.6 to allow use of AREVA NP Topical Report BAW–2308, Revisions 1–A and 2–A, "Initial RTNDT of Linde 80 Weld Materials."
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.
Docket Nos	50–454, 50–455, 50–456, 50–457.
NRC Project Manager, Telephone Number.	Joel Wiebe, 301–415–6606.
FirstEnergy Nuclear Operating Company; Beaver Valley Power Station, Unit Nos. 1 and 2; Beaver County, PA	
Application Date	October 20, 2019.
ADAMS Accession No	ML19293A367.
Location in Application of NSHC	Page 26 of 28.
Application Date	September 11, 2019.
Brief Description of Amendments	The amendments would revise technical specifications regarding primary and secondary coolant activities, control room emergency ventilation system testing criteria, and permit a one-time change to the control room envelope unfiltered air inleakages test frequency.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	David W. Jenkins, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.
Docket Nos	50–334, 50–412.
NRC Project Manager, Telephone Number.	Jennifer Tobin, 301–415–2328.
Florida Power & Light Company, et al.; St. Lucie Plant, Unit No. 2; St. Lucie County, FL	
Application Date	October 9, 2019.
ADAMS Accession No	ML19282D338.
Location in Application of NSHC	Enclosure, Page 8 of 12.
Brief Description of Amendments	The amendment would modify the Unit No. 2 Technical Specifications by revising the reactor coolant pump flywheel inspection program requirements consistent with the conclusions and limitations specified in NRC safety evaluation, Acceptance for Referencing of Topical Report SIR–94–080, "Relaxation of Reactor Coolant Pump Flywheel Inspection Requirements," dated May 21, 1997.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Debbie Hendell, Managing Attorney—Nuclear, Florida Power & Light Company, 700 Universe Blvd., MS LAW/JB, Juno Beach, FL 33408–0420.
Docket Nos	50–389.
NRC Project Manager, Telephone Number.	Natreon Jordan, 301–415–7410.
PSEG Nuclear LLC; Salem Nuclear Generating Station, Unit Nos. 1 and 2; Salem County, NJ	
Application Date	October 23, 2019.
ADAMS Accession No	ML19296B108.
Location in Application of NSHC	Enclosure, page 15.
Brief Description of Amendments	The amendments would address conditions of source range and intermediate range in operability that would mandate entry into Technical Specification 3.0.3.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Steven Fleischer, PSEG Services Corporation, 80 Park Plaza, T–5, Newark, NJ 07102.
Docket Nos	50–272, 50–311.
NRC Project Manager, Telephone Number.	James Kim, 301–415–4125.
Southern Nuclear Operating Company; Vogtle Electric Generating Plant (VEGP), Units 3 and 4; Burke County, GA	
Application Date	October 31, 2019.
ADAMS Accession No	ML19304C381.
Location in Application of NSHC	Enclosure 1, page 8 of 10.
Brief Description of Amendments	The amendments propose changes to the VEGP Units 3 and 4 COL Appendix C, with corresponding changes to the associated plant-specific Tier 1 information and associated Tier 2 information in the Updated Final Safety Analysis Report. Specifically, the proposed change is to update the Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) containment vessel wetted perimeter measurement to be taken at any elevation between the 266 ft. elevation and the spring line, instead of the current requirement of taking the measurement directly at the spring line (approximate elevation of 244 ft.) Because this proposed change requires a departure from Tier 1 information in the Westinghouse AP1000 Design Control Document (DCD), the licensee also required an exemption from the requirements of the Generic DCD Tier 1 in accordance with Section 52.63(b)(1) of 10 CFR.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	M. Stanford Blanton, Balch & Bingham LLP, 1710 Sixth Avenue North, Birmingham, AL 35203–2015.
Docket Nos	52–025, 52–026.

TABLE 1—LICENSE AMENDMENT REQUEST(S)—Continued

NRC Project Manager, Telephone Number.	Jennivine Rankin, 415–1530.

III. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed NSHC determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action, see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation, and/or Environmental Assessment as indicated. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

TABLE 2—LICENSE AMENDMENT ISSUANCE(S)

Duke Energy Progress, LLC; Brunswick Steam Electric Plant, Units 1 and 2; Brunswick County, NC	
Date Issued	November 21, 2019.
ADAMS Accession No	ML19281A330.
Amendment Nos	296 and 324.
Brief Description of Amendments	The amendments modified requirements for repetitive verification of the status of locked, sealed, or secured components to allow the verification to be done by use of administrative means consistent with Technical Specification Task Force Traveler (TSTF) 269–A, Revision 2, ''Allow Administrative Means of Position Verification for Locked or Sealed Valves.''
Docket Nos	50–324, 50–325.
Florida Power & Light Company; St. Lucie Plant, Unit Nos. 1 and 2; St. Lucie County, FL	
Date Issued	November 20, 2019.
ADAMS Accession No	ML19248C238.
Amendment Nos	201.
Brief Description of Amendments	The amendment revised the St. Lucie Plant, Unit No. 2, Technical Specifications by eliminating the requirements for the Iodine Removal System. The amendment also revised the surveillance requirements for the trisodium phosphate dodecahydrate basket.
Docket Nos	50–389.
Nine Mile Point Nuclear Station and Exelon Generation Company, LLC; Nine Mile Point Nuclear Station, Unit 1; Oswego County, NY	
Date Issued	November 25, 2019.
ADAMS Accession No	ML19301B005.
Amendment Nos	239.
Brief Description of Amendments	The amendment revised the Nine Mile Point Nuclear Station, Unit 1, Technical Specifications to make several editorial changes (e.g., pagination, redundancy, number sequencing, alignment, justification, etc.).
Docket Nos	50–220.
Southern Nuclear Operating Company, Inc.; Edwin I Hatch Nuclear Plant, Units 1 and 2; Appling County, GA	
Date Issued	November 19, 2019.
ADAMS Accession No	ML19239A244.
Amendment Nos	301 and 246.
Brief Description of Amendments	The amendments revised certain technical specifications to remove the requirements for engineered safety feature systems (e.g., secondary containment, secondary containment valve isolation capability, and standby gas treatment system) to be operable after sufficient radioactive decay of irradiated fuel has occurred following a plant shutdown.
Docket Nos	50–321, 50–366.
Southern Nuclear Operating Company; Vogtle Electric Generating Plant (VEGP), Units 3 and 4; Burke County, Georgia	
Date Issued	November 21, 2019.
ADAMS Accession No	ML19297C791.
Amendment Nos	168 (Unit 3) and 166 (Unit 4).

TABLE 2—LICENSE AMENDMENT ISSUANCE(S)—Continued

Brief Description of Amendments	The amendments authorized changes to Combined License Nos. NPF–91 and NPF–92, Appendix A, which contain the plant-specific technical specifications (TSs) and related information in the Updated Final Safety Analysis Report. Specifically, the amendments removed from the TSs certain manual surveillance requirements (SRs) to be performed on Protection and Safety Monitoring System (PMS) components. These are SRs requiring manual Channel Checks, Channel Operational Tests, Actuation Logic Tests, and Actuation Logic Output Tests. In addition, the amendments authorized changes to the approach for satisfying the SRs that verify the Reactor Trip System and Engineered Safety Features Response Times are within specified limits. Specifically, the amendments approved a method described in the license amendment request for choosing allocated response times from the PMS equipment.
Docket Nos.	52–025, 52–026.
Tennessee Valley Authority; Sequoyah Nuclear Plant, Unit 1; Hamilton County, TN	
Date Issued	November 21, 2019.
ADAMS Accession No.	ML19319C831.
Amendment Nos.	348.
Brief Description of Amendments	The amendment revised Unit 1 Technical Specification 4.2.2, ''Control Rod Assemblies,'' to allow Unit 1 to operate for Operating Cycle 24 with 52 full-length control rod assemblies instead of 53 full-length assemblies.
Docket Nos.	50–327.
Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN	
Date Issued	November 26, 2019.
ADAMS Accession No.	ML19238A005.
Amendment Nos.	129 (Unit 1) and 32 (Unit 2).
Brief Description of Amendments	The amendments revised Technical Specification (TS) 3.8.1, ''AC [Alternating Current] Sources—Operating''; TS 3.8.7, ''Inverts—Operating'; TS 3.8.8, ''Inverters—Shutdown''; and TS 3.8.9, ''Distribution Systems—Operating,'' to support performance of the 6.9 kilovolt and 480 Volt shutdown boards maintenance. The amendments revised Technical Specification (TS) 3.8.1, ''AC [Alternating Current] Sources—Operating''; TS 3.8.7, ''Inverters—Operating''; TS 3.8.8, ''Inverters—Shutdown''; and TS 3.8.9, ''Distribution Systems—Operating,'' to support performance of the 6.9 kilovolt and 480 Volt shutdown boards maintenance.
Docket Nos.	50–390, 50–391.

Dated at Rockville, Maryland, this 11th day of December, 2019.

For the Nuclear Regulatory Commission.

Jamie M. Heisserer,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2019–27001 Filed 12–16–19; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2019–24; MC2020–68 and CP2020–67; MC2020–69 and CP2020–68]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 19, 2019.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633,

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2019–24; *Filing Title:* USPS Notice of Amendment to Priority Mail Contract 478, Filed Under Seal; *Filing Acceptance Date:* December 11, 2019; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Jennaca D. Upperman; *Comments Due:* December 19, 2019.

2. *Docket No(s).:* MC2020–68 and CP2020–67; *Filing Title:* USPS Request to Add Parcel Select Contract 36 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 11, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Gregory Stanton; *Comments Due:* December 19, 2019.

3. *Docket No(s).:* MC2020–69 and CP2020–68; *Filing Title:* USPS Request to Add Priority Mail Contract 582 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 11, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Gregory Stanton; *Comments Due:* December 19, 2019.

This Notice will be published in the **Federal Register**.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2019–27142 Filed 12–16–19; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2018–96; MC2020–63 and CP2020–62; MC2020–64 and CP2020–63; MC2020–65 and CP2020–64; MC2020–66 and CP2020–65; MC2020–67 and CP2020–66]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 18, 2019, and December 19, 2019.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2018–96; *Filing Title:* Notice of the United States Postal Service of Filing Modification to an Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement; *Filing Acceptance Date:* December 10, 2019; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Katalin K. Clendenin; *Comments Due:* December 18, 2019.

2. *Docket No(s).:* MC2020–63 and CP2020–62; *Filing Title:* USPS Request to Add Priority Mail Contract 578 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 10, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 18, 2019.

3. *Docket No(s).:* MC2020–64 and CP2020–63; *Filing Title:* USPS Request to Add Priority Mail Contract 579 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 10, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 18, 2019.

4. *Docket No(s).:* MC2020–65 and CP2020–64; *Filing Title:* USPS Request to Add Priority Mail Contract 580 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 10, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Kenneth R. Moeller; *Comments Due:* December 18, 2019.

5. *Docket No(s).:* MC2020–66 and CP2020–65; *Filing Title:* USPS Request to Add Priority Mail Contract 581 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 10, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Kenneth R. Moeller; *Comments Due:* December 19, 2019.

6. *Docket No(s).:* MC2020–67 and CP2020–66; *Filing Title:* USPS Request to Add Priority Mail Express Contract 80 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 10, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Kenneth

R. Moeller; *Comments Due:* December 19, 2019.

This Notice will be published in the **Federal Register**.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2019–27099 Filed 12–16–19; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2020–61; Order No. 5344]

Inbound Parcel Post (at UPU Rates)

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is acknowledging a recent Postal Service filing of its intention to change prices not of general applicability to be effective January 1, 2020. This document informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 18, 2019.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

On December 10, 2019, the Postal Service filed notice announcing its intention to change prices not of general applicability for Inbound Parcel Post (at Universal Postal Union (UPU) Rates) effective January 1, 2020.[1]

II. Contents of Filing

To accompany its Notice, the Postal Service filed: A redacted copy of the UPU International Bureau (IB) Circular that contains the new prices, a copy of the certification required under 39 CFR 3015.5(c)(2), redacted Postal Service data used to justify any bonus payments, a copy of the Postal Service's submission to the UPU in support of an inflation-linked adjustment, and a redacted copy of Governors' Decision 19–1. Notice at 2–3; *see id.* Attachments 2–6. The Postal Service also filed redacted financial workpapers. Notice at 3.

Additionally, the Postal Service filed an unredacted copy of Governors' Decision 19–1, an unredacted copy of the new prices, and related financial information under seal. *See id.* The Postal Service filed an application for non-public treatment of materials filed under seal. Notice, Attachment 1.

The Postal Service states that it has provided supporting documentation as required by Order No. 2102 and Order No. 2310.[2] In addition, the Postal Service states that it provided citations and copies of relevant UPU IB Circulars and updates to inflation-linked adjustments as required by Order No. 3716.[3]

III. Commission Action

The Commission establishes Docket No. CP2020–61 for consideration of matters raised by the Notice.

The Commission invites comments on whether the Postal Service's filing is consistent with 39 U.S.C. 3632, 3633, and 39 CFR part 3015. Comments are due no later than December 18, 2019. The public portions of the filing can be accessed via the Commission's website (*http://www.prc.gov*).

The Commission appoints Katalin K. Clendenin to serve as Public Representative in this docket.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2020–61 for consideration of the matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, Katalin K. Clendenin is appointed to serve as an officer of the Commission to represent the interests of the general public in this proceeding (Public Representative).

3. Comments are due no later than December 18, 2019.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2019–27101 Filed 12–16–19; 8:45 am]

BILLING CODE 7710–FW–P

[1] Notice of the United States Postal Service of Filing Changes in Rates Not of General Applicability for Inbound Parcel Post (at UPU Rates), and Application for Non-Public Treatment, December 10, 2019, at 1–2 (Notice).

[2] Notice at 4–5. *See* Docket No. CP2014–52, Order Accepting Price Changes for Inbound Air Parcel Post (at UPU Rates), June 26, 2014, at 6 (Order No. 2102); Docket No. CP2015–24, Order Accepting Changes in Rates for Inbound Parcel Post (at UPU Rates), December 29, 2014, at 4 (Order No. 2310).

[3] Notice at 5. *See* Docket Nos. MC2017–58 and CP2017–86, Order Acknowledging Changes in Prices for Inbound Parcel Post (at UPU Rates), December 30, 2016, at 5 (Order No. 3716).

POSTAL SERVICE

Product Change—Parcel Select 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 17, 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 11, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Parcel Select Contract 36 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–68, CP2020–67.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–27067 Filed 12–16–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 17, 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 11, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 582 to*

Competitive Product List. Documents are available at *www.prc.gov,* Docket Nos. MC2020–69, CP2020–68.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–27069 Filed 12–16–19; 8:45 am]

BILLING CODE 7710–12–P

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Request for Information on the American Research Environment

AGENCY: Office of Science and Technology Policy (OSTP).

ACTION: Notice of Request for Information (RFI) on the American research environment.

SUMMARY: On behalf of the National Science and Technology Council's (NSTC's) Joint Committee on the Research Environment (JCORE), the OSTP requests input on actions that Federal agencies can take, working in partnership with private industry, academic institutions, and non-profit/philanthropic organizations, to maximize the quality and effectiveness of the American research environment. Specific emphasis is placed on ensuring that the research environment is welcoming to all individuals and enables them to work safely, efficiently, ethically, and with mutual respect, consistent with the values of free inquiry, competition, openness, and fairness.

DATES: The comment period has been extended. Interested persons are invited to submit comments on or before 11:59 p.m. ET on January 28, 2020.

ADDRESSES: Comments submitted in response to this notice may be submitted online to: The NSTC Executive Director, Chloe Kontos, *JCORE@ostp.eop.gov.* Email submissions should be machine-readable [pdf, word] and not copy-protected. Submissions should include ''RFI Response: JCORE'' in the subject line of the message.

Instructions: Response to this RFI is voluntary. Each individual or institution is requested to submit only one response. Submission must not exceed 10 pages in 12 point or larger font, with a page number provided on each page. Responses should include the name of the person(s) or organization(s) filing the comment. Comments containing references, studies, research, and other empirical data that are not widely published should include copies or electronic links of the referenced materials.

It is suggested that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this RFI.

In accordance with FAR 15.202(3), responses to this notice are not offers and cannot be accepted by the Federal Government to form a binding contract. Additionally, those submitting responses are solely responsible for all expenses associated with response preparation.

FOR FURTHER INFORMATION CONTACT: For additional information, please direct your questions to the NSTC Executive Director, Chloe Kontos, *JCORE@ostp.eop.gov.*

SUPPLEMENTARY INFORMATION: NSTC established JCORE in May 2019. JCORE is working to address key areas that impact the U.S. research enterprise; enabling a culture supportive of the values and ethical norms critical to world-leading science and technology. This includes the need to improve safety and inclusivity, integrity, and security of research settings while balancing accountability and productivity.

Specifically, JCORE is working to:

• *Ensure rigor and integrity in research:* This subcommittee is identifying cross-agency principles, priorities, and actions to enhance research integrity, rigor, reproducibility, and replicability. This includes exploring how Federal government agencies and stakeholder groups, including research institutions, publishers, researchers, industry, non-profit and philanthropic organizations, and others, can work collaboratively to support activities that facilitate research rigor and integrity through efforts to address transparency, incentives, communication, training and other areas.

• *Coordinate administrative requirements for Federally-funded research:* This subcommittee is identifying and assessing opportunities to coordinate agency policies and requirements related to Federal grant processes and conflicts of interest disclosure. Additionally, this subcommittee is also exploring how persistent digital identifiers and researcher profile databases can be used to reduce administrative work and track agency investments.

• *Strengthen the security of America's S&T research enterprise:* This subcommittee is working to enhance risk assessment and management, coordinate outreach and engagement across the research enterprise, strengthen disclosure requirements and policies, enhance oversight and vigilance, and work with organizations that perform research to develop best practices that can be applied across all sectors. The subcommittee is taking a risk-based approach to strengthening the security of our research enterprise balanced with maintaining appropriate levels of openness that underpins American global leadership in science and technology.

• *Foster safe, inclusive, and equitable research environments:* This subcommittee is convening the multi-sector research community to identify challenges and opportunities, share best practices, utilize case studies, and share lessons learned in order to promote practices and cultures that build safe, inclusive, and equitable research environments.

Research Rigor and Integrity

The National Academies and others have in recent reports on rigor, reproducibility and replicability [1] and integrity,[2] identified a number of areas that Federal agencies and non-Federal stakeholders should consider to foster rigorous research. The subcommittee on Rigor and Integrity in Research is seeking perspectives on actions Federal agencies can take, working in partnership with the broader research community, to strengthen the rigor and integrity of research while recognizing the need for discipline-specific flexibilities.

1. What actions can Federal agencies take to facilitate the reproducibility, replicability, and quality of research? What incentives currently exist to (1) conduct and report research so that it can be reproduced, replicated, or generalized more readily, and (2) reproduce and replicate or otherwise confirm or generalize publicly reported research findings?

2. How can Federal agencies best work with the academic community, professional societies, and the private sector to enhance research quality, reproducibility, and replicability? What are current impediments and how can institutions, other stakeholders, and Federal agencies collaboratively address them?

3. How do we ensure that researchers, including students, are aware of the ethical principles of integrity that are fundamental to research?

4. What incentives can Federal agencies provide to encourage reporting of null or negative research findings?

[1] National Academy of Sciences. Reproducibility and Replicability in Science (2019).

[2] National Academy of Sciences. Fostering Integrity in Research (2017).

How can agencies best work with publishers to to facilitate reporting of null or negative results and refutations, constraints on reporting experimental methods, failure to fully report caveats and limitations of published research, and other issues that compromise reproducibility and replicability?

5. How can the U.S. government best align its efforts to foster research rigor, reproducibility, and replicability with those of international partners?

Coordinating Administrative Requirements for Research

Numerous reports and recommendations, including from the National Academies,[3] the National Science Board,[4] and the Government Accountability Office,[5] have highlighted concerns about increasing administrative work for Federally-funded researchers. Congress has directed Federal agencies to reduce the administrative burden associated with Federal awards through the 21st Century Cures Act (Pub. L. 114–25) and the American Innovation and Competitiveness Act (Pub. L. 114–329). Despite these efforts, preliminary reports from the Federal Demonstration Partnership indicate that the time university faculty spend administering Federal awards, rather than on research, has continued to increase.

Taking into consideration the current Federal landscape with respect to individual Federal agency financial conflict of interest (FCOI) regulations and policies, including definitions, disclosure or reporting requirements and thresholds, training requirements, and timing for disclosure, please comment on the following:

1. What actions can the Federal government take to reduce administrative work associated with FCOI requirements for researchers, institutions, and Federal agency staff?

2. How can Federal agencies best achieve the appropriate balance between reporting and administrative requirements and the potential risk of unreported or managed financial conflicts that could compromise the research?

3. From the perspective of institutions, describe the impact of the 2011 revisions to the Public Health Services FCOI regulations. What were the implications with respect to the balance between burden and risk? Did the revisions result in fewer significant unresolved or unreported financial conflicts?

4. Please comment on whether and how a streamlined, harmonized, Federal-wide policy for FCOI would provide benefits with respect to reducing administrative work and whether there would be anticipated challenges.

5. How can agencies best reduce workload associated with submitting and reviewing applications for Federal research funding? What information is necessary to assess the merit of the proposed research, and what information can be delayed until after the merit determination is made (''just-in-time'')?

Research Security

The open and internationally collaborative nature of the U.S. science and technology research enterprise underpins America's innovation, science and technology leadership, economic competitiveness, and national security. However, over the past several years, some nations have exhibited increasingly sophisticated efforts to exploit, influence, our research activities and environments. Some of these recent efforts have come through foreign government-sponsored talent recruitment programs. Breaches of research ethics, both within talent programs and more generally, include the failure to disclose required information such as foreign funding, unapproved parallel foreign laboratories (so-called shadow labs), affiliations and appointments, and conflicting financial interests. Other inappropriate behaviors include conducting undisclosed research for foreign governments or companies on United States agency time or with United States agency funding, diversion of intellectual property or other legal rights, and breaches of contract and confidentiality in or surreptitious gaming of the peer-review process.

In light of these concerns, we seek public input on the following questions:

1. How can the U.S. Government work with organizations that perform research to manage and mitigate the risk of misappropriation of taxpayer or other funds through unethical behaviors in the research enterprise? Please consider:

a. Disclosure requirements and policies. Who within the research enterprise should disclose financial as well as nonfinancial support and affiliations (*e.g.,* faculty, senior researchers, postdoctoral researchers, students, visitors)? What information should be disclosed, and to whom? What period of time should the disclosure cover? How should the disclosures be validated especially since they are made voluntarily? What are appropriate consequences for nondisclosure?

b. Disclosure of sources of support for participants in the research enterprise. What additional sources of support should be disclosed, and should they include current or pending participation in foreign government-sponsored talent recruitment programs?

c. What information can the government provide to organizations that perform research to help them assess risks to research security and integrity?

2. How can the U.S. government best partner across the research enterprise to enhance research security? Please consider:

a. Appropriate roles and responsibilities for government agencies, institutions, and individuals;

b. Discovery of and communication of information regarding activities that threaten the security and integrity of the research enterprise; and

c. Establishment and operation of research security programs at organizations that perform research.

3. What other practices should organizations that perform research adopt and follow to help protect the security and integrity of the research enterprise? Please consider:

a. Organization measures to protect emerging and potentially critical early-stage research and technology.

b. How can Federal agencies and research institutions measure and balance the benefits and risks associated with international research cooperation?

Safe and Inclusive Research Environments

JCORE is focused on identifying actions that will ensure research environments in America are free from harassment of any kind, and from any conditions that encourage or tolerate harassment or other forms of behavior that are inconsistent with the ethical norms of research. The aim is to foster an American research enterprise, which epitomizes our values and those of research itself, namely, where researchers feel welcome and are encouraged to join, wish to remain, and subsequently thrive. To achieve this, leaders must create a research environment that welcomes all individuals, values their ideas, treats individuals as equals, and promotes bold thinking, rigorous and civil debate, and collegiality. With this focus in

[3] National Academies report Optimizing the Nation's Investment in Academic Research (2016).

[4] National Science Board report Reducing Investigators' Administrative Workload for Federally Funded Research (2014).

[5] Government Accountability Office report Federal Research Grants: Opportunities Remain for Agencies to Streamline Administrative Requirements (2016).

mind, we seek the public's input on the following questions:

1. What policies and practices are most beneficial in fostering a culture of safe and inclusive research environments? Where applicable, please provide information on:

a. Organizational leadership actions that create a culture of inclusivity;

b. Best practices for preventing harassment from beginning;

c. Best practices for prohibiting retaliation against those who report harassment;

d. Best practices for re-integrating those who have been accused of harassment but found to be innocent;

e. Whether your organization has a common code of ethics applicable to researchers, and whether that code is highlighted and actively promoted in training, research practice, etc;

f. How institution-based procedures for reporting cases of sexual harassment and non-sexual harassment (or toxic climate) differ, and if there are aspects of one set of policies that would be beneficial for broader inclusion.

2. What barriers does your organization face in the recruitment and retention of diverse researchers? Where applicable, please provide information on:

a. The setting to which it applies (*i.e.,* academic, industry, etc.);

b. Whether your organization has best practices or challenges specific to recruitment and retention of global talent;

c. Solutions your organization has used to successfully increase recruitment or retention of diverse and/or international researchers;

d. Best practices to promote bold thinking and enable collegiality in debate.

3. Are Federal agency policies on harassment complimentary or conflicting with regard to state or organizational policies? Where applicable, please provide information on:

a. What aspects are in conflict, along with the associated agency policy;

b. What aspects are most protective and make policy reasonable to implement;

c. What processes have effectively streamlined the administrative workload associated with implementation, compliance, or reporting.

4. What metrics can the Federal government use to assess progress in promoting safer and more inclusive research environments? Where applicable, please provide information on:

a. What methods your organization uses to assess workplace climate;

b. What systems within your organization were developed to enforce and/or report back to agencies;

c. What metrics does your organization uses to assess effectiveness of safe and inclusive practices;

d. What actions does your organization take communicate climate survey results, both within your organization and to external stakeholders?

Sean Bonyun,

Chief of Staff, Office of Science and Technology Policy.

[FR Doc. 2019–27165 Filed 12–16–19; 8:45 am]

BILLING CODE 3270–F9–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87681; File No. 4–443]

Joint Industry Plan; Notice of Filing of Amendment No. 5 to the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options To Adopt a Penny Interval Program

December 9, 2019.

I. Introduction

Pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 608 thereunder,[2] notice is hereby given that on July 18, 2019, BOX Exchange LLC; Cboe BZX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe Exchange, Inc.; Cboe EDGX Exchange, Inc.; Miami International Securities Exchange, LLC; MIAX Emerald, LLC; MIAX PEARL, LLC; Nasdaq BX, Inc.; Nasdaq GEMX, LLC; Nasdaq ISE, LLC; Nasdaq MRX, LLC; Nasdaq PHLX LLC; The Nasdaq Stock Market LLC; NYSE American, LLC; NYSE Arca, Inc. (collectively, ''Exchanges''); and The Options Clearing Corporation (''OCC'' and together with OCC, ''Plan Sponsors'') filed Amendment No. 5 to the Plan for the Purpose of Developing and Implementing Procedures to Facilitate the Listing and Trading of Standardized Options (''OLPP'').[3] The proposal reflects changes unanimously approved by the Plan Sponsors. The Amendment No. 5 proposes to adopt provisions that (i) establish a Program for quoting certain classes in penny increments; (ii) establish an annual review process to add to and/or remove option classes from the Penny Program; (iii) allow an option class to be added to the Penny Program if it is a newly listed option class and it meets certain criteria; (iv) allow an option class with significant growth in activity to be added to the Penny Program if it meets certain criteria; (v) provide that if a corporate action involves one or more option classes in the Penny Program, all adjusted and unadjusted series of the option class shall be included in the Penny Program; (vi) provide that any series in an option class participating in the Penny Program in which the underlying security has been delisted, or are identified by OCC as ineligible for opening customer transactions, will continue to quote pursuant to the rules of the Penny Program until all such options have expired; and (vii) establish an amendment process for the Penny Program. A copy of a report submitted by the Exchanges in support of the Amendment is attached as Exhibit A hereto. A copy of the Plan, as proposed to be amended, is attached as Exhibit B hereto. The Commission is publishing this notice to solicit comments from interested persons on the Amendment No. 5.[4]

[1] 15 U.S.C. 78k–1(a)(3).

[2] 17 CFR 242.608.

[3] See Letter from BOX Exchange LLC, CBOE BZX Exchange, Inc., CBOE Exchange, Inc., CBOE C2 Exchange, Inc, CBOE EDGX Exchange, Inc., Miami International Securities Exchange, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, NASDAQ BX, Inc., NASDAQ GEMX, LLC, NASDAQ ISE, LLC, NASDAQ MRX, LLC, NASDAQ PHLX, LLC, The NASDAQ Stock Market LLC, NYSE American, LLC, NYSE Arca, Inc., and the OCC, to Vanessa Countryman, Secretary, Commission, dated July 18, 2019. On July 6, 2001, the Commission approved the OLPP, which was proposed by the American Stock Exchange LLC, Chicago Board Options Exchange, Incorporated, International Securities Exchange LLC, OCC, Philadelphia Stock Exchange, Inc., and Pacific Exchange, Inc. *See* Securities Exchange Act Release No. 44521, 66 FR 36809 (July 13, 2001). *See also* Securities Exchange Act Release Nos. 49199 (February 5, 2004), 69 FR 7030 (February 12, 2004) (adding Boston Stock Exchange, Inc. as a Plan Sponsor); 57546 (March 21, 2008), 73 FR 16393 (March 27, 2008) (adding The Nasdaq Stock Market, LLC as a Plan Sponsor); 61528 (February 17, 2010), 75 FR 8415 (February 24, 2010) (adding BATS Exchange, Inc. as a Plan Sponsor); 63162 (October 22, 2010), 75 FR 66401 (October 28, 2010) (adding C2 Options Exchange Incorporated as a Plan Sponsor); 66952 (May 9, 2012), 77 FR 28641 (May 15, 2012) (adding BOX Options Exchange LLC as a Plan Sponsor); 67327 (June 29, 2012), 77 FR 40125 (July 6, 2012) (adding Nasdaq OMX BX, Inc. as a Plan Sponsor); 70765 (October 28, 2013), 78 FR 65739 (November 1, 2013) (adding Topaz Exchange, LLC as a Plan Sponsor); 70764 (October 28, 2013), 78 FR 65733 (November 1, 2013) (adding Miami International Securities Exchange, LLC as a Plan Sponsor); 76822 (January 1, 2016), 81 FR 1251 (January 11, 2016) (adding EDGX Exchange, Inc. as a Plan Sponsor); 77323 (March 8, 2016), 81 FR 13433 (March 14, 2016) (adding ISE Mercury, LLC as a Plan Sponsor); 79897 (January 30, 2017), 82 FR 9263 (February 3, 2017) (adding MIAX PEARL, LLC as a Plan Sponsor); and 85228 (March 1, 2019), 84 FR 8355 (March 7, 2019) (adding MIAX Emerald, LLC as a Plan Sponsor).

[4] 17 CFR 242.608. All capitalized and undefined terms used in this letter have the same meanings assigned to them in the OLPP.

II. Description of the Plan

Set forth in this Section I is the statement of the purpose and summary of Amendment No. 5, along with the information required by Rule 608(a)(4) and (5) under the Exchange Act,[5] prepared and submitted by the Plan Sponsors to the Commission.[6]

A. Statement of Purpose and Summary of the Plan Amendment

The Plan Sponsors have agreed to amend the OLPP to govern the listing of option classes that quote in one-cent increments and five-cent increments under a Penny Interval Program (''Penny Program'').[7] In particular, the Amendment proposes to adopt a new Section 3.1 that includes provisions to (i) establish an annual review process to add to and/or remove option classes from the Penny Program; (ii) allow an option class to be added to the Penny Program if it is a newly listed option class and it meets certain criteria; (iii) allow an option class with significant growth in activity to be added to the Penny Program if it meets certain criteria; (iv) provide that if a corporate action involves one or more option classes in the Penny Program, all adjusted and unadjusted series of the option class shall be included in the Penny Program; (v) provide that any series in an option class participating in the Penny Program in which the underlying security has been delisted, or are identified by OCC as ineligible for opening customer transactions, will continue to quote pursuant to the rules of the Penny Program until all such options have expired; and (vi) establish an amendment process for the Penny Program.

The Plan Sponsors propose to establish the Penny Program as a permanent replacement to the current Penny Pilot Program (''Penny Pilot'').[8] The Penny Program will provide for such designated option classes to be quoted in $0.01 increments (for all series in such option classes with a price of less than $3.00) and $0.05 increments (for all series in such option classes with a price of $3.00 or higher). All option series in QQQ (PowerShares QQQ TrustSM, Series 1), SPY (SPDR S&P 500 ETF) and IWM (iShares Russell 2000 Index Fund) will continue to quote in $0.01 increments, regardless of price.

Initial Selection of Penny Program Classes

The Penny Program will initially apply only to the 363[9] most actively traded multiply listed option classes, based on OCC's National Cleared Volume[10] in the six full calendar months ending in the month of approval,[11] that (i) currently quote in penny increments (*i.e.,* are already in the Penny Pilot) or, (ii) if not in the Penny Pilot, overlie securities priced below $200, or any index at an index level below $200.[12] Eligibility for inclusion in the Penny Program will be determined at the close of trading on the monthly expiration Friday of the second full month following Commission approval of the proposed Amendment. The changes made pursuant to this initial selection process will become effective on the first trading day of the third full calendar month following Commission approval of the proposed Amendment.[13] Option classes that are in the Penny Pilot but are not selected for inclusion in the Penny Program following the initial selection will be subject to the minimum trading increment as described in the rules of the Exchanges, effective on the first trading day of the third full calendar month following the Amendment's approval date. Once an option class is in the Penny Program, it will remain in the Penny Program until it is no longer among the 425 most actively traded multiply listed option classes at the time of annual review. Option classes will be replaced pursuant to the annual review process described below.

Annual Review

The Plan Sponsors agree on an annual review process by which eligible option classes may be added to the Penny Program, or ineligible option classes may be removed from the Penny Program based on objective criteria. Specifically, on an annual basis commencing in December 2020 and each December thereafter, OCC will rank all multiply listed option classes based on National Cleared Volume for the six full calendar months from June 1 through November 30 for determination of the most actively traded option classes. Any option class not yet in the Penny Program that is among the 300 most actively traded multiply listed option classes overlying

[5] *See* 17 CFR 242.608(a)(4) and (a)(5).

[6] *See* Transmittal Letter, *supra* note 3.

[7] This Amendment No. 5 also seeks to make administrative changes in Section 4 of the OLPP to replace references to the adjustment panel with OCC. On November 9, 2018, the Commission approved a Supplement to the Options Disclosure Document. The Supplement provided for the implementation of modifications to the OCC By-Laws that transferred the authority to make contract adjustment determinations from adjustment panels, consisting of representatives from option exchanges, to OCC. The proposed modification to Section 4 of the OLPP coincides with these changes to the OCC By-Laws to reflect that contract adjustment determinations are now made by OCC. *See* Securities Exchange Act Release No. 84565 (November 9, 2018), 83 FR 57778 (November 16, 2018) (SR–ODD–2018–01). *See also* Securities Exchange Act Release No. 69977 (July 11, 2013), 78 FR 42815 (July 17, 2013) (SR–OCC–2013–05). This Amendment further seeks to make non-substantive ministerial changes to update the names and addresses of certain Plan Sponsors, as set forth in Section 9 of the OLPP.

[8] On January 26, 2007, the six options exchanges commenced the Penny Pilot to quote and trade options on 13 stocks and ETFs in penny increments after Chairman Cox of the Commission encouraged the options exchanges in a letter dated June 6, 2006 to begin quoting a limited number of options in pennies. *See* Securities Exchange Act Release Nos. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR–Phlx–2006–74); 55154 (January 23, 2007), 72 FR 4743 (February 1, 2007) (SR–CBOE–2006–92); 55162 (January 24, 2007), 72 FR 4738 (February 1, 2007) (SR–Amex–2006–106); 55161 (January 24, 2007), 72 FR 4754 (January 24, 2007) (SR–ISE–2006–62); 55156 (January 23, 2007), 72 FR 4759 (February 1, 2007) (SR–NYSEArca–2006–73); and 55155 (January 23, 2007), 72 FR 4741 (February 1, 2007) (SR–BSE–2006–49). The Penny Pilot was subsequently expanded to include additional option classes. Most notably, the Penny Pilot was expanded by 22 option classes on September 28, 2007 and 28 option classes on March 28, 2008. The Penny Pilot was last expanded in 2009 to include the next 300 most actively traded, multiply-listed option classes that were not yet included in the Penny Pilot, excluding options with high premiums. *See* Securities Exchange Act Release Nos. 60711 (September 23, 2009), 74 FR 49419 (September 28, 2009) (SR–NYSEArca–2009–44); 60865 (October 22, 2009), 74 FR 55880 (October 29, 2009) (SR–ISE–2009–82); 60864 (October 22, 2009), 74 FR 55876 (October 29, 2009) (SR–CBOE–2009–076); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (SR–NASDAQ–2009–091); 60873 (October 23, 2009), 74 FR 56675 (November 2, 2009) (SR–Phlx–2009–91); 60886 (October 27, 2009), 74 FR 56897 (November 3, 2009) (SR–BX–2009–067); and 61106 (December 3, 2009), 74 FR 65193 (December 9, 2009) (SR–NYSEAmex–2009–74). Through these expansions, the Penny Pilot now consists of 363 option classes.

[9] This figure is taken from the current number of option classes in the Penny Pilot. *See supra* note 8.

[10] Under the current parameters of the Penny Pilot, whether for expansion of the Penny Pilot from 2007 to 2010, or for semi-annual replacements, new issues were selected based on total national contract volume cleared at OCC (*i.e.,* ''National Cleared Volume'') over a six month period. In discussions amongst the Plan Sponsors in creating a permanent Penny Program with an annual review, it was agreed to continue to rank issues based on National Cleared Volume. National Cleared Volume includes FLEX transactions and all listed series transactions, regardless of clearing account type.

[11] For example, if the proposal is approved on November 6, the volume test for the initial selection into the Penny Program will include six months of National Cleared Volume beginning in June up to and including the month of November.

[12] Certain option classes that currently quote in penny increments pursuant to the Penny Pilot that are not among the 363 most actively traded multiply listed option classes at the time of the initial selection will not be eligible to quote in penny increments under the Penny Program.

[13] For example, if the proposal is approved on November 6, the price determinant for inclusion into the Penny Program will be the expiration Friday in January (the second full month following approval). The changes from the initial selection process will become effective on the first trading day in February.

securities priced below $200, or an index at an index level below $200, will be added to the Penny Program. Following the annual review, option classes to be added to the Penny Program will begin quoting in $0.01 increments (for all series in such option classes with a price of less than $3.00) and $0.05 increments (for all series in such option classes with a price of $3.00 or higher) on the first trading day of January.

In addition, following the annual review, any option class in the Penny Program that falls outside the 425 most actively traded multiply listed option classes will be removed from the Penny Program.[14] Option classes that are removed from the Penny Program following an annual review will be subject to the minimum trading increment as described in the rules of the Exchanges, effective the first trading day of April. Each Exchange will announce via bulletin if orders in their respective order books in option classes being removed from the Penny Program will be cancelled or if they will be converted to another order type.[15] The Plan Sponsors believe that these time periods would give investors and traders sufficient time to prepare for the change in quoting increments. Further, the Plan Sponsors believe that the proposed annual review process provides an objective framework to add and remove option classes from the Penny Program in a manner that is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. As noted above, the proposed parameters of the annual review process are designed to ensure that the most active eligible issues (*i.e.,* top 300) are included while preventing high turnovers for issues that are removed from the Penny Program (*i.e.,* issues that fall outside the top 425). The Plan Sponsors believe that the proposed framework would thus promote consistency in the implementation of the Penny Program, thereby aiding in the maintenance of a fair and orderly options market system. Following Commission approval of the proposed Amendment, the Exchanges will continue to monitor the 300, 363 and 425 option class thresholds going forward to determine if they are set at appropriate levels.

Newly Listed Option Classes

In addition to the annual review described above, the Plan Sponsors agree to allow option classes to be added to the Penny Program if they are a newly listed option class that meets certain criteria. Specifically, the Exchanges may add a newly listed option class to the Penny Program, provided that (i) it is among the 300 most actively traded multiply listed option classes, as ranked by National Cleared Volume at OCC, in its first full calendar month of trading, and (ii) the underlying security is priced below $200 or the underlying index is at an index level below $200. Any option class added under this provision will be added on the first trading day of the month after it qualifies.[16] Any option class so added shall remain in the Penny Program for one full calendar year, after which it will be subject to the annual review. The Plan Sponsors believe that the proposed trading volume threshold and initial price test, as described herein, provide objective criteria by which the Exchanges can add new option classes to the Penny Program in issues with the most demonstrated trading interest from market participants and investors on an expedited basis prior to the annual review, in a manner that will benefit market participants and investors by allowing them to trade these new option classes that quote and trade in a finer trading increment.

Option Classes With Significant Growth in Activity

In addition to the annual review described above, the Plan Sponsors agree to allow an option class to be added to the Penny Program if it is an option class that has a significant growth in activity. Specifically, the Exchanges may add any option class to the Penny Program, provided that (i) it is among the 75 most actively traded multiply listed option classes, as ranked by National Cleared Volume at OCC, for six full calendar months of trading, and (ii) the underlying security is priced below $200 or the underlying index is at an index level below $200. Any option class added under this provision will be added on the first trading day of the second full month after it qualifies.[17] The option class will then remain in the Penny Program for the rest of the calendar year, after which it will be subject to the annual review.[18]

The Plan Sponsors believe that a provision to allow for option classes to be added to the Penny Program outside of the annual review process is beneficial to market participants because of the rare instances when an option class that has been listed for some time becomes very active for an extended period of time, such as after the development of a new product. While some issues may become active for a month or two, the six month activity requirement and the higher qualification level (among the 75 most active) ensures that only those option classes with widespread investor interest are added to the Penny Program outside of the regular process.

The Plan Sponsors also believe that option classes added outside of the regular process should be subject to the

[14] The Plan Sponsors actively discussed the parameters of the annual review process, and determined that consideration of the top 425 issues struck the appropriate balance between guaranteeing inclusion of the most active issues (*i.e.,* top 300) in the Penny Program while maintaining a buffer (of additional eligible issues) to ensure the least disruptive means for the annual rebalancing for those issues that were included in the Penny Program (which included the top 363 issues) that fall below the top 300. It was noted that the relative rankings of issues may increase or decrease by 20 to 30 spots from year to year, and that automatically including the top 300 (rather than 363), would allow the Penny Program to always include the most active issues, while maintaining the eligibility of an issue that is still active, although not as relatively active because of normal fluctuations in investor interest. Provided the issue was not less active than the next 62 most active (*i.e.,* not among the top 425) such issues would remain in the Program. If the activity level declines to where it is not in the top 425, however, it should be phased out of the Penny Program. The proposed framework is therefore designed to allow for consistency and prevent high turnovers for issues that are removed from the Penny Program.

[15] Each Exchange will disseminate a memorandum which will detail how open orders will be handled on its trading platform for all series on an option class removed from the Penny Program, since all the Exchanges do not employ the same process for cancellation of such orders.

[16] For example, a new issue that began trading on the 20th of October will have its volume for the month of November evaluated and ranked. If that issue is among the 300 most actively traded multiply listed option classes for November, and the underlying security is priced below $200 or the underlying index is at an index level below $200, it will be added to the Penny Program on the first trading day of December.

[17] For example, if an issue is among the 75 most actively traded multiply listed option classes for six months ending February 28 (for the period September 1 to February 28), and the underlying security is priced below $200 or the underlying index is at an index level below $200, it will be added to the Penny Program on the first trading day of April.

[18] Thus, for example, if an issue was added to the Penny Program under this provision in October 2020, it would be subject to the next annual review in December 2020. In contrast, if a new issue was added to the Penny Program in October 2020 under the process described above for newly listed options, it would be up for annual review in December 2021 (*i.e.,* it would remain in the Penny Program for one full calendar year, after which it would be subject to the annual review). As discussed below, the Plan Sponsors believe that it is appropriate for issues added under this provision to have a shorter lookback period as any issue that was already listed and was active enough to qualify under the more stringent requirements in this provision should be active enough to continue to qualify for the Penny Program.

next annual review, as any option class that was active enough to qualify outside of the regular process under this provision should be active enough to continue to qualify for the Penny Program. The Plan Sponsors believe that the proposed trading volume threshold and initial price test, as described herein, provide objective criteria by which the Exchanges can add an option class to the Penny Program in issues with the most demonstrated trading interest from market participants and investors on an expedited basis prior to the annual review, in a manner that will benefit market participants and investors by allowing them to trade these new option classes that quote and trade in a finer trading increment.

Corporate Actions

The Plan Sponsors agree to provide that if a corporate action involves one or more option classes in the Penny Program, all adjusted and unadjusted series of the option class shall be included in the Penny Program.[19] No trading volume threshold shall apply and the initial price test shall not apply to the option class added to the Penny Program as a result of the corporate action. The newly added adjusted and unadjusted series of the option class shall remain in the Penny Program for one full calendar year. After such time, the option class will be subject to the annual review. The Plan Sponsors believe that the proposal to allow such new option classes to be included in the Penny Program will ensure the continuality of liquidity in the option classes post-corporate action to the benefit of market participants and investors in a manner that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Delisted or Ineligible Option Classes

The Plan Sponsors agree to provide that any series in an option class participating in the Penny Program in which the underlying has been delisted, or is identified by OCC as ineligible for opening customer transactions, will continue to quote pursuant to the terms of the Penny Program until all options series have expired. The Plan Sponsors believe that the proposal to allow delisted or ineligible option classes to stay in the Penny Program until they expire will encourage market participants to continue to provide liquidity in these issues in a manner that is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Multiply Listed Option Classes; Penny Program Amendments

The Plan Sponsors agree that references to multiply listed option classes in proposed Section 3.1 of the OLPP will apply only to option classes in the Penny Program, and to no other sections of the OLPP.

The Plan Sponsors further agree to an amendment process that would only apply to changes to the Penny Program provisions set forth in proposed Section 3.1 of the OLPP. Currently, any amendments to the OLPP other than to add new Plan Sponsors must be approved unanimously by the Plan Sponsors.[20] As proposed, the Plan Sponsors agree to a separate amendment process to govern any changes to Section 3.1. Specifically, not sooner than 60 months following Commission approval of the proposed Amendment, a super-majority (⅔) of the Plan Sponsors may vote to make changes to the Penny Program. At any time before 60 months have passed since the adoption of the Penny Program, any changes must be unanimously approved by the Plan Sponsors. Any changes to the Penny Program will be subject to SEC review pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 and Rule 608 thereunder.

Summary of Penny Pilot Reports

The Plan Sponsors agree to adopt the Penny Program based on results of the numerous previously published studies regarding the Penny Pilot, and the most recent data presented in the Report on Activity in Option Classes Added to the Penny Pilot summarized below. Plan Sponsors note that the various markets and market participants have previously studied the Penny Pilot, in 2009 and 2010, when the Penny Pilot was expanded. The Exchanges have also studied the Penny Pilot throughout the duration of the program, and consistently found that as an overall program, the Penny Pilot was of significant benefit to investors and other market participants and had a minimal negative impact on the industry.[21] Through these studies, the options industry gained, and shared with the Commission, an understanding of the benefits to investors and other market participants of the Penny Pilot and the burdens on quote traffic and capacity caused by this program. Over the duration of the Penny Pilot, the Exchanges have studied quote traffic with an expectation that quote traffic would increase because of more quoting price points. However, this would be offset by benefits to the investing public due to narrowed spreads and more price points, along with the expectation that the increased quote traffic would provide increased trading activity. Overall, the Plan Sponsors agree these benefits remain true and that the Penny Pilot, as a whole, has largely met these expectations.

[19] For example, if Company A acquires Company B and Company A is not in the Penny Program but Company B is in the Penny Program, once the merger is consummated and an options contract adjustment is effective, then Company A will be added to the Penny Program and remain unchanged for one calendar year.

[20] Section 7 of the OLPP sets forth a discrete process to effect amendments adding new Plan Sponsors, including requirements that the Eligible Exchange, as defined therein, execute a copy of the OLPP and provide each then-current Plan Sponsor with a copy of such executed Plan.

[21] For example, the Exchanges' earlier Penny Pilot reports have generally found the National Best Bid and Offer (''NBBO'') spread width has narrowed, size available at the NBBO has declined, quote traffic has increased, and industry volumes have increased. *See e.g.,* Chicago Board Options Exchange, Penny Pilot Report dated March 4, 2008; International Securities Exchange Penny Pilot Analysis Phase 2, dated November 27, 2007; Philadelphia Stock Exchange Options Penny Pricing Pilot Report, dated February 29, 2007; American Stock Exchange Penny Pilot Report, dated November 2, 2007; New York Stock Exchange Arca Options: Understanding Economic and Capacity Impact of the Options Penny Pilot, dated November 14, 2007. The Exchanges' Penny Pilot reports are also available at: *https://www.cboe.org/general-info/hybrid-reg-penny-pilot-program; https://boxoptions.com/regulatory/governing-documents-related-information-nms-plans/pilot-reports/penny/*; and *https://www.nyse.com/markets/american-options/reports.*

In addition, the Commission's Division of Economic and Risk Analysis (''DERA'') recently contracted with Cornerstone Research (''Cornerstone'') to conduct an independent analysis of the impact of the Penny Pilot on market quality, using quoted and effective spreads as measures of market quality (''Cornerstone Analysis'').[22] The Cornerstone Analysis is based on data on options added to the Penny Pilot between January 26, 2007 and January 5, 2016, and thus covers a time period from the inception of the Penny Pilot. Overall, the Cornerstone Analysis finds that relative to the control sample of options that were not included in the Penny Pilot, there is a statistically significant decrease in effective and quoted spreads for the most liquid option classes included in the Penny Pilot.[23] However, for less liquid Penny Pilot option classes, especially in the later years (the period 2012—2015), the results do not indicate that inclusion in the Penny Pilot has a significant effect on market quality.[24]

Report on Activity in Option Classes Added to the Penny Pilot [25]

Most recently, on behalf of the U.S. options exchanges participating in the Penny Pilot, NYSE Group, together with its subsidiary markets, NYSE American Options and NYSE Arca Options, studied option quote and trade activity in the eight option classes listed in the table below (the ''Study Group''). The study examined trading activity for this Study Group during two time periods: the Third and Fourth Quarters of 2014 (*i.e.,* before the selected issues were added to the Penny Pilot (the ''pre- Pilot period'')) and the Third and Fourth Quarters of 2015 (*i.e.,* after the selected issues were added to the Penny Pilot (the ''Pilot period'')).[26]

OPTION CLASSES IN THE STUDY GROUP

Symbol	Underlying security	Date added to Pilot
BABA	Alibaba Group Holding Ltd	Jan. 5, 2015.
CBS	CBS Corp	Jan. 5, 2015.
FEYE	FireEye Inc	July 6, 2015.
GPRO	GoPro Inc	July 6, 2015.
HYG	iShares iBoxx $ High Yield Corporate Bond ETF	July 6, 2015.
OIH	Market Vectors Oil Service ETF	July 6, 2015.
RAD	Rite Aid Corp	July 6, 2015.
RSX	Market Vectors Russia ETF	July 6, 2015.

The data for the Study Group was compiled based on trading activity that occurred on each Wednesday during the pre-Pilot, and Pilot period (n=27), in an effort to minimize disruption from options expirations, which occur on Fridays, and/or the additions of new series, which often occur on Mondays.

The quote data was compiled across all series and expirations for options on each of the eight underlying securities in the Study Group. To focus on the effect of quoting in $0.01 increments, the quotes in the Study Group were segregated by those with an offer value less than or equal to $3.00, and those with an offer greater than $3.00.[27] Option classes that are not in the Penny Pilot quote in $0.05 increments below $3.00 and $0.10 increments at or above $3.00, whereas option classes in the Penny Pilot quote in $0.01 increments below $3.00, and $0.05 increments at or above $3.00.

1. Spread Width

Spread width is a measure of the benefit to investors, as the costs of entering and exiting the market are reduced by a narrower spread.[28]

As shown in Figures 1 and 3 of the Report, the study found that the average spread width for issues in the Study Group was reduced during the Pilot period as compared to the pre-Pilot period. The results indicated a more consistent reduction in spread width in the lower-priced options (*i.e.,* that typically quote and trade below $3.00) than in the higher-priced options (*i.e.,* that typically quote and trade at or above $3.00).

The study also examined the median width of all of the quotes on issues in the Study Group to determine whether the average spread width was distorted by higher-priced options in the Study Group. As Figures 4–5 show, the results indicated a reduced median spread width for lower-priced options during the Pilot period, while the results did not indicate as consistent a reduction in the median spread width for higher-priced options during the same period. The Exchanges still believe that the findings support making the Penny Pilot a permanent program because of the reduction in quoted spreads, especially for lower-priced options, which is beneficial to the investing public by lowering the costs of entering and exiting the market and thus consistent with the Act.

2. Liquidity; Trades by Quote Width

The study also examined the number of contracts in the Study Group offered at the National Best Offer. While most markets submitted to options exchanges are symmetrical in the number of contracts bid for, and the number of contracts offered, the common presence of quotes without a bid in out-of-the-money option series would distort the average bid size for a given option. With that in mind, the study focused solely on offer sizes.

Since the beginning of the Penny Pilot in 2007, there was a focus on whether the benefit of a reduced spread would be offset by a decrease in liquidity available at the National Best Bid/Offer (''NBBO''). As shown in Figure 6 and Table 2 of the Report, the study found that while there was a reduction in the number of contracts offered at the NBBO

[22] DERA Memorandum on Cornerstone Analysis, December 18, 2017, *https://www.sec.gov/files/DERA_Memo_on_a_Cornerstone_Penny_Pilot_Analysis.pdf.*

[23] *Id.* at 1.

[24] *Id.* at 2.

[25] The report setting forth the data for these studies, entitled ''Report on Activity in Options Classes Added to the Penny Pilot'' (''Report''), is submitted as Exhibit A as part of this Amendment No. 5.

[26] For avoidance of doubt, the phrase, ''Pilot period'' as used herein refers to solely the limited time period studied for purposes of the Report and does not include trading activity that is occurring in the ongoing Penny Pilot.

[27] Generally, rules on Trading Differentials refer to ''trading at less than $3.00'' or ''trading at $3.00 or above.'' To accurately evaluate the effect of quotations in one cent increments, both the bid and the offer (ask) must be in one cent increments, which requires offers to be at or below $3.00. Markets in Pilot Issues with an offer above $3.00 are at least $0.05 wide by rule.

[28] Spread width for this study was calculated by subtracting the National Best Bid from the National Best Offer.

for the Study Group during the Pilot period, the available size at the NBBO for the Study Group was, on average, greater than 99% of all options trades during this same time period.

As Table 3 shows, an examination of the Study Group trades during the pre-Pilot and Pilot period also indicated a sizeable percentage of transactions occurred between the NBBO (*i.e.,* between 36.1% and 44.0%), a result seen more frequently during the pre-Pilot period than during the Pilot period.[29] While the Exchanges recognize that the foregoing results show that there has been a reduction in displayed size available at the NBBO in the Study Group issues, the Exchanges believe the study still supports making the pilot permanent, especially since the results also show (in Table 2) that the available size at the NBBO for the Study Group was, on average, greater than 99% of all options trades during the Pilot period.

As shown in Figures 7–14 in the Report, further examination of the Study Group data also demonstrated that having price points available under $0.10 resulted in trading that was concentrated on narrower spreads even if this trend did not result in a significant narrowing of spreads across the universe of series in an underlying class. The data also indicated that after being added to the Penny Pilot, all but two classes in the Study Group experienced more than 50% of trading occurred when the spread width was $0.05 or less. The other two classes (*e.g.,* HYG and RSX) still experienced a noticeable increase in trading in that spread width bucket.

3. Quote Traffic Data

One portion of the quote traffic analysis also observed the same Study Group and covered time pre-Pilot and Pilot periods of 2014 and 2015, respectively. As Figure 15 of the Report shows, nearly all of the issues showed an increase in number of quotes once it was included with the Penny Pilot.[30] On average, the quote traffic increase between the two time periods was 121%.[31]

Additionally, further analysis was conducted on a second study group to evaluate quote traffic for Penny Pilot issues that were added to the Penny Pilot in July 2017 (see option classes below, ''July 2017 Study Group'').

OPTION CLASSES IN JULY 2017 STUDY GROUP

Symbol	Underlying security	Date added to Pilot
FEZ	SPDR EURO STOXX 50 ETF	Jul 5, 2017.
HPE	Hewlett Packard Enterprise Co	Jul 5, 2017.
ILG	ILG Inc	Jul 5, 2017.
JNUG	Direxion Daily Jr. Gold Miners Index Bull 3X Shares	Jul 5, 2017.
MBLY	Mobileye N.V	Jul 5, 2017.
MPC	Marathon Petroleum Corp	Jul 5, 2017.
PANW	Palo Alto Networks Inc	Jul 5, 2017.
SDRL	Seadrill Ltd	Jul 5, 2017
SNAP	Snap Inc	Jul 5, 2017.
UCO	ProShares Ultra Bloomberg Crude Oil	Jul 5, 2017.
YELP	Yelp Inc	Jul 5, 2017.

Figure 16 in the Report compares two time periods (January–June 2017 and January–June 2018) for the July 2017 Study Group, which represents the time before and after their inclusion into the Penny Pilot. As shown in Figure 16, of the July 2017 Study Group issues, only two (2) experienced a decrease in quote traffic (*e.g.,* MBLY and SDRL), and such issues are the only issues that have eventually been delisted from a National Market System.[32] On average, the July 2017 Study Group issues have experienced an increase in quote traffic of over 140% between the two time periods.

The Report also compares the effect on quote traffic for the potential removals and additions to the Penny Pilot for the time period between January 2018 and June 2018, as shown in Figure 17. Over the six months of 2018, the issues which would be additions to the Penny Pilot generated nearly 103 billion quotes, and issues which would be removed generated about 77 billion quotes over the same time period. Thus by comparison, the additions generated approximately 26 billion more quotes than the removals during January to June timeframe (or an average of over 4 billion quotes each month). While the foregoing findings demonstrate that the increase in quote traffic has been appreciable, the capacities of the Exchanges' systems and Options Price Reporting Authority (''OPRA'') have been sufficiently adequate in handling the quote traffic increase resulting from the Penny Pilot. In addition, the Exchanges believe that their respective and OPRA's systems have sufficient quote capacity going forward to accommodate the projected increase in quote traffic that will result from the initial selection and annual review process proposed above.

[29] For purposes of this study, all reported trades were included, regardless of trade condition, including Complex Trades. Complex Trades are priced at a total or net debit or credit, with the possibility of each component of the Complex Trade being priced between the National Best Bid and the National Best Offer. The observed variation in the percentage of transactions that occurred between the NBBO in the pre-Pilot and Pilot period could have been, in part, driven by the variation in the proportion of Complex Trades over the two periods.

[30] Alibaba Group Holding (BABA) shows an extreme traffic increase of 403%, which significantly overshadows the amount of quote traffic increase of the other additions. This is, in large part, due to its IPO in September 2014; when it was the largest IPO in history at that time. Over the two periods, historically, there were days of higher quote traffic around earnings announcements. Further, over each of the last two months of 2015, BABA quote traffic exceeded 2 billion quotes, which was nearly as much as it experienced, in total, over it first three months of trading.

[31] Due to the considerable influence of the BABA traffic increase, if the percentage increase in quote traffic was calculated without BABA's quote data, then the value would fall to 81%.

[32] Symbol MBLY was voluntarily delisted from NYSE on September 6, 2017, in connection with a tender offer from Intel (INTC) and subsequently listed on the OTC market. Symbol SDRL filed for Chapter 11 Bankruptcy on September 12, 2017. Subsequent to the bankruptcy filing, SDRL was delisted from NYSE and listed on an OTC market. When a security moves to the OTC market, many options exchanges seek to delist the security as it is not in compliance with continued listings standards for options. Due to its removal from nearly all options exchanges, quoting in this security is drastically reduced and are typically present only when (or if) a customer looks to close out an open options position.

B. Governing or Constitutional Documents

Not applicable.

C. Description of Amendment Implementation

The OLPP, as amended, will become effective upon Commission approval. The Plan Sponsors will implement the OLPP, as amended, pursuant to the terms of this Amendment No. 5 upon Commission approval.

D. Development and Implementation Phases

Not applicable.

E. Analysis of Impact on Competition

The proposed OLPP, as amended, does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Plan Sponsors do not believe that this Amendment No. 5 introduces terms that are unreasonably discriminatory for the purposes of Section 11A(c)(1)(D) of the Act.[33] The Plan Sponsors believe that making the Penny Pilot a permanent program will allow for continued competition between market participants trading similar products as their counterparts across the options exchanges, while at the same time allowing options exchanges to continue to compete for order flow in option classes trading as part of the Penny Program.

F. Written Understandings or Agreements Relating to Interpretation of, or Participation in, the OLPP

Not applicable.

G. Approval by Plan Sponsors

This Amendment No. 5 has been approved by the Plan Sponsors in accordance with the OLPP. The Plan Sponsors have each executed a signed copy of the Amendment.

H. Terms and Conditions of Access

Not applicable.

I. Method of Determination and Imposition, and Amount of, Fees and Charges

Not applicable.

J. Method and Frequency of Processor Evaluation

Not applicable.

K. Dispute Resolution

Not applicable.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the amendment 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 4–443 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 4–443.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 plan amendment that are filed with the Commission, and all written communications relating to the amendment between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the Participants' offices. 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 4–443 and should be submitted on or before January 7, 2020.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

Exhibit A to Amendment No. 5

Report on Activity in Option Classes Added to the Penny Pilot

March 8, 2019

Executive Summary

On behalf of the U.S. options exchanges participating in the Penny Pilot program (the ''Penny Pilot'' or ''Pilot''), NYSE Group, together with its subsidiary markets, NYSE American Options and NYSE Arca Options, studied option quote and trade activity in the eight option classes listed in the table below (the ''Study Group''). The study examined trading activity for this Study Group during two time periods: The Third and Fourth Quarters of 2014 (*i.e.,* before the selected issues were added to the Pilot (the ''pre- Pilot period'') and the Third and Fourth Quarters of 2015 (*i.e.,* after the selected issues were added to the Pilot (the ''Pilot period'').[1] The changes in market conditions could affect quote activity and market quality measures such as spread width and trading activity examined in this report. This report utilizes the level and changes in market volatility measured by Cboe Volatility index (''VIX'') to gauge market condition during the pre-Pilot period and the Pilot period. In general, an increase in market volatility could lead to an increase in quote activity, wider spread widths, and higher trading volume for options.

TABLE 1—OPTION CLASSES IN THE STUDY GROUP

Symbol	Underlying security	Date added to pilot
BABA	Alibaba Group Holding Ltd	Jan. 5, 2015.
CBS	CBS Corp	Jan. 5, 2015.
FEYE	FireEye Inc	July 6, 2015.
GPRO	GoPro Inc	July 6, 2015.

[33] 15 U.S.C. 78k–1(c)(1)(D).

[1] For avoidance of doubt, the phrase, ''Pilot period'' as used herein refers to solely the limited time period studied for purposes of this report and does not include trading activity that is occurring in the ongoing Pilot.

TABLE 1—OPTION CLASSES IN THE STUDY GROUP—Continued

Symbol	Underlying security	Date added to pilot
HYG	iShares iBoxx $ High Yield Corporate Bond ETF	July 6, 2015.
OIH	Market Vectors Oil Service ETF	July 6, 2015.
RAD	Rite Aid Corp	July 6, 2015.
RSX	Market Vectors Russia ETF	July 6, 2015.

The data for the Study Group was compiled based on trading activity that occurred on each Wednesday during the pre-Pilot, and Pilot period (n=27), in an effort to minimize disruption from options expirations, which occur on Fridays, and/or the addition of new series, which often occur on Mondays.

The quote data was compiled across all series and expirations for options on each of the eight underlying securities in the Study Group. To focus on the effect of quoting in $0.01 increments, the quotes in the Study Group were segregated by those with an offer value less than or equal to $3.00, and those with an offer greater than $3.00.[2] Option classes that are not in the Pilot quote in $0.05 increments below $3 and $0.10 increments at or above $3.00, whereas option classes in the Pilot quote in $0.01 increments below $3.00, and $0.05 increments at or above $3.00. Spread width is a measure of benefit to investors, as the costs of entering and exiting the market are reduced by a narrower spread.[3]

The study found that the average spread width for issues in the Study Group was reduced during the Pilot period as compared to the pre-Pilot period. The results indicated a more consistent reduction in spread width in the lower-priced options (*i.e.,* that typically quote and traded below $3) than in the higher-priced options (*i.e.,* that typically quote and traded at or above $3.00). The study also examined the median width of all of the quotes on issues in the Study Group to determine whether the average spread width was distorted by higher-priced options in the Study Group. The results indicated a reduced median spread width for lower-priced options during the Pilot period, while the results did not indicate as consistent a reduction in the median spread width for higher-priced options during the same period.

The study also examined the number of contracts in the Study Group offered at the National Best Offer. While most markets submitted to options exchanges are symmetrical in the number of contracts bid for, and the number of contracts offered, the common presence of quotes without a bid in out-of-the-money option series would distort the average bid size for a given option. With that in mind, the study focused solely on offer sizes.

Since the beginning of the Pilot in 2007, there was a focus on whether the benefit of a reduced spread would be offset by a decrease in liquidity available at the National Best Bid/Offer (''NBBO''). The study found that while there was a reduction in the number of contracts offered at the NBBO for the Study Group during the Pilot period, the size traded at the NBBO for the Study Group still vastly exceeded the available size at the NBBO during this same time period. An examination of the Study Group trades during the pre-Pilot and Pilot period also indicated a sizeable percentage of transactions occurred between the NBBO (*i.e.,* between 36.1% and 44.0%), a result seen more frequently during the pre-Pilot period than during the Pilot period. This finding of a reduced effective spread demonstrates that exchanges have used alternative mechanisms such as price improvement auctions to offset the artificial spread width caused by the lower minimum quote increments.[4]

Further examination of the Study Group data also demonstrated that having price points available under $0.10 resulted in trading that was concentrated on narrower spreads even if this trend did not result in a significant narrowing of spreads across the universe of series in an underlying class. The data also indicated that after being added to the Pilot, all but two classes experienced more than 50% of trading occurred when the spread width was $0.05 or less. The other two classes (*e.g.,* HYG and RSX) still showed a noticeable increase in trading in that spread width bucket.

The Participants feel the Report demonstrates the benefit to the investing public of pricing active options classes in $0.01 increments below $3.00, and $0.05 increments above $3.00. The Report is consistent with findings from earlier Penny Pilot Reports from 2007 to 2012: The NBBO spread has narrowed, size available at the NBBO has declined, quote traffic has increased and industry volumes have increased.

These findings are also consistent with those of Cornerstone Research,[5] that inclusion in the Pilot is associated with a decrease in quoted spreads.

* * * * *

[2] Generally, rules on Trading Differentials refer to ''trading at less than $3'' or ''trading at $3 or above.'' To accurately evaluate the effect of quotations in one cent increments, both the bid and the offer (ask) must be in one cent increments, which requires offers to be at or below $3. Markets in Pilot Issues with an offer above $3 are at least $0.05 wide by rule.

[3] Spread width for this study was calculated by subtracting the National Best Bid from the National Best Offer.

[4] For purposes of this study, all reported trades were included, regardless of trade condition, including Complex Trades. Complex Trades are priced at a total or net debit or credit, with the possibility of each component of the Complex Trade being priced between the National Best Bid and the National Best Offer. The observed variation in the percentage of transactions that occurred between the NBBO in the pre-Pilot and Pilot period could have been, in part, driven by the variation in the proportion of complex trades over the two periods.

[5] Division of Economic and Risk Analysis (''DERA'') of the U.S. Securities and Exchange Commission contracted with Cornerstone Research (''Cornerstone''), an economic and financial consulting firm, to conduct analyses related to investigating the effects on market quality of the continuing Pilot that allows certain exchange-traded options to be quoted in reduced price increments. *See* DERA Memorandum on Cornerstone Analysis, December 18, 2017, *https://www.sec.gov/files/DERA_Memo_on_a_Cornerstone_Penny_Pilot_Analysis.pdf.*

Spread Width[6]

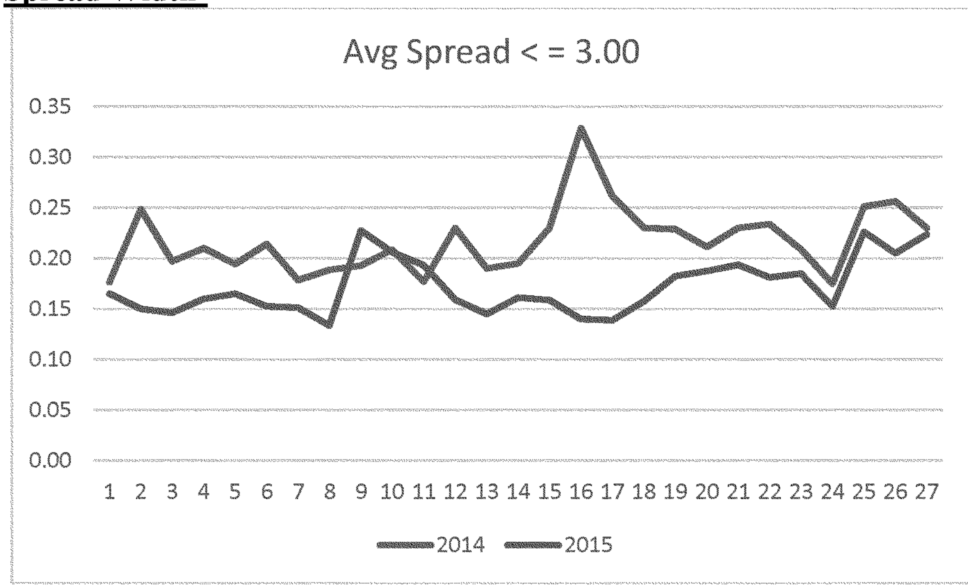

Figure 1. Average Spread Width When Offer Is Equal To or Less Than $3.00

Except for a two[6] week period where the Pilot period spread was higher than or equal to the Pre-Pilot period spread, the Pilot led to narrower markets across the Study Group in option series quoted in penny increments. As observed in Figure 2, the levels of market volatility measured by VIX are similar during the pre-Pilot and Pilot period. We observed narrower spreads during the Pilot period compared to those during the pre-Pilot period. The two week period where the Pilot period spread was higher than or equal to the pre-Pilot period spread is associated with higher and increasing market volatility.

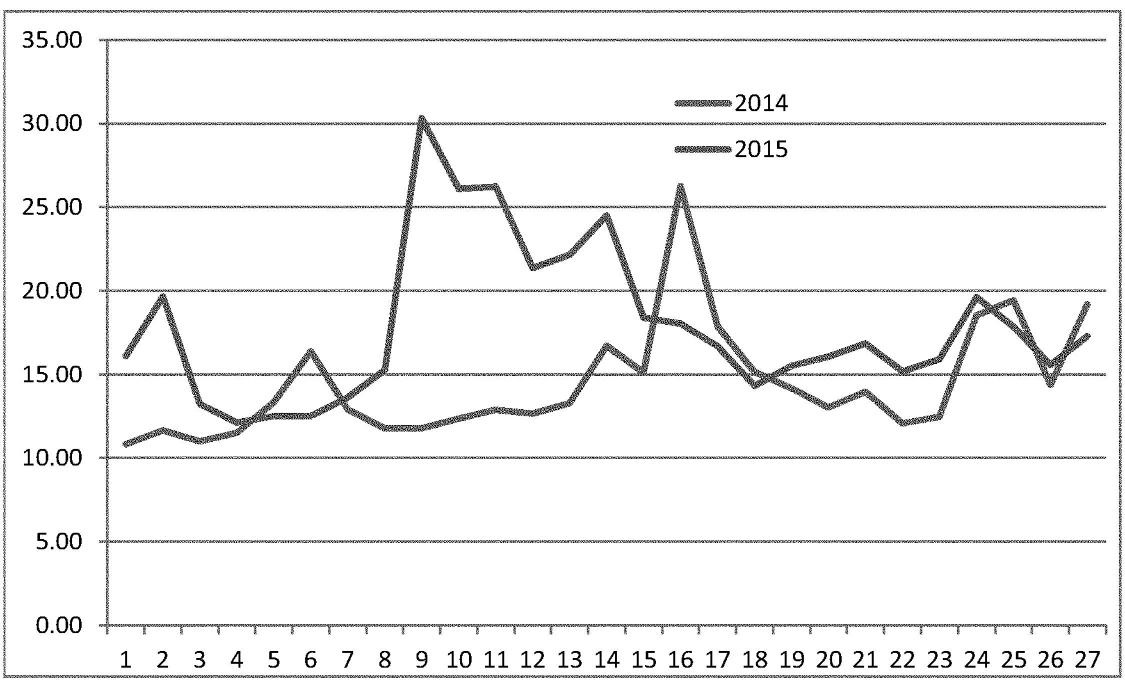

Figure 2. Closing Value of Cboe Volatility Index

The periods where VIX increased correlated to increased spread widths.

[6] Spread width for this study was calculated by subtracting the National Best Bid from the National Best Offer. No weighting was applied. Figure 1 represents the arithmetic average of all National Best Bid/Offer (''NBBO'') quotes in the Study Group with an offer equal to or less than $3, while Figure 3 represents the arithmetic average of all NBBO quotes in the Study Group with an offer greater than $3.

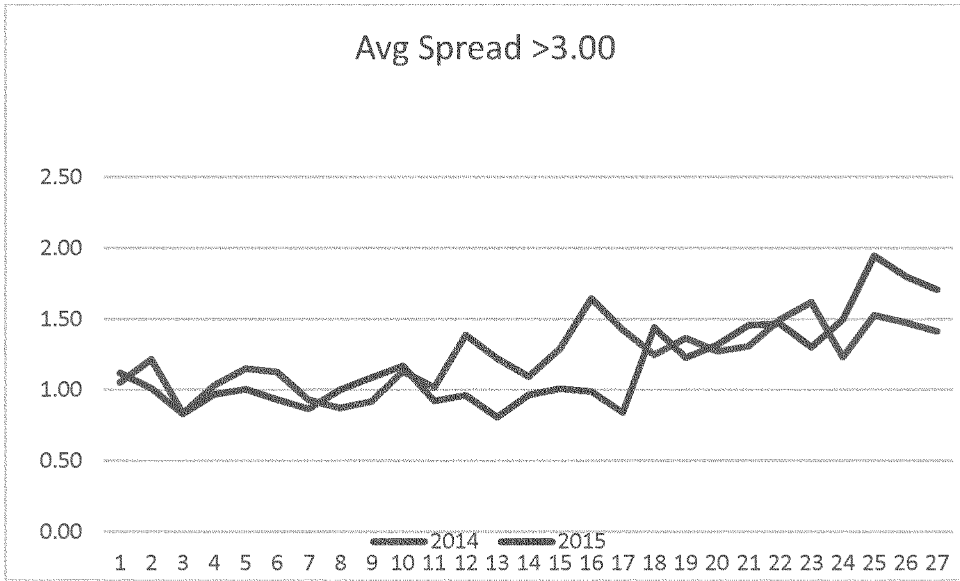

Figure 3. Average Spread Width When Offer Is Greater Than $3.00

The study did not demonstrate a consistently narrower market for higher-priced options.

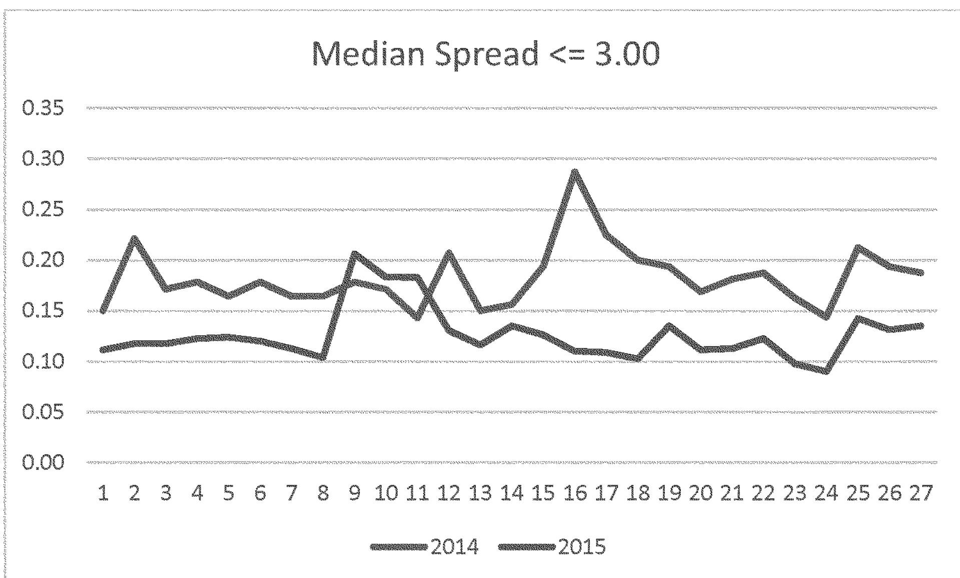

Figure 4. Median Spread Width When Offer Is Equal To or Less Than $3.00

An examination of the median of all the spreads of lower-priced options in the Study Group during the Pilot demonstrated a consistent reduction in the average spread width.

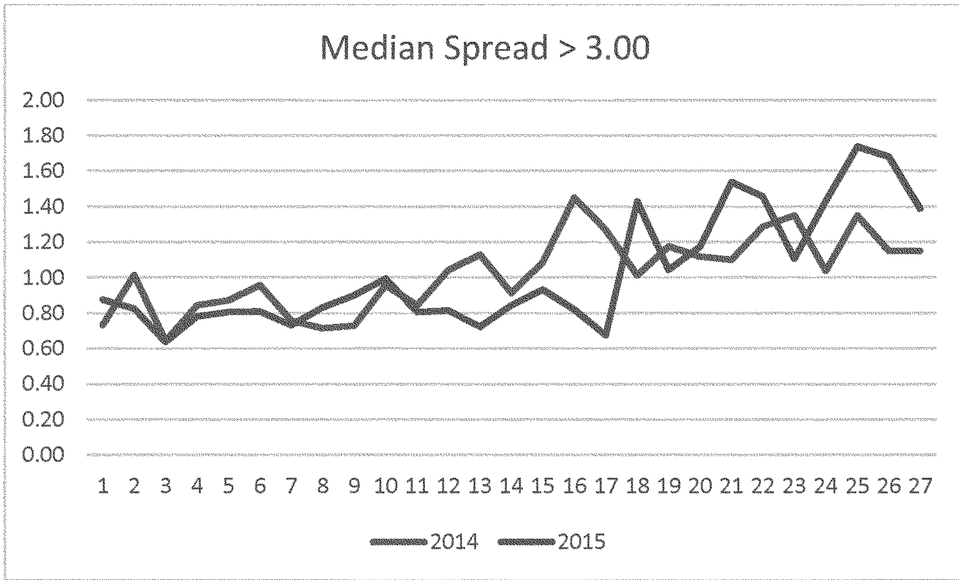

Figure 5. Median Spread Width When Offer Is Greater Than $3.00

An examination of the median of all spread widths of higher-priced options in the Study Group did not demonstrate as consistent a reduction in spread width.

Liquidity[7]

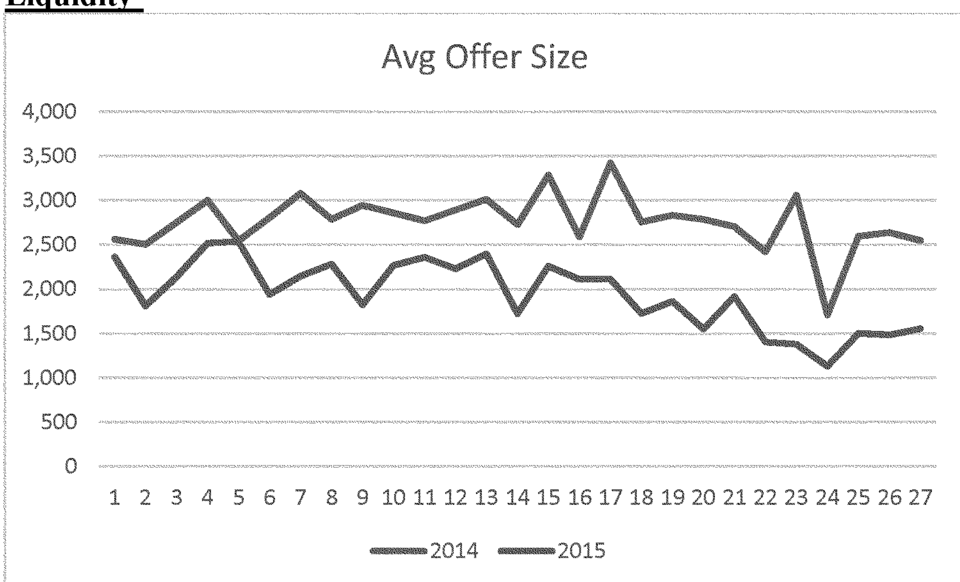

Figure 6. Average Offer Size, All Series

TABLE 2—TRANSACTIONS GROUPED BY TRADE SIZE (“TRADE BUCKETS”)

Trade size	Q3—2014	Q4—2014	Q3—2015	Q4—2015
0–10	64,935	276,275	158,229	216,690
11 to 50	13,298	47,541	31,656	36,690
51 to 100	1,688	5,950	4,277	4,486
101 to 500	1,094	2,587	1,880	1,994
501 to 1,000	254	204	144	143
>1,000	308	197	136	193
	81,577	332,754	196,322	260,196

While the data[7] indicated a reduction in available liquidity at the NBBO for options traded in the Study Group during the Pilot period, the quoted size at the NBBO for the Study Group issues was, on average, greater than 99% of all options trades during the Pilot period. Only the trade bucket for the very largest trades (>1,000 Contracts) were in excess of the average offer size.

TABLE 3—BREAKDOWN OF TRADES EXECUTED ON BID, OFFER, OR BETWEEN BID AND OFFER

	Total trades	At bid	At ask	Between
Q3—2014	81,577	18,378	21,881	35,917
		22.5%	26.8%	44.0%
Q4—2014	332,754	69,451	76,552	152,661
		20.9%	23.0%	45.9%
Q3—2015	196,322	54,692	57,840	75,908
		27.9%	29.5%	38.7%
Q4—2015	260,196	78,171	79,544	93,862
		30.0%	30.6%	36.1%

Trades by Quote Width[8]

Transactions in the Study Group for the pre-Pilot and Pilot periods were analyzed by segregating such transactions into the following ''buckets'' of quote widths:

$0.00–$0.05
$0.06–$0.10
$0.11–$0.20
$0.21–$0.40
>$0.40

A review of the data indicates that significantly higher percentage of Study Group transactions occurred in the bucket with the narrowest quote width (*i.e.,* $0.00 to $0.05) following an issue being added to the Pilot.

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[7] As noted above, the study focused solely on offer sizes because most markets submitted to options exchanges are symmetrical (*i.e.,* number of contracts bid for generally equals the number of contracts offered), and the common presence of quotes without a bid in out-of-the-money option series would distort the average bid size for a given option. Figure 6 represents an arithmetic average of all NBBO offer sizes in the Study Group.

[8] Quote width for this study was calculated by subtracting the National Best Bid from the National Best Offer. The quote used for each trade is the NBBO at the time of trade reporting.

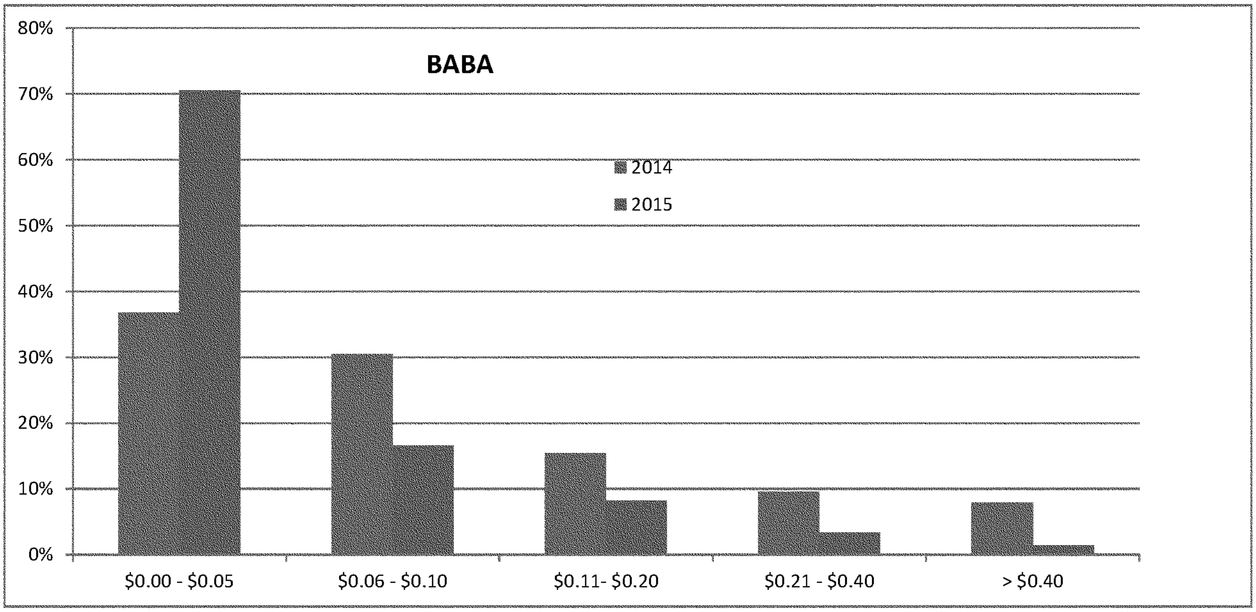

Figure 7. Trades in BABA by Quote Width

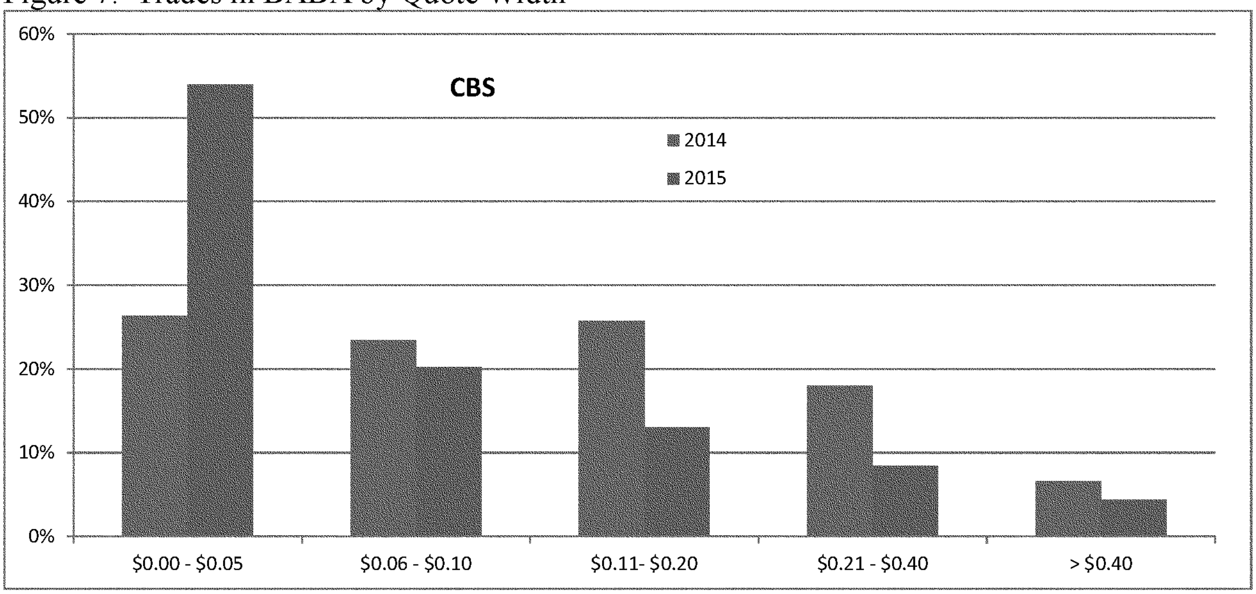

Figure 8. Trades in CBS by Quote Width

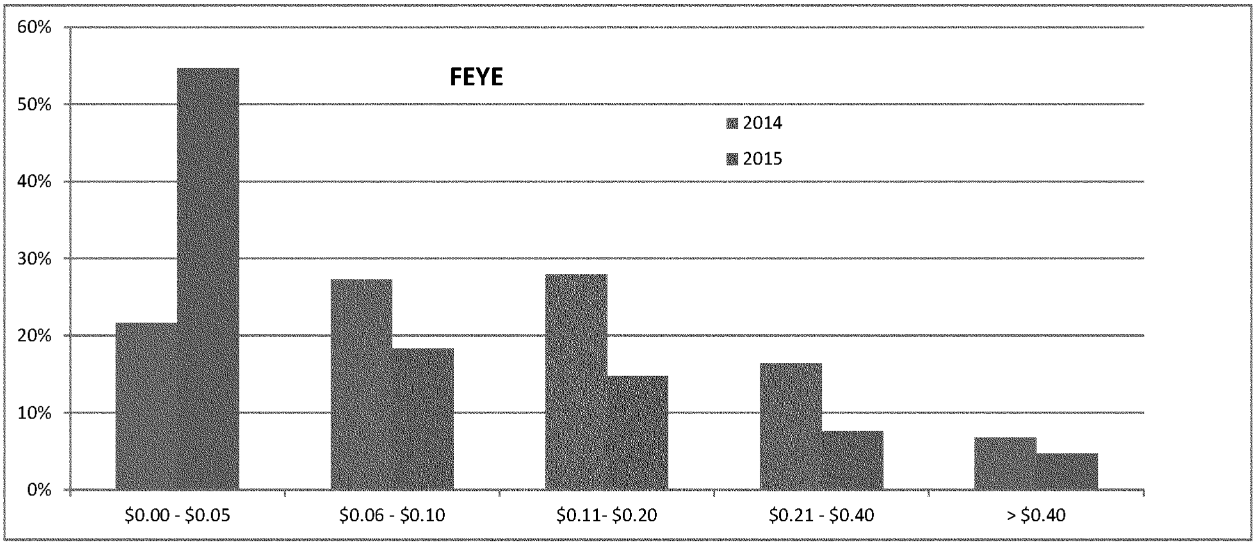

Figure 9. Trades in FEYE by Quote Width

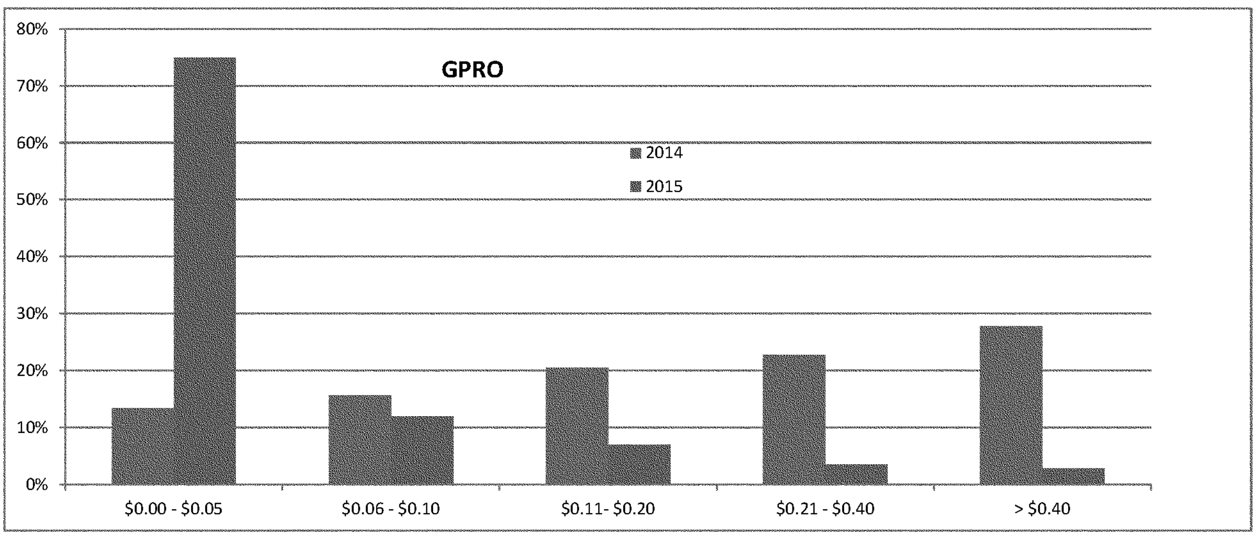

Figure 10. Trades in GPRO by Quote Width

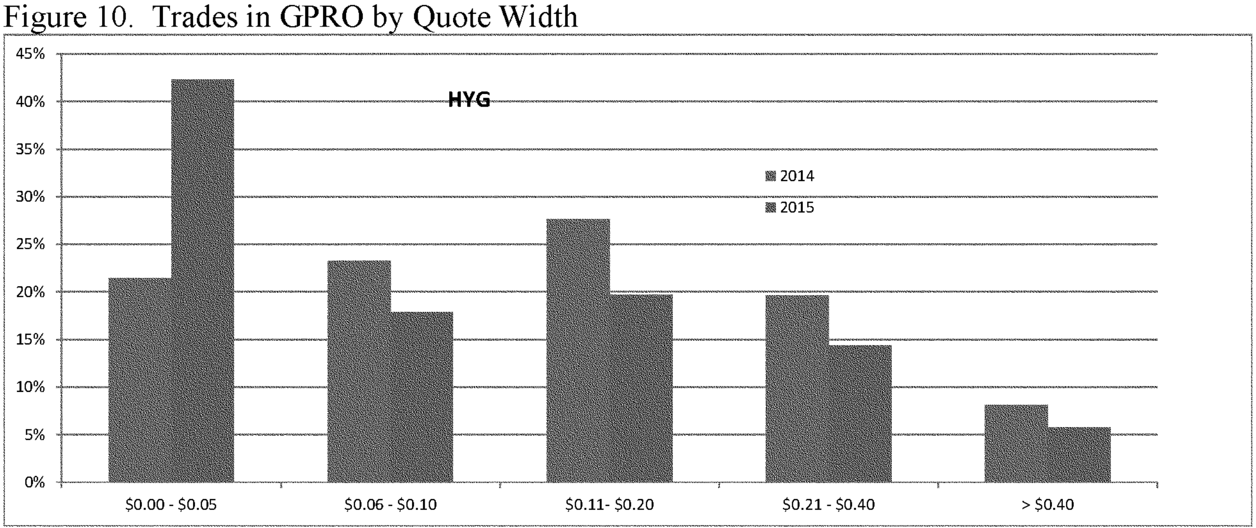

Figure 11. Trades in HYG by Quote Width

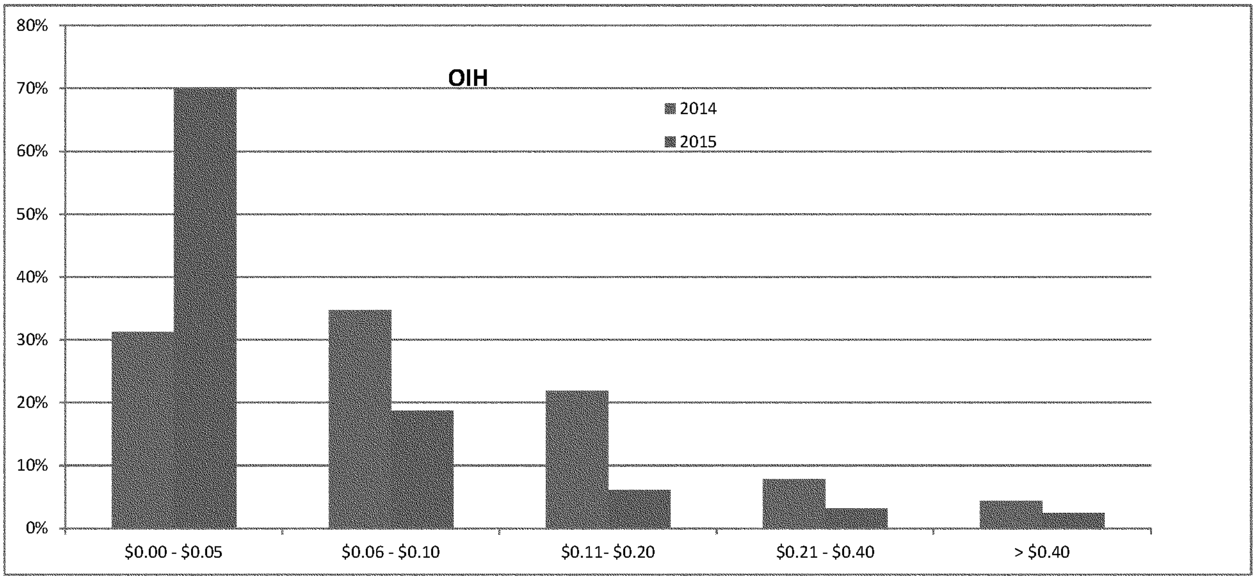

Figure 12. Trades in OIH by Quote Width

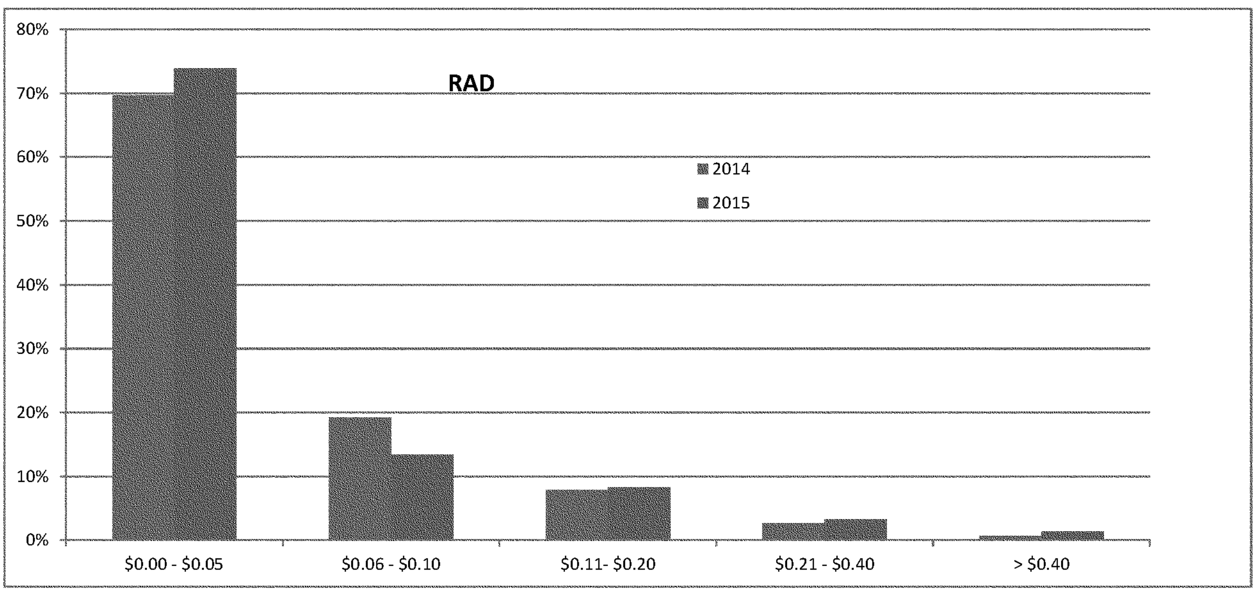

Figure 13. Trades in RAD by Quote Width

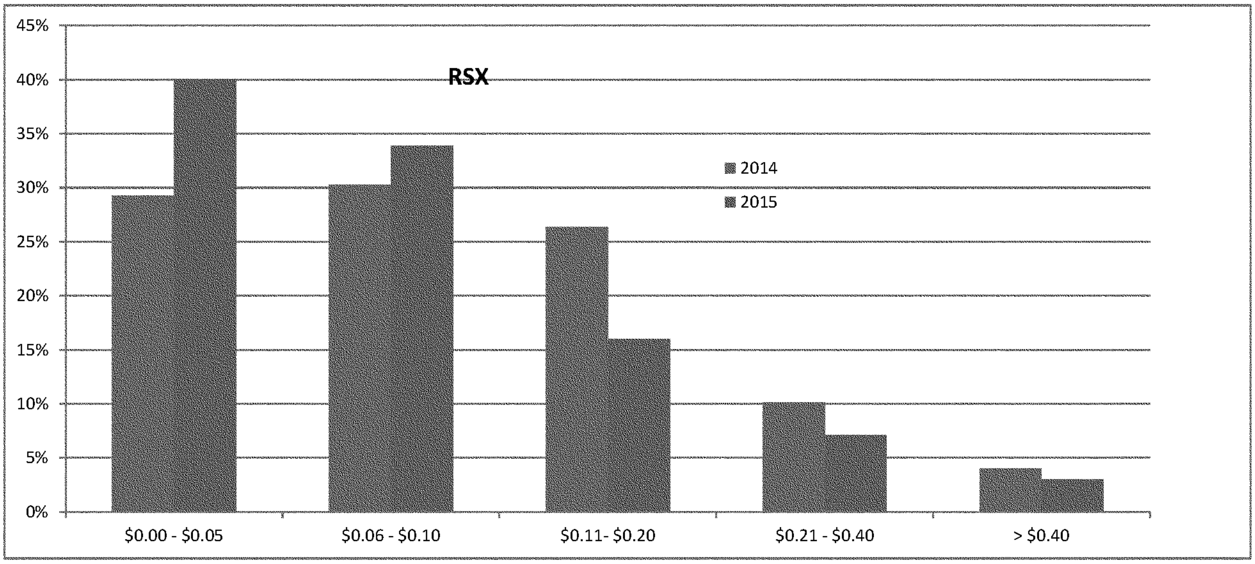

Figure 14. Trades in RSX by Quote Width

This data demonstrates that having price points available under $0.10 resulted in trading that was concentrated on narrower spreads even if this trend did not result in a significant narrowing of spreads across the universe of series in an underlying class. The data also indicated that after being added to the Pilot, all but two classes experienced more than 50% of trading occurred when the spread width was $0.05 or less. The other two classes (*e.g.,* HYG and RSX) still showed a noticeable increase in trading in that spread width bucket.

Quote Traffic Analysis and Projection [9]

As the Plan Sponsors look to amend the Pilot, one of the modifications to the program will be the inauguration of an annual review. This review will be conducted every December to allow eligible issues to be added to the program, while ineligible issues will be removed from the program. Currently, there are 363 issues in the Pilot. However, it is assumed that the current issues are not the top 363 issues in the industry based upon volume. The exchanges performed a test to assess what the impact would be if the annual review would be conducted present day versus waiting until December to do so. This would examine not only the issues added/removed, but also how OPRA quote traffic would be impacted with all changes to the program. For this projection, the analysis looked at options volume from January through July 2018 to set the industry's top 363 issues. There were 107 current Penny Pilot issues which did not rank within the top 363 industry issues. Conversely, there were 96 issues that are currently not in the Pilot, however, that rank in the top 363 industry issues. There are 11 issues that are within the top 363 issues, but would not qualify for the Pilot due to the underlying price being greater than $200.

The analysis looked at the basket of recent additions to the Penny Pilot (basket of 8 stocks from earlier analysis) from the years 2014–2015. As evidenced by the chart below, nearly all of the issues showed an increase in number of quotes once it was included with the Pilot.[10] On average, the quote traffic increase during the time periods was 121%.[11]

[9] The changes in quote traffic could have been due to factors unrelated to penny increment pricing. Changes in quote traffic could have been, in part, driven by differences in market conditions and/or corporate actions during the pre-Pilot and Pilot period. For example, when markets are more volatile we would expect market participants to update or revise quotes more frequently resulting in higher levels of quote traffic.

[10] Alibaba Group Holding (BABA) shows an extreme traffic increase of 403%, which significantly overshadows the amount of quote traffic increase of the other additions. This is, in large part, due to its IPO in September 2014; when it was the largest IPO in history at that time. Over the two periods, historically, there were days of higher quote traffic around earnings announcements. Further, over each of the last two months of 2015, BABA quote traffic exceeded 2 billion quotes, which was nearly as much as it experienced, in total, over it first three months of trading.

[11] Due to the considerable influence of the BABA traffic increase, if the percentage increase in quote traffic was calculated without BABA's quote data, then the value would fall to 81%.

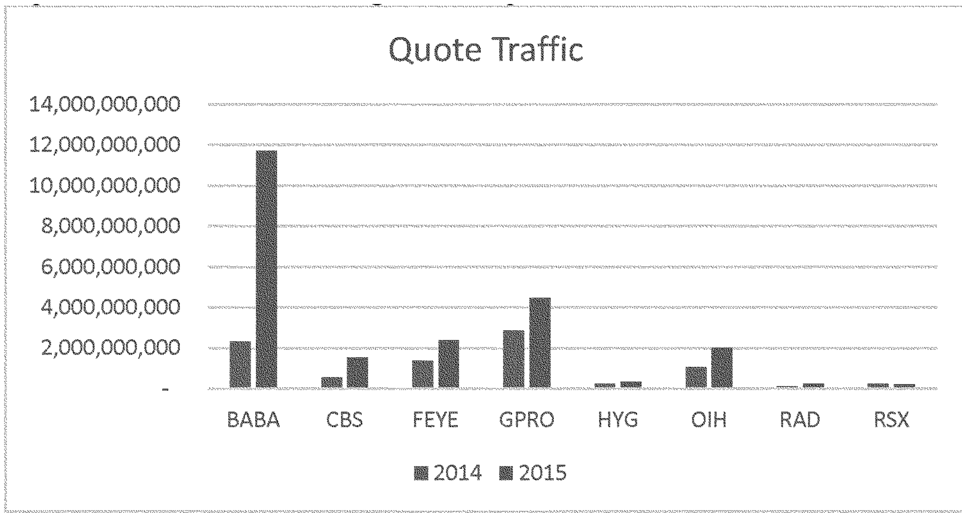

Figure 15. Quote Traffic Before and After Inclusion in Pilot

Using a different sample set, the analysis examined the quote traffic for the eleven (11) issues that were added to the Pilot in July 2017 (''July 2017 Study Group''). The below chart depicts the change in quote traffic based on quote totals from January to June 2017 vs January to June 2018. There were only two issues which did not experience an increase in quote traffic for the comparative time periods.[12] On average, these issues show that once added to the Penny pilot, there was an increase of 143% in quotes to the market.

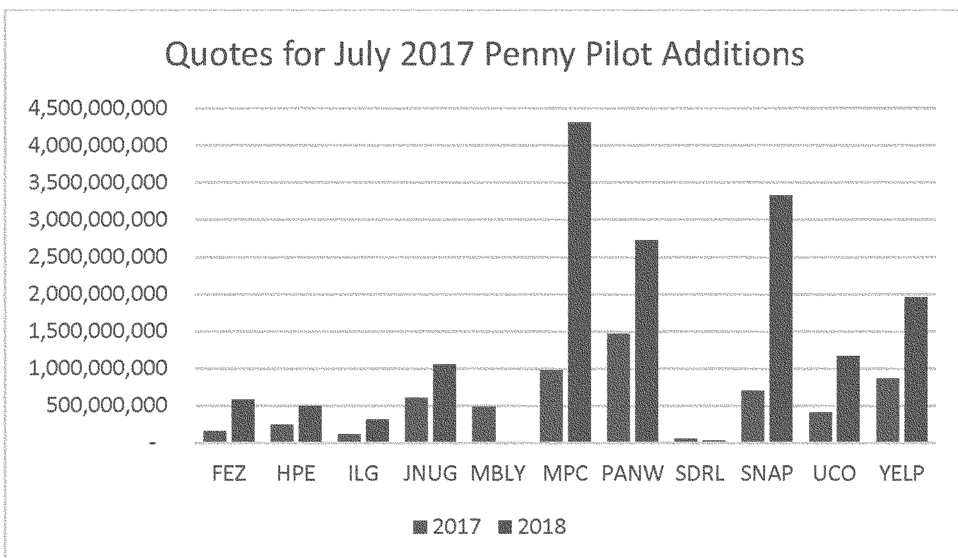

Figure 16. Quote Traffic Before and After Inclusion in Pilot – July 2017 Study Group

When analyzing the two study groups above, each of them showed a quote traffic increase over comparative time periods. The average increase between the samples is 132%.[13] In looking at the quote traffic data from the first six months of 2018, there were 107 issues which fell outside of the top 363 issues, and had a total of nearly 77.5 billion quotes (or an average of approximately 13 billion quotes per month over a six month period). On the other hand, there are 96 securities that are currently not on the Penny Pilot but are within the top 363 issues. These 96 issues totaled close to 103 billion quotes (or an average of about 17 billion quotes per month over a six month period). The chart below details the month to month activity of the issues which would be removed and added as a result of a review.

[12] Symbol MBLY was voluntarily delisted from NYSE on September 6, 2017, in connection with a tender offer from Intel (INTC) and subsequently listed on the OTC market. Symbol SDRL filed for Chapter 11 Bankruptcy on September 12, 2017. Subsequent to the bankruptcy filing, SDRL was delisted from NYSE and listed on an OTC market. When a security moves to the OTC market, many options exchanges seek to delist the security as it is not in compliance with continued listings standards for options. Due to its removal from nearly all options exchanges, quoting in this security is drastically reduced and are typically present only when (or if) a customer looks to close out an open options position.

[13] If BABA's large effect of the total quote traffic was not used, it would drop the average increase between the samples to 111%.

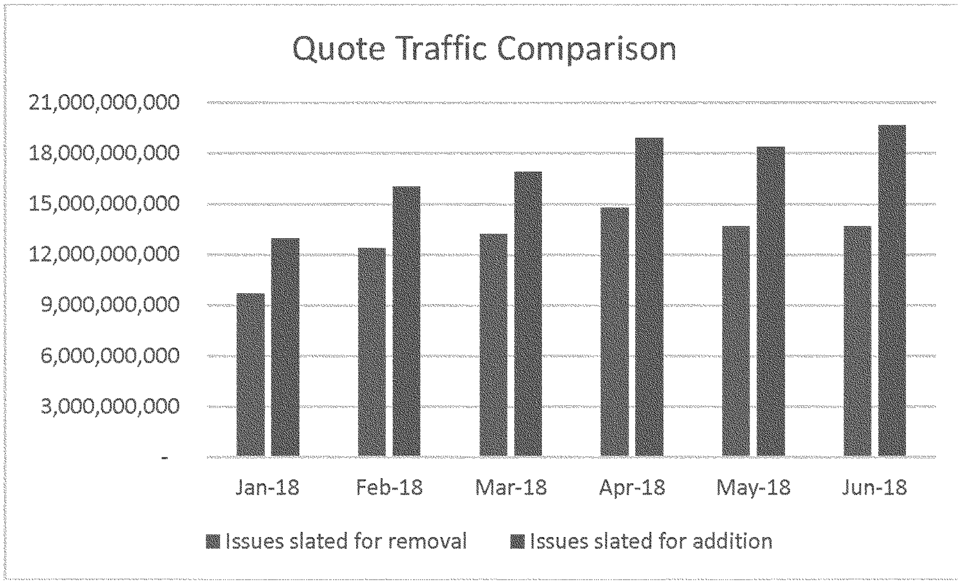

Figure 17. Effect on Quote Traffic from Rebalancing

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When comparing the January to June 2018 quote traffic for the potential removals and potential additions to the Penny Pilot, there is an increase in traffic for each of the six months. It ranges from a 28% increase in March to a 44% increase in June. The monthly traffic increase over the six month period averages out to nearly 33%.[14] Over the six months of 2018, the issues which would be additions to the Penny Pilot generated nearly 103 billion quotes. Conversely, the issues which would be removed generated about 77 billion quotes over the same time period. Therefore, by comparison, the additions generated approximately 26 billion more quotes than the removals in the January to June timeframe (or an average of slightly over 4 billion quotes each month).[15] Hence, if the 96 new issues were added to the program, it can be reasonably concluded that the Penny Pilot would see an increase in total quote traffic; even while removing the other 107 issues which would no longer qualify for the program.

TABLE 4—REFERENCE DATA TABLE

Quote date	Underlying symbol	Spread avg: Ask <=3.00	Spread avg: Ask >3.00	Appx. median spread: Ask <=3.00	Appx. median spread: Ask >3.00	Avg. ask size
Summary Quote Data for Pre-Pilot period (*i.e.,* Third and Fourth Quarter 2014)						
7/2/2014	CBS	0.34	1.15	0.30	1.10	1,091
7/2/2014	FEYE	0.25	1.36	0.25	1.10	2,364
7/2/2014	HYG	0.16	1.81	0.10	0.80	1,519
7/2/2014	OIH	0.10	0.84	0.05	0.60	1,949
7/2/2014	RAD	0.11	0.37	0.10	0.30	6,617
7/2/2014	RSX	0.10	0.79	0.10	0.50	1,837
7/9/2014	CBS	0.71	2.04	0.60	1.90	591
7/9/2014	FEYE	0.27	1.18	0.25	1.00	2,270
7/9/2014	GPRO	0.12	0.66	0.10	0.40	523
7/9/2014	HYG	0.27	2.31	0.25	2.20	2,228
7/9/2014	OIH	0.11	1.18	0.10	0.70	2,011
7/9/2014	RAD	0.15	0.38	0.15	0.40	7,739
7/9/2014	RSX	0.11	0.75	0.10	0.50	2,174
7/16/2014	CBS	0.17	0.71	0.15	0.50	1,755
7/16/2014	FEYE	0.25	1.01	0.25	1.00	2,840
7/16/2014	GPRO	0.38	1.51	0.30	1.40	1,647
7/16/2014	HYG	0.23	1.23	0.20	0.50	1,652
7/16/2014	OIH	0.14	0.56	0.10	0.50	2,654
7/16/2014	RAD	0.10	0.27	0.10	0.20	6,388
7/16/2014	RSX	0.11	0.55	0.10	0.40	2,330
7/23/2014	CBS	0.31	1.17	0.25	1.00	2,879
7/23/2014	FEYE	0.19	0.88	0.15	0.80	2,629

[14] This figure does not represent a constant growth rate of quote traffic into perpetuity. Historically, there have been issues in the Penny Pilot program which suffer a decrease in quote traffic over the years, with some even getting delisted at some point in the future. For example, issues such as GPRO and RAD have seen their quote numbers decrease by 83% and 53%, respectively, since their inclusion in the Penny Pilot from 2014.

[15] When comparing on a month to month basis for January to June 2018, the quote traffic differences between the added and removed issues are as follows: January 2018—3,261,431,336; February 2018—3,617,834,797; March 2018—3,685,135,946; April 2018—4,144,730,113, May 2018—4,688,087,205, June 2018—5,990,971,122. The total quote traffic difference is 25,388,190,519 more quotes generated by the potential 96 issues.

TABLE 4—REFERENCE DATA TABLE—Continued

Quote date	Underlying symbol	Spread avg: Ask <=3.00	Spread avg: Ask >3.00	Appx. median spread: Ask <=3.00	Appx. median spread: Ask >3.00	Avg. ask size
7/23/2014	GPRO	0.35	1.45	0.30	1.20	1,679
7/23/2014	HYG	0.26	1.61	0.25	1.30	2,232
7/23/2014	OIH	0.12	1.27	0.10	0.80	1,864
7/23/2014	RAD	0.12	0.30	0.10	0.30	7,091
7/23/2014	RSX	0.12	0.54	0.10	0.50	2,637
7/30/2014	CBS	0.26	1.22	0.25	0.80	1,989
7/30/2014	FEYE	0.21	0.71	0.20	0.70	2,212
7/30/2014	GPRO	0.33	1.47	0.25	1.30	1,557
7/30/2014	HYG	0.23	2.02	0.15	1.30	1,456
7/30/2014	OIH	0.11	1.31	0.10	1.10	2,325
7/30/2014	RAD	0.11	0.39	0.10	0.30	5,949
7/30/2014	RSX	0.11	0.93	0.10	0.60	2,339
8/6/2014	CBS	0.31	1.35	0.25	1.10	1,842
8/6/2014	FEYE	0.28	1.46	0.20	1.40	2,344
8/6/2014	GPRO	0.32	1.43	0.30	1.20	1,787
8/6/2014	HYG	0.24	0.95	0.20	0.70	2,257
8/6/2014	OIH	0.11	1.57	0.10	1.40	2,069
8/6/2014	RAD	0.14	0.38	0.10	0.40	6,918
8/6/2014	RSX	0.10	0.74	0.10	0.50	2,425
8/13/2014	CBS	0.25	1.13	0.25	0.90	1,648
8/13/2014	FEYE	0.18	0.85	0.15	0.80	2,338
8/13/2014	GPRO	0.28	1.63	0.25	1.40	2,005
8/13/2014	HYG	0.20	1.06	0.15	0.80	1,387
8/13/2014	OIH	0.11	0.94	0.10	0.60	2,768
8/13/2014	RAD	0.13	0.29	0.15	0.30	7,232
8/13/2014	RSX	0.10	0.60	0.10	0.50	4,179
8/20/2014	CBS	0.27	1.16	0.25	0.70	1,109
8/20/2014	FEYE	0.18	0.86	0.15	0.80	2,662
8/20/2014	GPRO	0.32	1.70	0.25	1.60	2,368
8/20/2014	HYG	0.20	0.81	0.20	0.60	2,054
8/20/2014	OIH	0.12	0.76	0.10	0.60	1,831
8/20/2014	RAD	0.12	0.32	0.10	0.30	6,414
8/20/2014	RSX	0.11	0.50	0.10	0.40	3,075
8/27/2014	CBS	0.24	0.80	0.25	0.70	1,500
8/27/2014	FEYE	0.18	0.91	0.15	0.90	2,764
8/27/2014	GPRO	0.31	1.53	0.25	1.20	1,749
8/27/2014	HYG	0.25	0.89	0.25	0.60	1,881
8/27/2014	OIH	0.12	1.26	0.10	0.90	2,560
8/27/2014	RAD	0.14	0.32	0.15	0.30	7,080
8/27/2014	RSX	0.11	0.71	0.10	0.50	3,080
9/3/2014	CBS	0.25	1.24	0.25	1.10	1,649
9/3/2014	FEYE	0.22	1.39	0.20	1.00	3,400
9/3/2014	GPRO	0.41	2.00	0.25	2.10	1,479
9/3/2014	HYG	0.22	0.96	0.20	0.80	1,466
9/3/2014	OIH	0.11	0.85	0.10	0.70	2,525
9/3/2014	RAD	0.14	0.61	0.10	0.40	6,192
9/3/2014	RSX	0.11	0.87	0.10	0.60	3,305
9/10/2014	CBS	0.25	1.13	0.25	0.90	1,756
9/10/2014	FEYE	0.19	0.98	0.15	0.70	2,826
9/10/2014	GPRO	0.41	2.07	0.30	2.30	1,616
9/10/2014	HYG	0.00	0.00	0.00	0.00	0
9/10/2014	OIH	0.11	1.31	0.10	0.90	2,841
9/10/2014	RAD	0.15	0.49	0.10	0.40	6,710
9/10/2014	RSX	0.13	1.13	0.10	0.70	3,641
9/17/2014	CBS	0.27	1.43	0.25	0.80	1,487
9/17/2014	FEYE	0.21	1.22	0.20	0.80	2,946
9/17/2014	GPRO	0.39	2.10	0.35	2.20	1,709
9/17/2014	HYG	0.31	1.47	0.30	1.20	1,762
9/17/2014	OIH	0.13	1.10	0.10	0.80	3,021
9/17/2014	RAD	0.18	1.01	0.15	0.70	5,996
9/17/2014	RSX	0.12	1.38	0.10	0.80	3,334
9/24/2014	CBS	0.25	1.25	0.25	1.10	2,128
9/24/2014	FEYE	0.19	0.82	0.15	0.80	3,146
9/24/2014	GPRO	0.26	2.24	0.15	2.60	858
9/24/2014	HYG	0.26	1.14	0.25	0.90	2,415
9/24/2014	OIH	0.12	1.31	0.10	1.10	2,939
9/24/2014	RAD	0.13	0.57	0.05	0.60	7,259
9/24/2014	RSX	0.12	1.22	0.10	0.80	2,334
10/1/2014	BABA	0.11	0.77	0.10	0.60	1,753
10/1/2014	CBS	0.26	1.02	0.25	0.80	1,984

TABLE 4—REFERENCE DATA TABLE—Continued

Quote date	Underlying symbol	Spread avg: Ask <=3.00	Spread avg: Ask >3.00	Appx. median spread: Ask <=3.00	Appx. median spread: Ask >3.00	Avg. ask size
10/1/2014	FEYE	0.18	0.69	0.15	0.70	2,465
10/1/2014	GPRO	0.45	2.24	0.30	2.40	1,101
10/1/2014	HYG	0.21	0.97	0.20	0.70	2,127
10/1/2014	OIH	0.13	1.31	0.10	1.00	2,452
10/1/2014	RAD	0.11	0.31	0.10	0.30	7,347
10/1/2014	RSX	0.11	1.44	0.05	0.80	2,577
10/8/2014	BABA	0.18	1.19	0.15	0.90	2,771
10/8/2014	CBS	0.30	1.10	0.25	0.80	1,649
10/8/2014	FEYE	0.20	0.72	0.20	0.70	4,029
10/8/2014	GPRO	0.52	2.35	0.40	2.50	2,891
10/8/2014	HYG	0.25	1.21	0.25	1.00	2,284
10/8/2014	OIH	0.13	1.59	0.10	1.40	2,900
10/8/2014	RAD	0.13	0.31	0.10	0.30	6,762
10/8/2014	RSX	0.13	1.85	0.10	1.10	3,012
10/15/2014	BABA	0.30	1.56	0.25	1.50	2,117
10/15/2014	CBS	0.56	2.23	0.50	2.00	1,613
10/15/2014	FEYE	0.33	1.53	0.30	1.50	3,365
10/15/2014	GPRO	0.63	2.52	0.50	2.50	1,916
10/15/2014	HYG	0.34	1.32	0.35	1.00	1,224
10/15/2014	OIH	0.17	1.87	0.15	1.90	1,819
10/15/2014	RAD	0.15	0.49	0.15	0.40	6,211
10/15/2014	RSX	0.15	1.63	0.10	0.80	2,443
10/22/2014	BABA	0.26	1.30	0.25	1.10	2,818
10/22/2014	CBS	0.32	1.54	0.25	1.35	2,337
10/22/2014	FEYE	0.23	1.06	0.25	1.00	3,753
10/22/2014	GPRO	0.51	2.44	0.45	2.50	1,731
10/22/2014	HYG	0.27	1.45	0.25	1.20	2,756
10/22/2014	OIH	0.16	1.37	0.15	1.20	3,444
10/22/2014	RAD	0.17	0.88	0.10	0.90	6,843
10/22/2014	RSX	0.17	1.35	0.10	0.90	3,707
10/29/2014	BABA	0.17	1.11	0.10	0.80	1,401
10/29/2014	CBS	0.26	1.33	0.25	1.00	2,687
10/29/2014	FEYE	0.24	0.84	0.25	0.70	2,233
10/29/2014	GPRO	0.51	2.08	0.50	2.10	1,526
10/29/2014	HYG	0.27	1.37	0.20	1.20	2,203
10/29/2014	OIH	0.12	1.46	0.10	1.00	2,809
10/29/2014	RAD	0.13	0.37	0.10	0.30	6,067
10/29/2014	RSX	0.14	1.42	0.10	1.00	3,127
11/5/2014	BABA	0.14	1.31	0.10	0.90	1,786
11/5/2014	CBS	0.27	1.44	0.25	1.10	1,514
11/5/2014	FEYE	0.18	1.55	0.15	1.50	1,980
11/5/2014	GPRO	0.57	2.26	0.50	2.30	1,459
11/5/2014	HYG	0.26	1.36	0.25	1.20	2,608
11/5/2014	OIH	0.12	1.33	0.10	1.10	3,771
11/5/2014	RAD	0.16	0.57	0.10	0.40	6,033
11/5/2014	RSX	0.13	1.10	0.10	0.90	3,516
11/12/2014	BABA	0.14	1.39	0.10	1.10	1,731
11/12/2014	CBS	0.24	1.31	0.20	0.90	1,500
11/12/2014	FEYE	0.17	0.96	0.15	0.90	2,465
11/12/2014	GPRO	0.45	2.37	0.30	2.50	1,525
11/12/2014	HYG	0.28	1.56	0.25	1.40	3,310
11/12/2014	OIH	0.12	1.14	0.10	1.10	3,105
11/12/2014	RAD	0.16	0.47	0.15	0.35	5,507
11/12/2014	RSX	0.13	0.98	0.10	0.70	3,146
11/19/2014	BABA	0.16	1.42	0.10	1.20	2,153
11/19/2014	CBS	0.24	1.30	0.20	1.00	1,466
11/19/2014	FEYE	0.18	0.77	0.15	0.70	2,602
11/19/2014	GPRO	0.57	2.39	0.40	2.40	901
11/19/2014	HYG	0.26	1.73	0.25	1.30	2,980
11/19/2014	OIH	0.14	1.25	0.10	1.10	3,119
11/19/2014	RAD	0.16	0.43	0.15	0.40	5,212
11/19/2014	RSX	0.13	1.17	0.10	0.70	3,207
11/26/2014	BABA	0.17	1.56	0.10	1.40	2,320
11/26/2014	CBS	0.29	1.80	0.25	1.20	1,301
11/26/2014	FEYE	0.24	1.12	0.20	1.10	2,484
11/26/2014	GPRO	0.43	2.26	0.30	2.50	1,281
11/26/2014	HYG	0.29	1.76	0.30	1.50	2,461
11/26/2014	OIH	0.12	1.36	0.10	1.10	2,115
11/26/2014	RAD	0.20	0.55	0.15	0.40	5,462
11/26/2014	RSX	0.13	1.56	0.10	1.10	1,951

TABLE 4—REFERENCE DATA TABLE—Continued

Quote date	Underlying symbol	Spread avg: Ask <=3.00	Spread avg: Ask >3.00	Appx. median spread: Ask <=3.00	Appx. median spread: Ask >3.00	Avg. ask size
12/3/2014	BABA	0.15	1.55	0.10	1.70	2,562
12/3/2014	CBS	0.25	1.85	0.20	1.60	1,525
12/3/2014	FEYE	0.19	1.51	0.15	1.20	3,131
12/3/2014	GPRO	0.40	1.89	0.30	1.90	1,996
12/3/2014	HYG	0.29	2.01	0.30	1.40	3,119
12/3/2014	OIH	0.13	1.92	0.10	1.50	3,492
12/3/2014	RAD	0.14	0.72	0.10	0.60	5,398
12/3/2014	RSX	0.12	1.49	0.05	0.90	3,247
12/10/2014	BABA	0.15	0.74	0.10	0.60	2,362
12/10/2014	CBS	0.32	1.75	0.30	1.30	1,772
12/10/2014	FEYE	0.25	1.12	0.20	0.80	2,632
12/10/2014	GPRO	0.44	2.08	0.40	2.20	1,758
12/10/2014	HYG	0.00	0.00	0.00	0.00	0
12/10/2014	OIH	0.12	2.19	0.10	1.60	2,313
12/10/2014	RAD	0.00	0.00	0.00	0.00	0
12/10/2014	RSX	0.12	1.96	0.05	1.80	2,837
12/17/2014	BABA	0.17	0.81	0.15	0.60	2,198
12/17/2014	CBS	0.34	1.69	0.25	1.50	1,669
12/17/2014	FEYE	0.24	0.98	0.20	0.70	2,255
12/17/2014	GPRO	0.46	2.18	0.45	2.20	1,822
12/17/2014	HYG	0.30	1.70	0.25	1.10	2,157
12/17/2014	OIH	0.17	2.39	0.15	2.60	2,886
12/17/2014	RAD	0.13	0.45	0.10	0.30	5,761
12/17/2014	RSX	0.20	2.01	0.15	1.80	2,026
12/24/2014	BABA	0.19	1.16	0.10	0.80	2,087
12/24/2014	CBS	0.30	1.36	0.25	1.00	1,898
12/24/2014	FEYE	0.27	1.62	0.20	1.20	1,894
12/24/2014	GPRO	0.37	1.84	0.20	1.90	1,692
12/24/2014	HYG	0.31	1.79	0.30	1.20	2,894
12/24/2014	OIH	0.20	1.95	0.15	1.60	2,714
12/24/2014	RAD	0.20	0.75	0.15	0.60	5,108
12/24/2014	RSX	0.21	1.32	0.20	0.90	2,816
12/31/2014	BABA	0.22	1.63	0.15	1.60	2,261
12/31/2014	CBS	0.21	1.09	0.20	0.80	1,131
12/31/2014	FEYE	0.23	1.38	0.15	1.00	2,594
12/31/2014	GPRO	0.36	1.78	0.25	1.70	1,770
12/31/2014	HYG	0.29	1.72	0.25	1.20	3,374
12/31/2014	OIH	0.18	1.82	0.15	1.50	2,526
12/31/2014	RAD	0.15	0.62	0.15	0.40	4,285
12/31/2014	RSX	0.20	1.26	0.20	1.00	2,440

TABLE 5—SUMMARY QUOTE DATA FOR PILOT PERIOD

[*i.e.,* third and fourth quarter 2015]

Quote date	Underlying symbol	Spread avg: Ask <=3.00	Spread avg: Ask >3.00	Appx. median spread: Ask <=3.00	Appx. median spread: Ask >3.00	Avg. ask size
7/1/2015	BABA	0.05	0.33	0.04	0.35	1,358
7/1/2015	CBS	0.23	1.29	0.20	0.85	2,000
7/1/2015	FEYE	0.24	1.11	0.20	0.90	2,180
7/1/2015	GPRO	0.27	1.64	0.20	1.40	2,164
7/1/2015	HYG	0.17	1.63	0.10	1.30	2,789
7/1/2015	OIH	0.12	1.56	0.05	1.30	3,174
7/1/2015	RAD	0.11	0.45	0.05	0.40	3,252
7/1/2015	RSX	0.13	0.94	0.05	0.50	1,986
7/8/2015	BABA	0.09	0.60	0.08	0.55	1,273
7/8/2015	CBS	0.24	1.44	0.21	1.15	1,795
7/8/2015	FEYE	0.29	1.38	0.27	1.20	2,244
7/8/2015	GPRO	0.26	1.27	0.19	1.00	2,102
7/8/2015	HYG	0.14	1.49	0.10	1.25	1,997
7/8/2015	OIH	0.09	1.54	0.04	1.10	1,811
7/8/2015	RAD	0.09	0.37	0.05	0.35	3,283
7/8/2015	RSX	0.00	0.00	0.00	0.00	0
7/15/2015	BABA	0.05	0.31	0.04	0.30	1,546
7/15/2015	CBS	0.28	0.80	0.29	0.75	1,765
7/15/2015	FEYE	0.17	0.88	0.14	0.65	1,883
7/15/2015	GPRO	0.22	1.22	0.14	0.95	1,914
7/15/2015	HYG	0.13	1.25	0.09	0.70	2,535

TABLE 5—SUMMARY QUOTE DATA FOR PILOT PERIOD—Continued

[*i.e.,* third and fourth quarter 2015]

Quote date	Underlying symbol	Spread avg: Ask <=3.00	Spread avg: Ask >3.00	Appx. median spread: Ask <=3.00	Appx. median spread: Ask >3.00	Avg. ask size
7/15/2015	OIH	0.11	1.15	0.07	0.95	1,980
7/15/2015	RAD	0.07	0.23	0.04	0.20	2,839
7/15/2015	RSX	0.14	0.81	0.13	0.60	2,637
7/22/2015	BABA	0.05	0.32	0.04	0.30	1,840
7/22/2015	CBS	0.22	0.76	0.19	0.65	1,870
7/22/2015	FEYE	0.20	0.97	0.17	0.65	2,680
7/22/2015	GPRO	0.22	1.56	0.11	1.50	1,615
7/22/2015	HYG	0.16	1.72	0.10	1.15	2,165
7/22/2015	OIH	0.13	1.65	0.12	1.30	3,805
7/22/2015	RAD	0.10	0.31	0.08	0.30	3,866
7/22/2015	RSX	0.20	0.46	0.17	0.40	2,302
7/29/2015	BABA	0.06	0.31	0.05	0.25	1,395
7/29/2015	CBS	0.20	0.97	0.17	0.75	1,780
7/29/2015	FEYE	0.28	0.98	0.21	0.60	1,912
7/29/2015	GPRO	0.24	1.33	0.21	1.25	2,692
7/29/2015	HYG	0.18	1.60	0.12	1.15	2,245
7/29/2015	OIH	0.10	1.38	0.06	1.15	3,903
7/29/2015	RAD	0.10	0.64	0.05	0.60	3,883
7/29/2015	RSX	0.16	0.83	0.12	0.70	2,483
8/5/2015	BABA	0.05	0.35	0.04	0.30	1,102
8/5/2015	CBS	0.29	0.97	0.22	0.80	1,881
8/5/2015	FEYE	0.24	1.50	0.21	1.47	1,362
8/5/2015	GPRO	0.18	1.24	0.16	1.20	1,859
8/5/2015	HYG	0.15	1.44	0.11	1.10	2,338
8/5/2015	OIH	0.08	1.00	0.05	0.75	2,818
8/5/2015	RAD	0.09	0.32	0.07	0.30	1,658
8/5/2015	RSX	0.14	0.63	0.10	0.55	2,495
8/12/2015	BABA	0.08	0.79	0.06	0.70	1,456
8/12/2015	CBS	0.22	0.72	0.19	0.60	2,031
8/12/2015	FEYE	0.21	0.96	0.18	0.80	2,505
8/12/2015	GPRO	0.26	1.43	0.16	1.30	1,643
8/12/2015	HYG	0.13	1.28	0.10	1.00	2,494
8/12/2015	OIH	0.10	0.99	0.07	0.90	2,903
8/12/2015	RAD	0.08	0.24	0.05	0.20	2,066
8/12/2015	RSX	0.13	0.52	0.09	0.35	2,073
8/19/2015	BABA	0.05	0.47	0.05	0.50	2,267
8/19/2015	CBS	0.25	0.84	0.25	0.70	1,880
8/19/2015	FEYE	0.17	0.93	0.15	0.80	2,167
8/19/2015	GPRO	0.19	1.30	0.15	1.25	2,705
8/19/2015	HYG	0.13	2.14	0.09	1.40	1,807
8/19/2015	OIH	0.09	1.18	0.05	1.00	2,485
8/19/2015	RAD	0.08	0.25	0.04	0.25	2,747
8/19/2015	RSX	0.11	0.89	0.05	0.75	2,205
8/26/2015	BABA	0.16	1.23	0.14	1.00	1,757
8/26/2015	CBS	0.30	1.01	0.31	0.90	1,675
8/26/2015	FEYE	0.27	1.29	0.25	1.15	1,751
8/26/2015	GPRO	0.28	1.54	0.20	1.50	2,395
8/26/2015	HYG	0.30	1.57	0.28	1.15	1,577
8/26/2015	OIH	0.18	0.91	0.16	0.70	2,142
8/26/2015	RAD	0.12	0.30	0.13	0.30	1,743
8/26/2015	RSX	0.21	0.84	0.18	0.50	1,558
9/2/2015	BABA	0.12	1.01	0.13	0.80	2,357
9/2/2015	CBS	0.23	1.29	0.16	1.05	1,693
9/2/2015	FEYE	0.24	1.33	0.24	1.20	2,281
9/2/2015	GPRO	0.22	1.62	0.15	1.70	1,852
9/2/2015	HYG	0.28	1.56	0.29	1.10	2,242
9/2/2015	RAD	0.11	0.26	0.12	0.25	3,314
9/2/2015	RSX	0.22	1.19	0.17	0.95	2,573
9/9/2015	BABA	0.16	1.03	0.17	0.85	2,237
9/9/2015	CBS	0.26	0.82	0.25	0.70	1,897
9/9/2015	FEYE	0.20	0.98	0.19	0.90	2,109
9/9/2015	GPRO	0.18	1.27	0.18	1.15	2,249
9/9/2015	HYG	0.27	1.28	0.26	1.05	1,676
9/9/2015	RAD	0.10	0.29	0.12	0.30	3,610
9/9/2015	RSX	0.17	0.54	0.11	0.50	2,838
9/16/2015	BABA	0.10	1.01	0.09	0.90	1,686
9/16/2015	CBS	0.16	0.92	0.12	0.75	1,679
9/16/2015	FEYE	0.19	0.82	0.16	0.60	1,998
9/16/2015	GPRO	0.19	1.34	0.17	1.35	1,932

TABLE 5—SUMMARY QUOTE DATA FOR PILOT PERIOD—Continued

[*i.e.,* third and fourth quarter 2015]

Quote date	Underlying symbol	Spread avg: Ask <=3.00	Spread avg: Ask >3.00	Appx. median spread: Ask <=3.00	Appx. median spread: Ask >3.00	Avg. ask size
9/16/2015	HYG	0.21	1.80	0.17	1.30	2,610
9/16/2015	RAD	0.10	0.29	0.08	0.25	3,333
9/16/2015	RSX	0.13	0.59	0.07	0.55	2,245
9/23/2015	BABA	0.08	0.67	0.06	0.60	1,937
9/23/2015	CBS	0.19	0.83	0.16	0.70	1,590
9/23/2015	FEYE	0.15	0.89	0.13	0.80	2,004
9/23/2015	GPRO	0.22	1.27	0.19	1.30	2,352
9/23/2015	HYG	0.19	1.27	0.13	1.00	2,401
9/23/2015	OIH	0.11	0.77	0.07	0.68	3,167
9/23/2015	RAD	0.10	0.31	0.12	0.30	3,277
9/23/2015	RSX	0.12	0.45	0.07	0.40	2,450
9/30/2015	BABA	0.10	0.92	0.09	0.85	1,560
9/30/2015	CBS	0.18	0.77	0.16	0.65	1,697
9/30/2015	FEYE	0.20	0.96	0.19	0.95	1,693
9/30/2015	GPRO	0.24	1.50	0.21	1.50	2,074
9/30/2015	HYG	0.25	2.23	0.23	1.65	1,560
9/30/2015	OIH	0.10	0.70	0.05	0.60	1,489
9/30/2015	RAD	0.09	0.22	0.06	0.20	1,953
9/30/2015	RSX	0.13	0.41	0.09	0.35	1,770
10/7/2015	BABA	0.10	0.50	0.06	0.40	1,069
10/7/2015	CBS	0.18	0.80	0.17	0.80	1,555
10/7/2015	FEYE	0.22	1.05	0.22	1.05	1,997
10/7/2015	GPRO	0.17	1.38	0.13	1.35	2,167
10/7/2015	HYG	0.22	2.21	0.18	2.00	1,855
10/7/2015	OIH	0.12	1.24	0.06	1.05	2,360
10/7/2015	RAD	0.12	0.37	0.11	0.30	4,144
10/7/2015	RSX	0.14	0.51	0.08	0.50	2,917
10/14/2015	BABA	0.08	0.55	0.06	0.40	1,191
10/14/2015	CBS	0.16	0.85	0.14	0.75	1,588
10/14/2015	FEYE	0.18	1.24	0.17	0.95	1,792
10/14/2015	GPRO	0.15	1.08	0.12	1.00	2,034
10/14/2015	HYG	0.19	2.15	0.15	1.85	1,963
10/14/2015	OIH	0.10	1.02	0.06	0.80	2,157
10/14/2015	RAD	0.12	0.41	0.10	0.30	3,669
10/14/2015	RSX	0.14	0.61	0.08	0.50	2,486
10/21/2015	BABA	0.07	0.46	0.05	0.35	1,020
10/21/2015	CBS	0.19	0.80	0.16	0.80	1,215
10/21/2015	FEYE	0.17	1.05	0.16	0.85	1,982
10/21/2015	GPRO	0.16	1.23	0.13	1.10	1,636
10/21/2015	HYG	0.18	1.49	0.12	0.80	1,748
10/21/2015	OIH	0.09	0.86	0.06	0.75	2,753
10/21/2015	RAD	0.13	0.31	0.11	0.30	4,003
10/21/2015	RSX	0.12	0.53	0.08	0.45	2,522
10/28/2015	BABA	0.08	0.66	0.05	0.45	987
10/28/2015	CBS	0.20	0.99	0.18	0.70	1,044
10/28/2015	FEYE	0.18	0.84	0.16	0.65	1,479
10/28/2015	GPRO	0.15	0.97	0.09	0.80	1,574
10/28/2015	HYG	0.17	2.47	0.10	2.70	1,665
10/28/2015	OIH	0.13	1.30	0.08	1.10	3,245
10/28/2015	RAD	0.18	3.56	0.04	4.33	1,411
10/28/2015	RSX	0.17	0.72	0.12	0.70	2,396
11/4/2015	BABA	0.06	0.50	0.04	0.35	784
11/4/2015	CBS	0.30	1.89	0.24	1.80	1,260
11/4/2015	FEYE	0.17	0.89	0.16	0.65	2,112
11/4/2015	GPRO	0.15	0.93	0.12	0.80	1,899
11/4/2015	HYG	0.16	2.49	0.09	2.60	1,485
11/4/2015	OIH	0.13	0.99	0.08	0.85	2,960
11/4/2015	RAD	0.33	1.27	0.25	0.55	1,996
11/4/2015	RSX	0.16	0.86	0.10	0.75	2,401
11/11/2015	BABA	0.07	0.56	0.05	0.35	304
11/11/2015	CBS	0.20	1.27	0.16	0.95	1,264
11/11/2015	FEYE	0.17	1.19	0.14	0.95	1,705
11/11/2015	GPRO	0.15	0.87	0.13	0.75	1,264
11/11/2015	HYG	0.18	2.13	0.08	1.60	1,308
11/11/2015	OIH	0.12	1.04	0.08	0.90	2,824
11/11/2015	RAD	0.47	2.88	0.16	3.35	1,837
11/11/2015	RSX	0.14	0.60	0.09	0.55	1,897
11/18/2015	BABA	0.05	0.44	0.03	0.30	861
11/18/2015	CBS	0.22	1.33	0.17	1.05	1,467

TABLE 5—SUMMARY QUOTE DATA FOR PILOT PERIOD—Continued

[*i.e.,* third and fourth quarter 2015]

Quote date	Underlying symbol	Spread avg: Ask <=3.00	Spread avg: Ask >3.00	Appx. median spread: Ask <=3.00	Appx. median spread: Ask >3.00	Avg. ask size
11/18/2015	FEYE	0.18	0.99	0.16	0.95	2,330
11/18/2015	GPRO	0.19	1.47	0.12	1.40	1,893
11/18/2015	HYG	0.19	2.49	0.10	2.65	2,772
11/18/2015	OIH	0.12	1.10	0.07	0.95	2,420
11/18/2015	RAD	0.45	3.24	0.14	4.50	1,960
11/18/2015	RSX	0.15	0.58	0.11	0.50	1,631
11/25/2015	BABA	0.05	0.39	0.04	0.30	859
11/25/2015	CBS	0.25	1.39	0.22	0.90	1,064
11/25/2015	FEYE	0.18	1.02	0.15	0.80	1,691
11/25/2015	GPRO	0.20	1.08	0.14	0.95	1,769
11/25/2015	HYG	0.21	2.71	0.13	2.70	1,291
11/25/2015	OIH	0.09	1.15	0.06	1.00	1,572
11/25/2015	RAD	0.34	3.27	0.16	4.45	1,320
11/25/2015	RSX	0.13	0.72	0.08	0.55	1,667
12/2/2015	BABA	0.06	0.51	0.04	0.30	567
12/2/2015	CBS	0.22	1.47	0.16	1.15	1,201
12/2/2015	FEYE	0.12	1.01	0.08	0.70	1,754
12/2/2015	GPRO	0.16	0.81	0.11	0.65	1,298
12/2/2015	HYG	0.19	1.79	0.11	1.25	1,484
12/2/2015	OIH	0.09	1.17	0.05	1.05	1,497
12/2/2015	RAD	0.51	3.03	0.15	3.25	1,293
12/2/2015	RSX	0.13	0.62	0.08	0.50	1,940
12/9/2015	BABA	0.06	0.48	0.04	0.35	503
12/9/2015	CBS	0.23	1.25	0.19	1.10	973
12/9/2015	FEYE	0.12	1.02	0.06	0.90	1,013
12/9/2015	GPRO	0.09	1.03	0.05	0.90	693
12/9/2015	HYG	0.17	2.18	0.10	1.70	989
12/9/2015	OIH	0.10	1.46	0.05	1.35	2,167
12/9/2015	RAD	0.31	3.75	0.14	4.55	853
12/9/2015	RSX	0.14	0.80	0.09	0.60	1,853
12/16/2015	BABA	0.12	0.77	0.06	0.50	705
12/16/2015	CBS	0.30	1.79	0.28	1.50	1,250
12/16/2015	FEYE	0.21	1.24	0.15	0.90	1,731
12/16/2015	GPRO	0.18	1.16	0.11	1.00	947
12/16/2015	HYG	0.22	2.68	0.19	3.15	1,539
12/16/2015	OIH	0.15	1.64	0.07	1.20	2,458
12/16/2015	RAD	0.43	4.41	0.18	4.65	974
12/16/2015	RSX	0.20	1.87	0.10	1.00	2,407
12/23/2015	BABA	0.11	0.66	0.05	0.45	663
12/23/2015	CBS	0.28	1.71	0.24	1.15	568
12/23/2015	FEYE	0.20	1.30	0.17	1.15	949
12/23/2015	GPRO	0.22	0.97	0.13	0.80	1,306
12/23/2015	HYG	0.21	3.14	0.16	3.70	2,071
12/23/2015	OIH	0.11	1.30	0.05	0.90	3,149
12/23/2015	RAD	0.35	4.08	0.17	4.50	1,271
12/23/2015	RSX	0.16	1.24	0.08	0.80	1,892
12/30/2015	BABA	0.16	0.62	0.06	0.45	787
12/30/2015	CBS	0.19	1.61	0.19	1.10	772
12/30/2015	FEYE	0.21	1.08	0.19	0.85	1,059
12/30/2015	GPRO	0.22	0.98	0.16	0.80	1,295
12/30/2015	HYG	0.20	1.86	0.13	1.35	2,193
12/30/2015	OIH	0.11	1.65	0.06	1.15	3,080
12/30/2015	RAD	0.55	4.00	0.19	4.50	1,132
12/30/2015	RSX	0.15	1.85	0.10	0.90	2,120

Exhibit B to Amendment No. 5

AMENDMENT TO PLAN FOR THE PURPOSE OF DEVELOPING AND IMPLEMENTING PROCEDURES DESIGNED TO FACILITATE THE LISTING AND TRADING OF STANDARDIZED OPTIONS SUBMITTED PURSUANT TO SECTION 11A(a)(3)(B)OF THE SECURITIES EXCHANGE ACT OF 1934.

Italicized language indicates additions. [Bracketed] language indicates deletions.

PLAN FOR THE PURPOSE OF DEVELOPING AND IMPLEMENTING PROCEDURES DESIGNED TO FACILITATE THE LISTING AND TRADING OF STANDARDIZED OPTIONS SUBMITTED PURSUANT TO SECTION 11A(a)(3)(B) OF THE SECURITIES EXCHANGE ACT OF 1934

* * * * *

3.1 ***Selecting Option Classes for the Penny Interval Program ("Penny Program")***

The registered options exchanges agree to list option classes for the Penny Program with the following minimum increment quoting requirements ("penny increments"):

(A) one cent ($0.01) for all series in QQQ (PowerShares QQQ TrustSM, Series 1), SPY (SPDR S&P 500 ETF) and IWM (iShares Russell 2000 Index Fund), regardless of price;

(B) one cent ($0.01) for all series in such option classes included in the Penny Program with a price of less than $3.00;

(C) five cents ($0.05) for all series in such option classes included in the Penny Program with a price of $3.00 or higher.

(a) Initial Selection. On the first trading day of the third full calendar month after [insert date of approval], the Penny Program will apply only to the 363 most actively traded multiply listed option classes, based on OCC's National Cleared Volume in the six full calendar months ending in the month of approval, that (i) currently quote in penny increments, or (ii) overlie securities priced below $200, or any index at an index level below $200. Eligibility for inclusion in the Penny Program will be determined at the close of trading on the monthly Expiration Friday of the second full month following [insert date of approval].

(b) Annual Review. Commencing in December 2020 and each December thereafter, OCC will rank all multiply listed option classes based on National Cleared Volume for the six full calendar months from June 1 through November 30 for determination of the most actively traded option classes.

(1) Addition to the Penny Program. Based on the Annual Review, any option class not in the Penny Program that is among the 300 most actively traded multiply listed option classes overlying securities priced below $200, or an index at an index level below $200, will be added to the Penny Program on the first trading day of January.

(2) Removal from the Penny Program. Except as provided in (c), (d), (e) and (f) below, based on the Annual Review, any option class in the Penny Program that falls outside the 425 most actively traded multiply listed option classes will be removed from the Penny Program on the first trading day of April.

(c) Newly Listed Option Classes. A registered options exchange may add a newly listed option class to the Penny Program, provided that (i) it is among the 300 most actively traded multiply listed option classes, as ranked by National Cleared Volume at OCC, in its first full calendar month of trading and (ii) the underlying security is priced below $200 or the underlying index is at an index level below $200. Any option class added under this provision will be added on the first trading day of the month after it qualifies and will remain in the Penny Program for one full calendar year, after which it will be subject to the Annual Review stated in section (b) above.

(d) Classes with Significant Growth in Activity. A registered options exchange may add any option class to the Penny Program, provided that (i) it is among the 75 most actively traded multiply listed option classes, as ranked by National Cleared Volume at OCC, in the past six full calendar months of trading and (ii) the underlying security is priced below $200 or the underlying index is at an index level below $200. Any option class added under this provision will be added on the first trading day of the second full month after it qualifies and will remain in the Penny Program for the rest of the calendar year, after which it will be subject to the Annual Review stated in section (b) above.

(e) Corporate Actions. If a corporate action involves one or more option classes in the Penny Program, all adjusted and unadjusted series of the option class will be included in the Penny Program. Any new option class added to the Penny Program under this provision will remain in the Penny Program for one full calendar year; after which it will be subject to the Annual Review stated in section (b) above.

(f) Delisted or Ineligible Option Classes. Any series in an option class participating in the Penny Program in which the underlying security has been delisted, or are identified by OCC as ineligible for opening customer transactions, will continue to quote pursuant to the terms of the Penny Program until all such options have expired.

(g) The registered options exchanges agree that references to multiply listed option classes in this section of the Plan only applies to option classes in the Penny Program, and to no other sections of the Plan.

(h) Not sooner than 60 months after approval of the Penny Program, a super-majority (2/3) of the Plan Sponsors may vote to make changes to the Penny Program. At any time before 60 months have passed since the adoption of the Penny Program, any changes must be unanimously approved by the Plan Sponsors. Any changes to the Penny Program are subject to SEC review pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 and Rule 608 thereunder.

4. **Adjustments Pursuant to OCC By-Laws**—Article VI, Section 11 of the OCC By-Laws, as approved by the SEC, provides that [an adjustment panel of the Securities Committee, comprised of representatives from each registered options exchange trading options on the affected underlying security,]*OCC* shall determine whether to make adjustments to reflect particular events in respect of such underlying security, and the nature and extent of any such adjustment. In connection with such determinations, the options exchanges trading such options class are authorized to determine operational issues attendant to the adjustment made by [the adjustment panel]*OCC.*

* * * * *

9. **List of Plan Sponsors**—The Sponsors of the Options Listing Procedures Plan are as follows:

- [American Stock Exchange LLC ("AMEX")]*NYSE American, LLC,* registered as a national securities exchange under the Exchange Act and having its principal place of business at [86 Trinity Place, New York, New York 10006]*11 Wall Street, New York, NY 10005.*
- [BATS Exchange, Inc. ("BATS")]*Cboe BZX Exchange, Inc.,* registered as a national securities exchange under the Exchange Act and having its principal place of business at [8050 Marshall Dr., Suite 120, Lenexa, Kansas 66214]*400 South LaSalle Street, Chicago, Illinois 60605.*
- BOX [Options] Exchange LLC ("BOX"), registered as a national

securities exchange under the Exchange Act and having its principal place of business at 101 Arch Street, St. 610, Boston, Massachusetts 02110.

- [Chicago Board Options Exchange, Incorporated. (''CBOE'')]*Cboe Exchange, Inc.,* registered as a national securities exchange under the Exchange Act and having its principal place of business at 400 South LaSalle Street, Chicago, Illinois 60605.
- [C2 Options Exchange, Incorporated (''C2'')]*Cboe C2 Exchange, Inc.,* registered as a national securities exchange under the Exchange Act and having its principal place of business at 400 South LaSalle Street, Chicago, Illinois 60605.
- [EDGX Exchange, Inc. (''EDGX'')]*Cboe EDGX Exchange, Inc.,* registered as a national securities exchange under the Exchange Act and having its principal place of business at [8050 Marshall Dr., Suite 120, Lenexa, Kansas 66214]*400 South LaSalle Street, Chicago, Illinois 60605.*
- [International Securities Exchange LLC (''ISE'')]*Nasdaq ISE, LLC,* registered as a national securities exchange under the Exchange Act and having its principal place of business at [60 Broad Street, New York, New York 10004]*One Liberty Plaza, 50th Floor, New York, New York 10006.*
- [ISE Mercury, LLC (''ISE Mercury'')]*Nasdaq MRX, LLC,* registered as a national securities exchange under the Exchange Act and having its principal place of business at [60 Broad Street, New York, New York 10004]*One Liberty Plaza, 50th Floor, New York, New York 10006.*
- Miami International Securities Exchange, LLC (''MIAX''), registered as a national securities exchange under the Exchange Act and having its principal place of business at 7 Roszel Road, Fifth Floor, Princeton, New Jersey 08540.
- MIAX Emerald, LLC (''MIAX Emerald''), registered as a national securities exchange under the Exchange Act and having its principal place of business at 7 Roszel Road, Fifth Floor, Princeton, New Jersey 08540.
- MIAX PEARL, LLC (''MIAX PEARL''), registered as a national securities exchange under the Exchange Act and having its principal place of business at 7 Roszel Road, Fifth Floor, Princeton, New Jersey 08540.
- The [NASDAQ]*Nasdaq* Stock Market LLC, registered as a national securities exchange under the Exchange Act and having its principal place of business at One Liberty Plaza, 50th Floor, New York, New York 10006.
- [NASDAQ OMX BX, Inc., (''BX'')]*Nasdaq BX, Inc.,* registered as a national securities exchange under the Exchange Act and having its principal place of business at One Liberty Plaza, 50th Floor, New York, New York 10006.
- The Options Clearing Corporation (''OCC''), registered as a clearing agency under the Exchange Act and having its principal place of business at [440 South LaSalle Street, Chicago, Illinois 60605]*125 South Franklin Street, Suite 1200, Chicago, Illinois 60606.*
- [Pacific Exchange, Inc. (''PCX'')]*NYSE Arca, Inc.,* registered as a national securities exchange under the Exchange Act and having its principal place of business at [301 Pine Street, San Francisco, California 94104]*11 Wall Street, New York, NY 10005.*
- [Philadelphia Stock Exchange, Inc. (''PHLX'')]*Nasdaq PHLX LLC,* registered as a national securities exchange under the Exchange Act and having its principal place of business at [1900 Market Street, Philadelphia, Pennsylvania 19103]*FMC Tower, Level 8, 2929 Walnut Street, Philadelphia, Pennsylvania 19104.*
- [Topaz Exchange, LLC (''Topaz'')]*Nasdaq GEMX, LLC,* registered as a national securities exchange under the Exchange Act and having its principal place of business at [60 Broad Street, New York, New York 10004]*One Liberty Plaza, 50th Floor, New York, New York 10006.*

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[FR Doc. 2019–26816 Filed 12–16–19; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87717; File No. SR–OCC–2019–009]

Self-Regulatory Organizations; the Options Clearing Corporation; Order Approving Proposed Rule Change Related to Proposed Changes to the Options Clearing Corporation's Rules, Clearing Fund Methodology Policy, and Clearing Fund and Stress Testing Methodology

December 11, 2019.

I. Introduction

On October 10, 2019, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2019–009 (''Proposed Rule Change'') pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 [2] thereunder to make changes to OCC's Clearing Fund and stress testing rules and methodology.[3] The Proposed Rule Change was published for public comment in the **Federal Register** on October 29, 2019.[4] The Commission has received no comments regarding the Proposed Rule Change.[5] This order approves the Proposed Rule Change.

II. Background [6]

As noted above, OCC proposes to revise its Clearing Fund and stress testing rules and methodology. Specifically, OCC proposes to: (1) Incorporate a new set of stress test scenarios to be used in the monthly sizing of OCC's Clearing Fund that are designed to capture the risks of extreme moves in individual or small subsets of securities; (2) revise OCC's stress testing methodology for modeling certain volatility index futures; (3) modify OCC's methodology for allocating Clearing Fund contribution requirements to standardize the margin risk component of the allocation formula for all Clearing Members; and (4) adopt an additional threshold for notifying senior management of intra-day margin calls based on certain stress test results. OCC also proposes to correct certain rules concerning OCC's cooling-off period and replenishment/assessment powers.[7]

A. Sizing Stress Test Scenarios

On a monthly basis, OCC establishes the size of its Clearing Fund at the level it believes is necessary to maintain sufficient financial resources to cover losses arising from the default of the two Clearing Member Groups that would

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 4, at 84 FR 57911.

[4] Securities Exchange Act Release No. 87386 (Oct. 23, 2019), 84 FR 57911 (Oct. 29, 2019) (SR–OCC–2019–009) (''Notice of Filing''). OCC also filed a related advance notice (SR–OCC–2019–806) (''Advance Notice'') with the Commission pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 and Rule 19b–4(n)(1)(i) under the Exchange Act. 12 U.S.C. 5465(e)(1). 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively. The Advance Notice was published in the **Federal Register** on November 12, 2019. Securities Exchange Act Release No. 87475 (Nov. 6, 2019), 84 FR 61120 (Nov. 12, 2019) (SR–OCC–2019–806).

[5] Since the proposal contained in the Proposed Rule Change was also filed as an advance notice, all public comments received on the proposal are considered regardless of whether the comments are submitted on the Proposed Rule Change or Advance Notice.

[6] Capitalized terms used but not defined herein have the meanings specified in OCC's Rules and By-Laws, available at *https://www.theocc.com/about/publications/bylaws.jsp.*

[7] Additionally, OCC proposes clarifying and conforming changes to its Rules, Clearing Fund Methodology Policy (''Policy''), and Stress Testing and Clearing Fund Methodology Description (''Methodology Description'').

potentially cause the largest aggregate credit exposure to OCC under certain stress scenarios.[8] OCC determines the size of its Clearing Fund each month through an approach based on broad-based market and systemic shocks (''Systemic Scenarios'').[9] OCC proposes to incorporate an additional set of stress test scenarios to be used in the monthly sizing of OCC's Clearing Fund that are designed to capture the risks of extreme moves in individual or small subsets of securities (''Idiosyncratic Scenarios''). The Idiosyncratic Scenarios would be in addition to the existing Systemic Scenarios. Because OCC's monthly Clearing Fund sizing process is designed to cover OCC's largest aggregate stress test exposures, the expansion of the set of Clearing Fund sizing stress tests could not result in a smaller Clearing Fund than would be the case without such an expansion.

In constructing the Idiosyncratic Scenarios, OCC would shock each single-name equity (*i.e.,* excluding exchange-traded funds, exchange-traded notes, indices, and non-equity products). OCC would evaluate the effects of such shocks on every Clearing Member Group's portfolios. Within each Clearing Member Group's portfolio, OCC would identify the four single-name equities for which such shocks would result in the largest losses. OCC would then identify the two Clearing Member Groups with the largest aggregate losses. The combined losses of the two identified Clearing Member Groups would represent the loss that OCC would seek to cover in its monthly Clearing Fund sizing process. OCC believes that implementing the proposed Idiosyncratic Scenarios would enhance OCC's stress testing methodology and overall resiliency by providing a more comprehensive suite of sizing stress tests to ensure that OCC maintains an appropriate level of financial resources to cover its credit exposures under scenarios addressing both systemic market risks and idiosyncratic risks.[10]

B. Volatility Index Futures

Under OCC's current stress testing methodology, prices shocks for futures based on the Cboe Volatility Index (''VIX'') [11] are equivalent to a price shock for the underlying. Because the VIX has no term structure, this process produces a uniform shock across expirations of the VIX futures contracts. Futures contracts for different expirations, however, generally trade at different prices reflecting the differing future price expectations of the underlying asset.[12] OCC believes that applying a uniform shock across expirations is unrealistic, and that it would lead to an overestimation of VIX futures price shocks, particularly in market decline scenarios.[13] As noted above, OCC proposes to revise its stress testing methodology for modeling certain volatility index futures. Specifically, the proposed change would produce differing price shocks for VIX futures across the term structure. The proposed methodology would be based on SPX volatility shocks across different expirations, as opposed to the current methodology's reliance on a single shock to the VIX. OCC believes that implementation of the proposed methodology would improve pricing for VIX futures as well as VIX options.[14]

C. Clearing Fund Allocation

OCC allocates Clearing Fund contribution requirements to individual Clearing Members, in part, based on each Clearing Member's proportionate share of risk margin, which OCC refers to as ''total risk.'' [15] The majority of Clearing Member margin requirements are based on OCC's System for Theoretical Analysis and Numerical Simulations (''STANS''), which is OCC's proprietary risk management system. The margin requirement for certain Clearing Members' accounts, however, is calculated using the Standard Portfolio Analysis of Risk Margin Calculation System (''SPAN''), which reflects customer gross margining.[16] OCC proposes to define ''total risk'' as based on the same margin model for all Clearing Members.[17] OCC believes it is more appropriate to use the same margin risk measurement for all Clearing Members when allocating Clearing Fund contribution requirements to allow for a more equitable comparison across all accounts.[18]

D. Margin Call Notification

On a daily basis, OCC evaluates the sufficiency of its financial resources based on OCC's potential exposure to Clearing Member Groups under certain stress test scenarios (''Sufficiency Stress Tests''). Based on the results of the Sufficiency Stress Tests, OCC may call for additional collateral to ensure that it maintains sufficient financial resources to guard against potential losses. For example, OCC is authorized to make an intra-day margin call against a Clearing Member Group whose Sufficiency Stress Test exposures breach a pre-determined threshold. Currently, OCC's rules require that written notification of such intra-day margin calls in excess of $500 million be provided to OCC's Executive Chairman, Chief Executive Officer, and Chief Operating Officer (''Office of the CEO''). OCC proposes to revise its rules to require that written notification of stress test-related intra-day margin calls also be sent to the Office of the CEO when a stress test-related intra-day margin call would exceed 75 percent of the Clearing Member's excess net capital. OCC believes that this additional notification requirement is appropriate because it would allow OCC's senior management to be informed as soon as practicable of, and to subsequently monitor, circumstances where a margin call may strain a particular Clearing Member's ability to meet such requirements based on its financial condition or the amount of collateral it has available to pledge when certain pre-identified thresholds have been exceeded.[19]

E. Cooling-Off Period

In 2018, OCC implemented a set of recovery tools, including revisions to OCC's authority to assess its Clearing Members for funds to replenish OCC's

[8] *See* Notice of Filing, 84 FR at 57912.

[9] *See* Notice of Filing, 84 FR at 57913. *See also,* Securities Exchange Act Release No. 83735 (Jul. 27, 2018), 83 FR 37855, 37857 (Aug. 2, 2019) (SR–OCC–2018–008) (describing OCC's Clearing Fund sizing stress test scenarios as an approach based on hypothetical stress scenarios that assume shocks to the Cboe S&P 500 Index (''SPX'') associated with a 1-in-80-year market event).

[10] *See* Notice of Filing, 84 FR at 57913.

[11] The VIX is an index designed to measure the 30-day expected volatility of the SPX.

[12] When there is a large shock to the VIX it has consistently been observed that the change in price of near-term VIX future contracts is much larger than for further out expirations. *See* Notice of Filing, 84 FR at 57913, n. 11.

[13] *See* Notice of Filing, 84 FR at 57913.

[14] *See* Notice of Filing, 84 FR at 57914. OCC uses VIX futures to calculate theoretical values for VIX options.

[15] Currently, OCC uses the following weighting in its allocation of clearing fund requirements: 70 percent total risk, 15 percent open interest, and 15 percent volume. *See* Securities Exchange Act Release No. 83735 (Jul. 27, 2018), 83 FR 37855, 37863 (Aug. 2, 2019) (SR–OCC–2018–008).

[16] *See* Notice of Filing, 84 FR at 57914, n. 16 (stating that ''OCC calculates margin requirements for segregated futures accounts using both SPAN on a gross basis and STANS on a net basis, and if at any time OCC staff observes a segregated futures account where initial margin calculated pursuant to STANS on a net basis exceeds the initial margin calculated pursuant to SPAN on a gross basis, OCC collateralizes this risk exposure by applying an additional margin charge in the amount of such difference to the account'' (citation omitted)).

[17] Specifically, OCC proposes to use STANS plus certain add-on charges as the basis for determining each Clearing Member's proportionate share of total risk.

[18] *See* Notice of Filing, 84 FR at 57914.

[19] *See* Notice of Filing, 84 FR at 57914.

Clearing Fund.[20] For example, OCC implemented a ''cooling-off period'' during which its authority to levy such assessments is capped, which provides certainty to Clearing Members regarding their potential obligations to OCC. In proposing such revisions, OCC intended that the cooling-off period would be triggered by any proportionate Clearing Fund charges to Clearing Members related to the default of a Clearing Member.[21] OCC's current rules, however, do not provide for a cooling-off period based on proportionate Clearing Fund charges arising out of two specific sets of circumstances: (1) In connection with protective transactions effected for the account of OCC pursuant to Chapter XI of OCC's Rules and (2) as a result of a failure of any Clearing Member to make any other required payment or render any other required performance (as provided in clauses (v) and (vi) of OCC Rule 1006(a)). OCC proposes to revise its rules such that any proportionate Clearing Fund charges to Clearing Members related to the default of a Clearing Member, including the two listed above, would trigger a cooling-off period.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.[22] After carefully considering the Proposed Rule Change, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to OCC. More specifically, the Commission finds that the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act [23] and Rules 17Ad–22(e)(2) and (4) thereunder.[24]

A. Consistency With Section 17A(b)(3)(F) of the Exchange Act

Section 17A(b)(3)(F) of the Exchange Act requires, among other things, that the rules of a clearing agency be designed to (i) promote the prompt and accurate clearance and settlement of securities transactions, and to the extent applicable, derivatives agreements, contracts, and transactions; (ii) assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible; and (iii), in general, protect investors and promote the public interest.[25] Based on its review of the record, the Commission believes that the proposed changes are designed to promote prompt and accurate clearance and settlement, assure the safeguarding of securities and funds which are in OCC's custody or control or for which OCC is responsible, and, in general, protect investors and promote the public interest for the reasons set forth below.

The Commission believes that the proposed changes to OCC's stress testing methodology are designed to promote the prompt and accurate clearance and settlement of securities transactions. As an initial matter, OCC is the only clearing agency for standardized U.S. securities options listed on Commission-registered national securities exchanges (''listed options'').[26] OCC provides central counterparty services for the listed-options markets.[27] OCC's role as the sole CCP for all listed options contracts in the U.S. makes it an integral part of the national system for clearance and settlement.[28] As described above, OCC proposes to expand the suite of stress tests it uses to size the Clearing Fund each month, and to revise OCC's estimation of VIX futures prices for stress testing. The introduction of the Idiosyncratic Scenarios to the monthly sizing of OCC's Clearing Fund would be in addition to the Systemic Scenarios OCC already uses to size its Clearing Fund and would help OCC address risks not currently contemplated by OCC's Systemic Scenarios, which in turn should enhance OCC's ability to accurately and appropriately size its Clearing Fund. Additionally, OCC proposes to revise its process for shocking VIX futures prices to reflect the actual term structure dynamics of such futures. OCC's current use of a uniform shock for VIX futures contracts, regardless of tenure, is not consistent with OCC's observation that futures contracts with different expirations generally trade at different prices reflecting the differing future price expectations of the underlying asset. By enhancing its methodology for modeling price shocks for VIX futures, OCC should be able to produce more appropriate VIX futures price shocks in its stress scenarios, which in turn also should enhance OCC's ability to accurately and appropriately size its Clearing Fund. OCC relies on the resources in its Clearing Fund to manage the potential losses arising out of the default of a Clearing Member under extreme but plausible market conditions. Strengthening the methodology that OCC uses to manage its financial resources by enhancing its ability to accurately and appropriately size the Clearing Fund, therefore, would enhance OCC's ability to manage Clearing Member defaults, which, in turn, facilitates the continued clearance and settlement of listed options. The Commission believes, therefore, that the proposed changes to OCC's stress testing methodology, taken together, are consistent with the promotion of prompt and accurate clearance and settlement of derivatives contracts.

The Commission believes that the proposed changes regarding notice of intra-day margin requirements and allocation of Clearing Fund requirements are consistent with assuring the safeguarding of securities and funds. Currently, OCC notifies its Office of the CEO when intra-day margin calls generated in response to OCC's daily stress tests are large in absolute terms (*i.e.,* in excess of $500 million). OCC proposes to also notify its Office of the CEO when such margin calls are large relative to the Clearing Member against which they are made (*i.e.,* in excess of 75 percent of the Clearing Member's excess net capital). The Commission believes that such notification would provide OCC's senior management with additional risk management information, which in turn could be used to inform critical decisions related to margin or other protective measures that could help OCC avoid drawing on resources from surviving Clearing Members to manage a Clearing Member default. In the Commission's view, such measures would be consistent with assuring the safeguarding of securities and funds which are in OCC's custody or control or for which OCC is responsible.

Additionally, OCC proposes to revise its method of allocating Clearing Fund contribution requirements across

[20] *See* Securities Exchange Act Release No. 83916 (Aug. 23, 2018), 83 FR 44076 (Aug. 29, 2018) (SR–OCC–2017–020).

[21] *See* Notice of Filing, 84 FR at 57915. Such triggers include the assessments arising out of a Clearing Member's failure to meet its obligations regarding confirmed trades, exercised or assigned contracts, stock loan transactions, or the liquidation of a Clearing Member's open positions. *See id.* at n. 22.

[22] 15 U.S.C. 78s(b)(2)(C).

[23] 15 U.S.C. 78q–1(b)(3)(F).

[24] 17 CFR 240.17Ad–22(e)(2) and 17 CFR 240.17Ad–22(e)(4).

[25] 15 U.S.C. 78q–1(b)(3)(F).

[26] *See* Securities Exchange Act Release No. 85121 (Feb. 13, 2019), 84 FR 5157 (Feb. 20, 2019) (File No. SR–OCC–2015–02).

[27] *See id.,* 84 FR at 5158.

[28] *See id.*

Clearing Members. OCC proposes to redefine the ''total risk'' component of its Clearing Fund allocation formula such that it would rely on the same underlying model for all Clearing Members when calculating total risk (as opposed to using different models for different Clearing Members depending on their cleared positions). The proposed change would not alter the allocation weighting, but, in the Commission's view, it would provide a more consistent metric by which to assess risks across Clearing Members and determine how much risk each Clearing Member should bear in terms of Clearing Fund requirements.[29] The Commission believes that these changes as well are consistent with assuring the safeguarding of securities and funds which are in OCC's custody or control or for which OCC is responsible.

Finally, the Commission believes that the proposed expansion of triggers for the cooling-off period is designed, in general, to protect investors and promote the public interest. The Commission continues to believe that the cooling-off period provides certainty and predictability regarding Clearing Members' maximum liability for Clearing Fund contributions.[30] Currently, however, the cooling-off period would be triggered by some, but not all proportionate Clearing Fund charges to Clearing Members arising out of a Clearing Member's failure to meet certain obligations under OCC's rules. OCC proposes to expand the set of events that would trigger the cooling-off period to include certain protective transactions and the failure of a Clearing Member to meets its obligations under certain of OCC's rules. The two events to be added as cooling-off period triggers are similar to the current triggers in that they pertain to proportionate Clearing Fund charges designed to manage the failure of a Clearing Member to meet its obligations to OCC. The Commission believes that including these two additional events as cooling-off period triggers would provide Clearing Members with additional certainty and predictability regarding their potential maximum liability for Clearing Fund contributions, which in turn is consistent with the protection investors and promotion of the public interest.

The Commission believes, therefore, that the Proposed Rule Change is consistent with the requirements of Section 17A(b)(3)(F) of the Exchange Act.[31]

B. Consistency With Rule 17Ad–22(e)(2) Under the Exchange Act

Rule 17Ad–22(e)(2)(v) under the Exchange Act requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that, among other things, specify clear and direct lines of responsibility.[32]

As described above, OCC proposes to add a new internal reporting requirement regarding certain intra-day margin calls. OCC may call for additional margin from Clearing Members based on the results of its Sufficiency Stress Tests. In addition to notifying its Office of the CEO when such margin calls are large in absolute terms (*i.e.,* in excess of $500 million), OCC now proposes to also notify to its Office of the CEO when such margin calls are large relative to the Clearing Member against which they are made (*i.e.,* in excess of 75 percent of the Clearing Member's excess net capital). The Commission believes that such notification would inform OCC's senior management, who could then monitor circumstances as appropriate, when an intra-day margin call could strain the resources of a particular Clearing Member based on its financial condition. Accordingly, the Commission believes that the adoption of such a notification requirement is consistent with Rule 17Ad–22(e)(2)(v) under the Exchange Act.[33]

C. Consistency With Rule 17Ad–22(e)(4) Under the Exchange Act

Rule 17Ad–22(e)(4) under the Exchange Act requires, in part, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes.[34] Based on its review of the record, the Commission believes that the proposed rule change is consistent with Rule 17Ad–22(e)(4) under the Exchange Act.

1. Stress Testing

Rules 17Ad–22(e)(4)(i) and (iii) under the Exchange Act require that a covered clearing agency's policies and procedures meet the requirements of Rule 17Ad–22(e)(4) by maintaining financial resources at the minimum to enable OCC to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the participant family that would potentially cause the largest aggregate credit exposure for OCC in extreme but plausible market conditions.[35] Further, Rule 17Ad–22(e)(4)(vi) under the Exchange Act requires that a covered clearing agency's policies and procedures meet the requirements of Rule 17Ad–22(e)(4) by testing the sufficiency of a covered clearing agency's total financial resources available to meet the minimum financial resource requirements under Rules 17Ad–22(e)(4)(i) through (iii).[36]

As described above, OCC proposes to expand the set of stress tests that it uses to size the Clearing Fund by adding the Idiosyncratic Scenarios to its current suite of stress tests. The Idiosyncratic Scenarios are designed to capture the risk of extreme moves in individual securities or small subsets of securities, while the current Systemic Scenarios are based on broad-based market and systemic shocks. Consistent with the general view that expanding the types of scenarios that a clearing agency uses in its monthly sizing process makes the clearing agency's risk management robust to a broader range of shocks, the Commission believes that OCC's proposal to add the Idiosyncratic Scenarios to its suite of stress tests would be a strengthening change—meaning it would enhance OCC's ability to accurately and appropriately size its Clearing Fund—that is consistent with the requirements of Rules 17Ad–22(e)(4)(i) and (iii) under the Exchange Act.[37]

Additionally, OCC proposes to revise its stress testing methodology to produce differing price shocks for VIX futures across the term structure. The proposed methodology would be based on SPX volatility shocks across different expirations, as opposed to the current methodology's reliance on a single shock to the VIX. As discussed above, these changes would help OCC produce VIX futures price shocks in its stress scenarios that are consistent with OCC's observation that futures contracts with different expirations generally trade at different prices reflecting the differing future price expectations of the underlying asset, which in turn should

[29] While the proposed change would not affect the total size of the Clearing Fund, it would result in changes to Clearing Members' proportionate share of the Clearing Fund.

[30] *See* Securities Exchange Act Release No. 83916 (Aug. 23, 2018), 83 FR 44076, 44082 (Aug. 29, 2018) (SR–OCC–2017–020).

[31] 15 U.S.C. 78q–1(b)(3)(F).

[32] 17 CFR 240.17Ad–22(e)(2)(v).

[33] 17 CFR 240.17Ad–22(e)(2)(v).

[34] 17 CFR 240.17Ad–22(e)(4).

[35] 17 CFR 240.17Ad–22(e)(4)(i) and 17 CFR 240.17Ad–22(e)(4)(iii).

[36] 17 CFR 240.17Ad–22(e)(4)(vi).

[37] 17 CFR 240.17Ad–22(e)(4)(i) and 17 CFR 240.17Ad–22(e)(4)(iii).

enhance OCC's ability to accurately and appropriately size its Clearing Fund, consistent with the requirements of Rule 17Ad–22(e)(4)(vi).

Accordingly, the Commission believes that, taken together, OCC's proposed changes to its stress testing methodology would be consistent with the requirements of Rules 17Ad–22(e)(4)(i), (iii), and (vi).[38]

2. Clearing Fund Allocation

As noted above, Rule 17Ad–22(e)(4) under the Exchange Act generally requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes.[39]

OCC relies on the Clearing Fund as a source of mutualized resources available to manage losses arising out of a Clearing Member's default. OCC's method for allocating contributions to the Clearing Fund among Clearing Members is aligned primarily with the credit risk posed by each Clearing Member.[40] OCC proposes to redefine the margin risk component of its Clearing Fund allocation formula such that it would rely on the same underlying model—STANS—for all Clearing Members (as opposed to relying on STANS for most Clearing Members and SPAN for certain Clearing Members with segregated futures accounts). The proposed change would not change the overall allocation weighting (*i.e.,* margin risk would still account for 70 percent of the Clearing Fund allocation among Clearing Members), but the Commission believes it would provide a more consistent metric by which to assess margin risk across Clearing Members. Accordingly, the Commission believes that the proposed change is reasonably designed to support the management of OCC's credit exposures to its participants. The Commission believes, therefore, that OCC's proposed change to its Clearing Fund allocation methodology is consistent with the requirements of Rule 17Ad–22(e)(4).[41]

[38] 17 CFR 240.17Ad–22(e)(4)(i); 17 CFR 240.17Ad–22(e)(4)(iii); and 17 CFR 240.17Ad–22(e)(4)(vi).

[39] 17 CFR 240.17Ad–22(e)(4).

[40] Clearing Fund allocations are based on a weighting of 70 percent margin risk, what OCC refers to as the ''total risk'' component of its Clearing Fund allocation formula, with open interest and cleared volume weighted at 15 percent each.

[41] 17 CFR 240.17Ad–22(e)(4).

3. Cooling-Off Period

Rule 17Ad–22(e)(4)(ix) under the Exchange Act requires, in part, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to describe its process to replenish any financial resources it may use following a default or other event in which use of resources is contemplated.[42]

As noted above, OCC's current recovery tools include a cooling-off period, during which OCC's authority to assess Clearing Members for funds to replenish OCC's Clearing Fund is limited. Recognizing the limit that such a cooling-off period places on the financial resources available to OCC, the Commission continues to believe that the cooling-off period provides certainty and predictability regarding Clearing Members' maximum liability for Clearing Fund contributions.[43] OCC proposes to expand the set of events that would start the cooling-off period to include proportionate Clearing Fund charges to Clearing Members triggered by certain protective transactions or the failure of a Clearing Member to meet certain obligations under OCC's rules, consistent with OCC's original intention with its prior filing. The two events to be added as triggers for the cooling-off period are similar to the current triggers in that they pertain to amounts paid out of the Clearing Fund to manage the failure of a Clearing Member to meet its obligations to OCC. Consistent with the Commission's statements regarding the current formulation of the cooling-off period, the Commission believes that the proposed expansion is consistent with OCC's obligations to describe its process to replenish any financial resources it may use following a default or other event in which use of resources is contemplated as required under Rule 17Ad–22(e)(4)(ix).[44]

Accordingly, and for the reasons stated above, the Commission believes the changes proposed in the Proposed Rule Change are consistent with Rule 17Ad–22(e)(4) under the Exchange Act.[45]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act[46] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[47] that the Proposed Rule Change (SR–OCC–2019–009) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[48]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27081 Filed 12–16–19; 8:45 am]

BILLING CODE 8011–01–P

[42] 17 CFR 240.17Ad–22(e)(4)(ix).

[43] *See* Securities Exchange Act Release No. 83916 (Aug. 23, 2018), 83 FR 44076, 44082 (Aug. 29, 2018) (SR–OCC–2017–020).

[44] 17 CFR 240.17Ad–22(e)(4)(ix).

[45] 17 CFR 240.17Ad–22(e)(4).

[46] In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[47] 15 U.S.C. 78s(b)(2).

[48] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87720; File No. SR–LCH SA–2019–008]

Self-Regulatory Organizations; LCH SA; Order Approving Rule Change Relating to the Updated 2018 Version of the Recovery Plan

December 11, 2019.

I. Introduction

On October 8, 2019, Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), filed with the Securities and Exchange Commission (''Commission''), Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder[2] a proposed rule change (''the ''Proposed Rule Change'') to adopt an updated recovery plan (the ''RP''). The proposed rule change was published for comment in the **Federal Register** on October 29, 2019.[3] The Commission has not received any comments on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

The purpose of LCH SA's RP is to maintain the continuity of critical services in times of extreme stress and to facilitate its recovery.[4] Generally, the RP identifies if and to what level LCH SA's services are critical for the market

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 34–87388 (October 23, 2019), 84 FR 57897 (October 29, 2019) (SR–LCH SA–2018–008) (''Notice'').

[4] The description herein is substantially excerpted from the Notice, 84 FR 57897.

and what internal or external services/systems are critical for the continuity of LCH SA's activity; outlines the scenarios under which recovery of the LCH SA might be necessary; defines the early warning indicators and triggers for initiating the recovery measures; defines the governance framework to trigger these recovery measures; and identifies the available recovery tools to manage crisis situations and to restore business as usual.

Significant scenarios that could prevent LCH SA from providing its critical services discussed in the RP include the default of one or multiple clearing members; liquidity shortfalls as result of a clearing member or allied clearing house default; default of an investment counterparty of LCH SA or any other investment losses resulting from changes in the market value on the investments; losses resulting from an operational risk event; failure of a critical IT service provider; and failure of financial market infrastructures such as an allied clearing house, CSD, or Trades Repository.

The proposed rule change intends to incorporate the following main changes from the updated 2018 version of the RP: (1) Inclusion of details on handling of the recovery from a cyber-risk scenario, (2) inclusion of fraud as an operational risk, (3) inclusion of tools for non-Euro transactions and collateral, (4) implementation of CC&G rulebook changes related to service closure, (5) inclusion of a comprehensive list of LCH SA's critical service providers, (6) inclusion of details regarding the monitoring of capital related tools, and (7) inclusion of details for managing the failure of LCH Ltd as a service provider.

A. Recovery From a Cyber-Risk Scenario

Under the proposed rule change, the RP would include more details on the management of a cyber-risk scenario with the addition of the Cyber Crisis Management Plan as a new recovery tool. The Cyber Crisis Management Plan would define ''cyber-crisis'' and provide a framework of procedures describing and specifying how LCH SA would respond to a potential breach of a system, service or network indicating possible problems with information security policy or a failure of controls. The RP further defines cyber-risks as a single or a series of unwanted or unexpected information security events that have a significant probability of compromising business operations and threatening information security taking the form of unauthorized scans or probes, malicious code, denial of service, or attempts to gain access. The framework and procedures would be activated in event that LCH SA detected a cyber incident that could potentially cause a significant impact on LCH SA business objectives.

B. Fraud Risk

In addition to losses resulting from a clearing member default scenarios, the RP covers losses resulting from a non-default operational risk event. While the current version of the RP addresses operational risks such as failure of third party service providers or cyber risks, the proposed rule change would include as an operational risk losses resulting from a fraud which impacts the critical services provided by LCH SA. As is the case with other operational risks, the RP would specify that business lines and operational risk departments have the responsibility to identify potential fraud and to put into place relevant controls to monitor for fraud risk.

C. Non-Euro Recovery Tools

Currently, the RP includes various tools to deal with liquidity needs resulting from default losses or other events giving rise to liquidity constrains, including deferral of settlement for fixed income and cash equity as well as collateral limits. The RP would now specify that to bolster its recovery tools, LCH SA can use several new tools to meet liquidity needs, including using non-Euro collateral to raise liquidity, transforming liquidity received in non-Euro currencies into Euro through bi-lateral repo transactions with the ''FXmarkets'' recovery tool, receiving liquidity directly in Euro from Gilt or USD securities, and performing payments in an alternate currency than the original obligation.

D. CC&G Rulebook Changes

The current version of the RP provides as a recovery tool the closure of the interoperability link on Italian debt, which is triggered when CC&G is declared in default or CC&G has performed a service closure. Upon triggering this tool, LCH SA will proceed with closing out all outstanding contracts. Further, uncovered losses from the cash settlement and close out after a CC&G default will be covered by deposited collateral of CC&G and the application of a haircut on outgoing payments to clearing members. In order to cover a potential cash shortfall in case of a CC&G default, LCH SA is proposing that the RP would state that in the event of a closure of CC&G, LCH SA will not be obliged to perform payment to clearing members until it receives deposited collateral from the CC&G estate, which addresses LCH SA's potential inability to retrieve the deposited collateral with CC&G.

E. Critical Service Providers

The current RP in general describes critical services such as those provided by LCH Ltd and other entities providing technological services. The RP describes LCH SA's approach to the maintaining continuity of services to LCH SA, including contractual rights. In this rule proposal, the RP would describe that LCH SA will implement a new framework to manage critical service providers. The framework would identify the various types of critical service providers and include a new list of such providers in an annex to the RP. This would layout the overall landscape of providers and facilitate LCH SA's ability to monitor for potential financial or operational failure of a critical service provider and plan to replace service providers or otherwise sustain any disruption caused by their failure.

F. Monitoring of Capital Related Tools

The quantitative assessment section of the recovery plan would include more details on the monitoring of capital related recovery tools like surplus capital, variable payments and dividend payments in order to help ensure their adequacy to cover the identified scenarios. This additional detail would list each tool and describe their efficiency as recovery tools. The RP currently notes that LCH SA will monitor that surplus/buffers capital is adequate to cover both default and non-default losses. The proposed rule would revise the RP to describe the stress scenarios and associated indicators as well as the capital coverage tools available in each case. In addition to the capital requirements and available headroom, the RP would note that LCH SA follows indicators such as the Liquidity Coverage Ratio, the aggregate credit risk and market risk exposure on its investment portfolio, operational risk and business risks indicators. The RP would indicate that the capital and buffers are monitored in order to allow LCH SA to always be in a situation to replenish the skin in the game within one month if the CCP was to face multiple defaults.

In addition to surplus capital, the RP would indicate that the LCH Board may decide to withhold Dividend payment and Variable bonus payment to be used as additional buffers.

G. LCH Ltd Exit Plan

In response to French regulatory recommendations, the RP would provide information related to the dependency between LCH SA and LCH

Ltd. LCH Ltd provides IT services to LCH SA and an approach on how LCH SA will manage a potential wind down of LCH Ltd would be included in the RP. The RP would include scenarios and mitigating actions in case of failure of LCH Ltd as a service provider. For example, LCH SA will take steps to replicate the exact information technology services provided by LCH Ltd.

III Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[5] For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act[6] and Rules 17Ad–22(e)(2) and (3) thereunder.[7]

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of LCH SA be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of LCH SA or for which it is responsible, and, in general, to protect investors and the public interest.[8]

As noted above, the updates to the RP reflected in this proposed rule change would add more details on the management of a cyber-scenario and the Cyber Crisis Management Plan has been added as a new recovery tool. By providing a framework of procedures for allowing LCH SA to respond to or prevent cyber incidents, the Commission believes that LCH SA will improve its ability to cope with, prevent, and plan for disruptions to its clearing services by responding quickly to such things as software malfunctions or cyber breaches. Further, the Commission believes that LCH SA will be in a position to prioritize incidents and activate the relevant response teams and plans.

Similarly, by updating the RP to account for the failure of entities such as linked CCPs and critical service providers as described above, the Commission believes that the proposed rule change provides LCH SA the ability to timely and efficiently plan for, monitor, and respond to failures or disruptions of these other parties. Specifically, the RP would note that LCH SA has implemented the rules relating to CC&G service closure related to a potential loss on investment of the cash collateral with CC&G. LCH SA may not immediately be able to retrieve the deposited collateral with CC&G if it is insolvent and has to wait for the relevant payment of the estate. However, the RP would clarify that LCH SA is only obliged to perform payment to clearing members if and when it has received the relevant funds from the CC&G estate. The Commission believes that these changes strengthen LCH SA's ability to recover from the liquidity and credit challenges that could arise from CC&G's closure. This in turn enhances LCH SA's financial position and ultimately its ability to continue to provide prompt and accurate clearance and settlement. Likewise, the RP would include scenarios and mitigating actions in case of the failure of LCH Ltd as a service provider and include a list of other critical service providers. The Commission believes that these proposed changes enhance LCH SA's management of important relationships by including details of these services and the steps that it can take to replace or otherwise respond to disrupted services. The Commission believes that this in turn promotes LCH SA's ability to continue to promptly and accurately clear transactions.

Additionally, as noted above, the RP would include more details on the monitoring of capital related recovery tools like surplus capital, variable payments and dividend payments. For example, the RP would note that LCH SA will monitor that ''surplus/buffers capital'' is adequate to cover both default and non-default losses. By including within the RP the scenarios, indicators, and capital coverage tools available in each case, the Commission believes that LCH SA will enhance its ability to preserve the requisite financial resources and hence its ability to continue to promptly and accurately clear transactions and safeguard securities and funds in its custody and control.

Further, the proposed rule change would provide that LCH SA can use several new tools to meet liquidity needs, including using non-Euro collateral to raise liquidity, transforming liquidity received in non-Euro currencies through bi-lateral repo transactions with the ''FXmarkets'' recovery tool, receiving liquidity directly in Euro from Gilt or USD securities, and performing payments in an alternate currency than the original obligation. The Commission believes that this enhances LCH SA's ability to resolve a specific currency liquidity shortfall resulting from a management of a defaulting clearing member and thereby maintains its financial strength and ultimately its ability to promptly and accurately clear transactions.

Overall, the Commission believes that with the additional detail described above, the updated RP would continue to strengthen the purpose of the RP as originally adopted of maintaining the continuity LCH SA's critical services by reducing the likelihood of a disorderly or unsuccessful recovery through planning for various disruptive scenarios. Therefore, for the reasons stated above the Commission finds that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions, assure the safeguarding of securities and funds in LCH SA's custody and control, and, in general, protect investors and the public interest, consistent with the Section 17A(b)(3)(F) of the Act.[9]

B. Consistency With Rule 17Ad–22(e)(2)

Rule 17Ad–22(e)(2) requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, provide for governance arrangements that are clear and transparent and clearly prioritize the safety and efficiency of the covered clearing agency, to support the public interest requirements in Section 17A of the Act.[10]

As noted above, more details on the management of a cyber-scenario and the Cyber Crisis Management Plan have been added as a new recovery tool. The purpose of this document is to provide a framework of procedures allowing LCH SA to respond to cyber incidents and crises. The RP would contain details about the procedures utilized to identify incidents, notification of hierarchy, and for notifying and activating the Crisis Management Team. The Commission believes that proposed details regarding the cyber scenario will enhance LCH SA's governance procedures as they relate to cyber crisis by setting forth a clear process for detecting and notifying required

[5] 15 U.S.C. 78s(b)(2)(C).

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 17 CFR 240.17Ad–22(e)(2) and (3).

[8] 15 U.S.C. 78q–1(b)(3)(F).

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 17 CFR 240.17Ad–22(e)(2).

management as well as activation of a specific plan for managing cyber crisis.

Therefore, for the above reasons the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(2).

C. Consistency With Rule 17Ad–22(e)(3)

Rule 17Ad–22(e)(3) requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which must include plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.

Overall, the Commission believes that the rule proposal enhances LCH SA's ability to manage legal, credit, liquidity, operational, general business, investment, and other risks that arise in or are borne by the covered clearing agency in the recovery context. As noted above, the rule proposal updates the RP to address operational, liquidity, and investment risks. Specifically, the RP would include fraud as an operational risk and incorporate it into its system for the monitoring and management of losses. The Commission believes that with this addition, the RP is more attentive to fraud as an operational risk. Additionally, the Commission believes that the inclusion of non-Euro recovery tools described above will enhance LCH SA's ability to cope with liquidity challenges by giving it additional ways to access and meet liquidity needs. The Commission also believes that by implementing the rules relating to CC&G service closure discussed above, LCH SA has resolved a potential liquidity risk relating to a CC&G default.

Further, the Commission believes that the proposed changes to the RP related to LCH Ltd. and other critical service providers strengthen LCH SA's ability to maintain the continuity of critical services in times of extreme stress and to facilitate the recovery of LCH SA. For instance, the Commission believes that the list of critical service providers and scope of each service enhances LCH SA's ability to identify those services which could impact the continuity of LCH SA's operations and the LCH Ltd exit plan strengthens LCH SA's ability to manage a potential wind down of LCH Ltd. and replicate or replace the services provided by LCH Ltd. on short notice.

Additionally, because the quantitative assessment section of the RP, as described above, now includes more details on the monitoring of capital related recovery tools, the Commission believes that LCH SA's ability to monitor and sustain its capital requirements under various scenarios has been strengthened.

Therefore, for the above reasons the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(3).

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, Section 17A(b)(3)(F) of the Act [11] and Rules 17Ad–22(e)(2) and (3) thereunder.[12]

It is therefore ordered pursuant to Section 19(b)(2) of the Act that the proposed rule change (SR–LCH SA–2019–008) be, and hereby is, approved.[13]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–27092 Filed 12–16–19; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 17 CFR 240.17Ad–22(e)(2) and (3).

[13] In approving the proposed rule change, the Commission considered the proposal's impacts on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87718; File No. SR–OCC–2019–010]

Self-Regulatory Organizations; the Options Clearing Corporation; Order Approving Proposed Rule Change Related to Proposed Changes to the Options Clearing Corporation's Rules, Margin Policy, Margin Methodology, Clearing Fund Methodology Policy, and Clearing Fund and Stress Testing Methodology To Address Specific Wrong-Way Risk

December 11, 2019.

I. Introduction

On October 10, 2019, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2019–010 (''Proposed Rule Change'') pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 [2] thereunder to revise OCC's Rules, margin policy and methodology, Clearing Fund policy, and Clearing Fund and stress testing methodology to adopt new margin charges and other risk measures to address the specific wrong-way risk presented by certain cleared positions.[3] The Proposed Rule Change was published for public comment in the **Federal Register** on October 29, 2019.[4] The Commission has received no comments regarding the Proposed Rule Change.[5] This order approves the Proposed Rule Change.

II. Background [6]

As a central counterparty (''CCP''), OCC is exposed to its Clearing Members' positions. To the extent that the value of a Clearing Member's positions is positively correlated with the creditworthiness of the Clearing Member, OCC faces specific wrong-way risk (''SWWR'').[7] OCC proposes changes to address such SWWR. Specifically OCC proposes to: (1) Adopt a new SWWR margin add-on charge for OCC's margin methodology (''SWWR Add-on''); (2) introduce stress test scenarios to measure the SWWR, to the extent not addressed in margin, of cleared positions involving Clearing Member-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 4, at 84 FR 57890.

[4] Securities Exchange Act Release No. 87387 (Oct. 23, 2019), 84 FR 57890 (Oct. 29, 2019) (SR–OCC–2019–010) (''Notice of Filing''). OCC also filed a related advance notice (SR–OCC–2019–807) (''Advance Notice'') with the Commission pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 and Rule 19b–4(n)(1)(i) under the Exchange Act. 12 U.S.C. 5465(e)(1). 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively. The Advance Notice was published in the **Federal Register** on November 12, 2019. Securities Exchange Act Release No. 87476 (Nov. 6, 2019), 84 FR 61114 (Nov. 12, 2019) (SR–OCC–2019–807).

[5] Since the proposal contained in the Proposed Rule Change was also filed as an advance notice, all public comments received on the proposal are considered regardless of whether the comments are submitted on the Proposed Rule Change or Advance Notice.

[6] Capitalized terms used but not defined herein have the meanings specified in OCC's Rules and By-Laws, available at *https://www.theocc.com/about/publications/bylaws.jsp.*

[7] SWWR arises when an exposure to a participant is highly likely to increase when the creditworthiness of that participant is deteriorating. *See* Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786, 70816, n. 317 (October 13, 2016) (S7–03–14) (''Covered Clearing Agency Standards'').

issued exchange-traded notes (''ETNs''); and (3) impose restrictions on stock lending activity cleared by OCC.[8]

A. SWWR Margin Add-On

As a general matter, OCC uses its System for Theoretical Analysis and Numerical Simulations (''STANS'') methodology for calculating Clearing Member margin requirements. OCC also incorporates add-on charges to address risks not otherwise addressed by its STANS methodology.[9] OCC proposes to adopt a new margin add-on to address SWWR at the Clearing Member account level (*i.e.,* the SWWR Add-on). The SWWR Add-on would address SWWR presented by cleared positions involving equities and ETNs issued by a Clearing Member and its affiliates and would comprise three components: (1) ''SWWR Equity Charge,'' (2) ''SWWR ETN Charge,'' and (3) ''SWWR Residual.'' Each of these components is discussed below.

1. SWWR Equity Charge

The proposed SWWR Equity Charge is based on the assumption that, when a Clearing Member defaults, the value of any equity security issued by the Clearing Member or its affiliates would fall to zero. For purposes of calculating the SWWR Equity Charge, OCC would value a Clearing Member's positions accordingly (*i.e.,* all stocks, single stock futures, call options, and put options would be valued at zero).[10] Any potential gain from the SWWR positions would be excluded by defining the minimum SWWR Equity Charge as zero. OCC stated that the purpose of the SWWR Equity Charge would be to provide protection from the risk of potential market exposure to products based on a Clearing Member Group's own equity in a default or bankruptcy scenario.[11]

2. SWWR ETN Charge

The SWWR ETN Charge would be designed to address the risk that the value of open positions related to uncollateralized ETNs issued by a Clearing Member or its affiliates would be correlated with the Clearing Member's credit quality. Similar to the SWWR Equity Charge, the SWWR ETN Charge assumes that a degradation in the value of securities issued by a Clearing Member or its affiliates would occur concurrently with the Clearing Member's default. The SWWR ETN Charge, however, would not assume a complete loss of value for the relevant securities (*i.e.,* ETNs issued by the Clearing Member or its affiliates). OCC states that such uncollateralized ETNs are generally equivalent to unsecured senior debt.[12] OCC, in turn, proposes to utilize an industry standard recovery rate assumption designed to reflect potential losses to ETN positions for the purpose of setting the SWWR ETN Charge component of the SWWR Add-on.

3. SWWR Residual

The SWWR Residual would ensure that implementation of the SWWR Add-on would not reduce a Clearing Member's overall margin requirements.[13] To determine the SWWR Residual, OCC would first calculate a ''base margin'' under on OCC's current methodology (*i.e.,* not assuming any specific degradation in the value of securities issued by a Clearing Member or its affiliates). Next, OCC would calculate a ''residual margin,'' which would represent the Clearing Member's margin requirement for only those positions unaffected by the SWWR Equity Charge and SWWR ETN Charge. Finally, the SWWR Residual would be the difference between the residual margin and the base margin; however, OCC would adjust the value of the SWWR Residual if the sum of the SWWR Equity Charge, SWWR ETN Charge, and SWWR Residual would otherwise reduce a Clearing Member's margin requirement.

B. SWWR Stress Test Scenarios

As noted above, the proposed SWWR ETN Charge would not assume a complete loss of value for ETNs issued by a Clearing Member or its affiliates. The SWWR Add-on, in turn, would not generate margin requirements designed to cover a scenario in which the recovery rate for such ETNs would be zero. To address such a scenario, OCC proposes to introduce new scenarios into the set of stress tests that OCC uses to test the sufficiency of its financial resources (''SWWR Sufficiency Scenarios''). To construct the SWWR Sufficiency Scenarios, OCC would revise certain of its existing stress test scenarios by assuming a value of zero for ETNs issued by a Clearing Member or its affiliates. OCC stated that the introduction of SWWR Sufficiency Scenarios would enable OCC to more accurately measure its credit risks as they relate to SWWR and better test the sufficiency of its overall financial resources as well as to call for additional resources as appropriate.[14] OCC believes, therefore, it would have sufficient financial resources to cover the SWWR associated with SWWR ETN positions if such positions were to be liquidated for less than the assumed recovery rate.[15]

C. Stock Lending Restrictions

Through its stock loan programs,[16] OCC novates stock loan transactions and becomes the lender to each Borrowing Clearing Member and the borrower to each Lending Clearing Member. OCC is exposed to SWWR in such programs when a Clearing Member lends equity securities or ETNs issued by the Clearing Member or its affiliates. To mitigate such risks, OCC proposes prohibiting Clearing Members from lending equity securities or ETNs issued by the Clearing Member or its affiliates within OCC's stock loan programs. OCC does not believe that the proposed prohibition would have a material impact on Clearing Members because Clearing Members do not typically lend their own equity securities, and borrowers do not typically accept equity securities issued by their lending

[8] OCC also proposes clarifying and conforming changes to the Clearing Fund Methodology Policy (''CFM Policy'') and Stress Testing and Clearing Fund Methodology Description (''Methodology Description'').

[9] *See e.g.* Securities Exchange Act Release No. 86119 (Jun. 17, 2019), 84 FR 29267 (Jun. 21, 2019) (approving implementation of an add-on charge ''to guard against potential shortfalls in margin requirements that may arise due to the costs of liquidating the portfolio of a defaulted Clearing Member.'')

[10] Because the SWWR arising from equities issued by a Clearing Member or its affiliates would be fully covered as part of margins, OCC proposes to remove such positions from Clearing Fund calculations under OCC's Clearing Fund methodology and would revise its Methodology Description accordingly.

[11] *See* Notice of Filing, 84 FR at 57892.

[12] *See* Notice of Filing, 84 FR at 57892.

[13] OCC noted that where a customer of a Clearing Member has net short positions referencing that Clearing Member's issued equities, such positions may actually present ''right-way risk,'' whereby the position would result in a gain or margin credit for that account as the credit quality of the Clearing Member deteriorates. *See* Notice of Filing, 84 FR at 57893, n. 20.

[14] *See* Notice of Filing, 84 FR at 57893. OCC's current rules authorize OCC to call for additional resources based on the results of stress scenarios used to test the sufficiency of OCC's financial resources. *See* Securities Exchange Act Release No. 83735 (Jul. 27, 2018), 83 FR 37855 (Aug. 2, 2018) (SR–OCC–2018–008). OCC's rules also authorize adjustments to OCC's monthly Clearing Fund sizing process based on the results of stress scenarios used to test the sufficiency of OCC's financial resources. OCC believes, however, that SWWR is more appropriately charged to the Clearing Member presenting the risk. *See* Notice of Filing, 84 FR at 57893. Based on that belief, OCC proposes to revise the CFM Policy such that the results of the SWWR Sufficiency Scenarios would not be used to adjust OCC's monthly Clearing Fund sizing.

[15] *See* Notice of Filing, 84 FR at 57893.

[16] OCC operates programs for clearing stock loan transactions initiated either bilaterally between market participants or through anonymous matching by a Loan Market. *See* Notice of Filing, 84 FR at 57891.

counterparty.[17] Further, market participants are able to engage in, and would continue to be able to engage in, securities lending on an uncleared basis outside of OCC.[18]

OCC proposes to implement the prohibition on Clearing Members lending their own securities only on a going-forward basis. The proposal would not affect stock lending activity cleared by OCC before the implementation of the prohibition. Existing stock loan transactions would, however, be subject to the SWWR Add-on described above.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.[19] After carefully considering the Proposed Rule Change, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to OCC. More specifically, the Commission finds that the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act [20] and Rules 17Ad–22(e)(4) and (6) thereunder.[21]

A. Consistency With Section 17A(b)(3)(F) of the Exchange Act

Section 17A(b)(3)(F) of the Exchange Act requires, among other things, that the rules of a clearing agency be designed to (i) promote the prompt and accurate clearance and settlement of securities transactions, and to the extent applicable, derivatives agreements, contracts, and transactions; and (ii) assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[22] Based on its review of the record, the Commission believes that the proposed changes are designed to promote prompt and accurate clearance and settlement as well as assure the safeguarding of securities and funds which are in OCC's custody or control for the reasons set forth below.

First, the Commission believes that the adoption of the SWWR Add-on would be consistent with assuring the safeguarding of securities and funds. To the extent that the value of a Clearing Member's positions is positively correlated with the creditworthiness of the Clearing Member, OCC faces SWWR. OCC's current margin methodology does not incorporate a specific component designed to address SWWR for cleared positions. As described above, the proposed SWWR Add-on would address SWWR arising out of equities and ETNs issued by the relevant Clearing Member or its affiliates underlying a Clearing Member's cleared positions. Further, the SWWR Add-on would be designed to avoid any unintended reduction in margin requirements resulting from ''right-way risk'' in a Clearing Member's accounts.[23] The Commission believes that the proposal would provide for more comprehensive management of the potential risks posed by the default of a Clearing Member because OCC would adopt an add-on charge to address a risk not captured elsewhere in its margin methodology. Management of such risks through the collection of margin collateral could, in turn, help reduce the amount of credit losses that would potentially be charged to the Clearing Fund contributions of surviving Clearing Members. The Commission believes, therefore, that the proposed SWWR charge would be consistent with assuring the safeguarding of securities and funds posted by surviving Clearing Members as collateral.

Second, the Commission believes that introduction of the SWWR Sufficiency Scenarios and the proposed prohibition of certain stock lending activity as described above would be consistent with the promotion prompt and accurate clearance and settlement. As an initial matter, OCC is the only clearing agency for standardized U.S. securities options listed on Commission-registered national securities exchanges (''listed options'').[24] The ETN component of the SWWR Add-on would not address the exposures presented by a complete loss of value for ETNs issued by the Clearing Member or its affiliates. To address the potential credit exposure represented by the value of such ETNs going to zero, OCC proposes to introduce the new SWWR Sufficiency Scenarios described above. OCC would use the SWWR Sufficiency Scenarios to test its total financial resources. The proposed introduction of new scenarios to test the sufficiency of OCC's financial resources in the Clearing Fund would address assumptions underlying OCC's proposed margin methodology (*i.e.,* a non-zero ETN recovery rate). OCC relies on the resources in its Clearing Fund to manage the risk of losses arising out of the default of a Clearing Member under extreme but plausible market conditions. Additionally, prohibiting certain stock loan activity that could generate losses in the event of a Clearing Member default would avoid those potential losses all together. Strengthening the methodology that OCC uses to manage its financial resources or avoiding the risk of loss all together, strengthens OCC's ability to manage Clearing Member defaults, which, in turn, facilitates the clearance and settlement of listed options.

The Commission believes, therefore, that the Proposed Rule Change is consistent with the requirements of Section 17A(b)(3)(F) of the Exchange Act.[25]

B. Consistency With Rule 17Ad–22(e)(4) Under the Exchange Act

Rule 17Ad–22(e)(4) under the Exchange Act requires, in part, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes.[26]

As described above, OCC proposes to prohibit each Clearing Member submitting for clearing any stock loan activity involving the lending of equity securities or ETNs issued by such a Clearing Member or its affiliates going forward. Under the proposal, OCC would identify those stock loan transactions presenting SWWR and avoid any potential exposures arising out of such transactions through the proposed prohibition. Further, for those transactions that would not be affected by the prohibition (*i.e.,* existing transactions), OCC proposes to measure, monitor, and manage its exposures through the use of the SWWR Add-on described above and discussed below. Accordingly, the Commission believes that OCC's proposal in the Proposed Rule Change to prohibit certain stock loan transactions is consistent with Rule 17Ad–22(e)(4) under the Exchange Act.[27]

[17] *See* Notice of Filing, 84 FR at 57892.

[18] The proposed restrictions on lending activity cleared by OCC would not prevent Clearing Members from lending equities or ETNs issued by the Clearing Member or any affiliate outside of OCC.

[19] 15 U.S.C. 78s(b)(2)(C).

[20] 15 U.S.C. 78q–1(b)(3)(F).

[21] 17 CFR 240.17Ad–22(e)(4) and 17 CFR 240.17Ad–22(e)(6).

[22] 15 U.S.C. 78q–1(b)(3)(F).

[23] *See supra* at note 13.

[24] *See* Securities Exchange Act Release No. 85121 (Feb. 13, 2019), 84 FR 5157 (Feb. 20, 2019) (File No. SR–OCC–2015–02).

[25] 15 U.S.C. 78q–1(b)(3)(F).

[26] 17 CFR 240.17Ad–22(e)(4).

[27] 17 CFR 240.17Ad–22(e)(4).

Rules 17Ad–22(e)(4)(i) and (iii) under the Exchange Act require that a covered clearing agency's policies and procedures meet the requirements of Rule 17Ad–22(e)(4) by maintaining financial resources at the minimum to enable OCC to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the participant family that would potentially cause the largest aggregate credit exposure for OCC in extreme but plausible market conditions.[28] Further, Rule 17Ad–22(e)(4)(vi) under the Exchange Act requires that a covered clearing agency's policies and procedures meet the requirements of Rule 17Ad–22(e)(4) by testing the sufficiency of a covered clearing agency's total financial resources available to meet the minimum financial resource requirements under Rules 17Ad–22(e)(4)(i) through (iii).[29]

As described above and discussed below, the proposed SWWR Add-on is designed to measure and manage OCC's credit exposures to Clearing Members to the extent those exposures arise out of SWWR related to cleared positions. One component of the SWWR Add-on—the SWWR ETN Charge—would not, however, fully cover OCC's potential exposure through margin because it would not assume a complete loss of value for ETNs issued by the Clearing Member or its affiliates. To address the potential credit exposure represented by the value of ETNs issued by the Clearing Member or its affiliates going to zero, OCC proposes to introduce the new SWWR Sufficiency Scenarios described above. OCC would use the SWWR Sufficiency Scenarios to test its total financial resources and to call for additional resources as necessary to ensure the resources it holds would be sufficient to enable OCC to cover exposures arising under the relevant stress scenarios. Accordingly, and for the reasons stated above, the Commission believes the changes proposed in the Proposed Rule Change are consistent with Rule 17Ad–22(e)(4)(i), (iii), and (vi) under the Exchange Act.[30]

C. Consistency With Rule 17Ad–22(e)(6) Under the Exchange Act

Rule 17Ad–22(e)(6)(i) under the Exchange Act requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover, if the covered clearing agency provides central counterparty services, its credit exposure to participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[31]

As noted above, OCC faces SWWR to the extent that the value of a Clearing Member's positions is positively correlated with the creditworthiness of the Clearing Member. OCC proposes to cover its exposure to such SWWR posted by its Clearing Members through the introduction of the SWWR Add-on. The SWWR Add-on consists of three components. Two of those components—the SWWR Equity Charge and SWWR ETN Charge—are designed to produce margin levels commensurate with the particular attributes of certain products that OCC clears in terms of the likely recovery available in the event of a default by the issuing Clearing Member. Further, the SWWR Residual would ensure that the introduction of the SWWR Add-on could not inadvertently weaken OCC's current margin methodology due to the potential existence of ''right-way risk'' in a Clearing Member's accounts.[32] Accordingly, and for the reasons stated above, the Commission believes the adoption of a margin add-on charge designed to cover exposures arising out of SWWR is consistent with Rule 17Ad–22(e)(6)(i) under the Exchange Act.[33]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act[34] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[35] that the Proposed Rule Change (SR–OCC–2019–010) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27087 Filed 12–16–19; 8:45 am]

BILLING CODE 8011–01–P

[28] 17 CFR 240.17Ad–22(e)(4)(i) and 17 CFR 240.17Ad–22(e)(4)(iii).

[29] 17 CFR 240.17Ad–22(e)(4)(vi).

[30] 17 CFR 240.17Ad–22(e)(4)(i); 17 CFR 240.17Ad–22(e)(4)(iii); 17 CFR 240.17Ad–22(e)(4)(vi).

[31] 17 CFR 240.17Ad–22(e)(6)(i).

[32] *See supra* at note 13.

[33] 17 CFR 240.17Ad–22(e)(6)(i).

[34] In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[35] 15 U.S.C. 78s(b)(2).

[36] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87715; File No. SR–NYSE–2019–68]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Amend Its Rules To Add New Rule 7.19 (Pre-Trade Risk Controls)

December 11, 2019.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 27, 2019, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to add new Rule 7.19 (Pre-Trade Risk Controls). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In order to assist member organizations' efforts to manage their risk, the Exchange proposes to amend

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

its rules to add new Rule 7.19 (Pre-Trade Risk Controls) to establish a set of pre-trade risk controls by which Entering Firms and their designated Clearing Firms (as defined below) may set credit limits and other pre-trade risk controls for an Entering Firm's trading on the Exchange and authorize the Exchange to take action if those credit limits or other pre-trade risk controls are exceeded.

For purposes of this proposed rule change, the Exchange proposes to define the term ''Entering Firm'' to mean a member organization that either has a correspondent relationship with a Clearing Firm whereby it executes trades and the clearing function is the responsibility of the Clearing Firm or clears for its own account [4] and to define the term ''Clearing Firm'' to mean a member organization that acts as principal for clearing and settling a trade, whether for its own account or for an Entering Firm.[5]

1. Overview

In order to help firms manage their risk, the Exchange proposes to offer optional pre-trade risk controls that would authorize the Exchange to take automated actions if a designated credit limit or other pre-trade risk control for a firm is breached. Because Clearing Firms bear the risk on behalf of their correspondent Entering Firms, the Exchange proposes to make the proposed pre-trade risk controls available not only to Entering Firms, but also to their Clearing Firms, if so authorized by the Entering Firm. These pre-trade risk controls would provide Entering Firms and their Clearing Firms with enhanced abilities to manage their risk with respect to orders on the Exchange.

As proposed, these optional controls would allow Entering Firms and their Clearing Firms to each define different pre-set risk thresholds and to choose the automated action the Exchange would take if those thresholds are breached, which would range from notifying the Entering Firm and Clearing Firm that a limit has been breached, blocking new orders, or canceling orders until the Entering Firm has been reinstated to trade on the Exchange.

Although use of the proposed Exchange-provided pre-trade risk controls are optional, all orders on the Exchange will pass through risk checks. As such, an Entering Firm that does not choose to set limits or permit its Clearing Firm to set limits on its behalf will not achieve any latency advantage with respect to its trading activity on the Exchange. In addition, the Exchange expects that any latency added by the pre-trade risk controls will be *de minimis*.

The proposed pre-trade risk controls described are meant to supplement, and not replace, the member organizations' own internal systems, monitoring and procedures related to risk management. The Exchange does not guarantee that these controls will be sufficiently comprehensive to meet all of a member organization's needs, the controls are not designed to be the sole means of risk management, and using these controls will not necessarily meet a member organization's obligations required by Exchange or federal rules (including, without limitation, the Rule 15c3–5 under the Act [6] (''Rule 15c3–5'')). Use of the Exchange's pre-trade risk controls will not automatically constitute compliance with Exchange or federal rules and responsibility for compliance with all Exchange and SEC rules remains with the member organization.[7]

2. Proposed Rule Change

Proposed Rule 7.19(a) would set forth the definitions that would be used for purposes of the Rule. In addition to the defined terms of ''Entering Firm'' and ''Clearing Firm,'' as described above, the Exchange proposes the following definitions:

- The term ''Single Order Maximum Notional Value Risk Limit'' would mean a pre-established maximum dollar amount for a single order before it can be traded.
- The term ''Single Order Maximum Quantity Risk Limit'' would mean a pre-established maximum number of shares that may be included in a single order before it can be traded.
- The term ''Gross Credit Risk Limit'' would mean a pre-established maximum daily dollar amount for purchases and sales across all symbols, where both buy and sell orders are counted as positive values. For purposes of calculating the Gross Credit Risk Limit, unexecuted orders in the Exchange Book,[8] orders routed on arrival pursuant to Rule 7.37(a)(1), and executed orders are included.

The Exchange proposes to separately calculate Gross Credit Risk Limits for: (i) All unexecuted and executed orders; (ii) unexecuted orders only; and (iii) executed orders only.

Proposed Rule 7.19(b) would set forth the Pre-Trade Risk Controls that would be available to Entering Firms and Clearing Firms. Under proposed Rule 7.19(b)(1), an Entering Firm may select one or more of the following optional pre-trade risk controls with respect to its trading activity on the Exchange: (i) One or more Gross Credit Risk Limits; (ii) Single Order Maximum Notional Value Risk Limits; and (iii) Single Order Maximum Quantity Risk Limits, which would collectively be referred to as the ''Pre-Trade Risk Controls.''

In addition, under proposed Rule 7.19(b)(2)(A), an Entering Firm that does not self-clear may designate its Clearing Firm to (i) view any Pre-Trade Risk Controls set by the Entering Firm, or (ii) set one or more Pre-Trade Risk Controls on the Entering Firm's behalf, or both. Proposed Rule 7.19(b)(2)(B) provides that an Entering Firm would be able to view any Pre-Trade Risk Controls that its Clearing Firm sets with respect to the Entering Firm's trading activity on the Exchange. Because both an Entering Firm and Clearing Firm would be able to access information about Pre-Trade Risk Controls, this mechanism would foster transparency between an Entering Firm and its Clearing Firm regarding which Pre-Trade Risk Control limits may have been set. For example, if an Entering Firm designates its Clearing Firm to view the Pre-Trade Risk Controls set by that Entering Firm, its Clearing Firm may determine that it does not need to separately set Pre-Trade Risk Controls on behalf of such Entering Firm.

Because the Entering Firm is the member organization that is entering orders on the Exchange, the Exchange will not take action based on a Clearing Firm's instructions about the Entering Firm's trading activities on the Exchange without first receiving consent from the Entering Firm. Accordingly, proposed Rule 7.19(b)(2)(C) would provide that if an Entering Firm designates a Clearing Firm to set Pre-Trade Risk Controls for the Entering Firm, the Entering Firm would be consenting to the Exchange taking certain prescribed actions (discussed further below) with respect to the Entering Firm's trading activity as provided for in proposed Rules 7.19(c)

[4] *See* proposed Rule 7.19(a)(1).

[5] *See* proposed Rule 7.19(a)(2). As required by Rule 7.14, a member organization is required to give up the name of the clearing firm through which each transaction on the Exchange will be cleared.

[6] *See* 17 CFR 240.15c3–5.

[7] The Exchange proposes Commentary .01 to Rule 7.19 to provide that ''[t]he pre-trade risk controls described in this Rule are meant to supplement, and not replace, the member organization's own internal systems, monitoring and procedures related to risk management and are not designed for compliance with Rule 15c3–5 under the Exchange Act. Responsibility for compliance with all Exchange and SEC rules remains with the member organization.''

[8] The term ''Exchange Book'' is defined in Rule 1.1(k) to refer to the Exchange's electronic file of orders, which contains all orders entered on the Exchange.

and (d), described below. The Exchange would consider an Entering Firm to provide such consent by authorizing a Clearing Firm to enter Pre-Trade Risk Controls via the risk management tool that will be provided to Entering Firms in connection with this proposed rule change. Once such authorization is provided by the Entering Firm, the Clearing Firm would have access to the Pre-Trade Risk Controls on behalf of that Entering Firm. The proposed Rule makes clear that by designating a Clearing Firm to set limits on its trading activities, the Entering Firm will have authorized the Exchange to act pursuant to the Clearing Firm's instructions if the limits set by the Clearing Firm are breached.

Proposed Rule 7.19(b)(3) would set forth how the Pre-Trade Risk Controls could be set or adjusted. Proposed Rule 7.19(b)(3)(A) would provide that Pre-Trade Risk Controls may be set before the beginning of a trading day and may be adjusted during the trading day. Proposed Rule 7.19(b)(3)(B) would provide that Entering Firms and Clearing Firms may set Pre-Trade Risk Controls at the MPID level or at a sub-ID of an MPID, as designated by an Entering Firm. The Exchange believes that supporting Pre-Trade Risk Controls at both an MPID and sub-ID level would provide both Entering Firms, and if designated, their Clearing Firms, more granular control over how such risk controls are determined and monitored.

Proposed Rule 7.19(b)(4) would provide that with respect to Gross Credit Risk Limits, both an Entering Firm and its designated Clearing Firm may enable alerts to signal when an Entering Firm is approaching its designated credit limit(s). The Exchange believes that by providing such alerts, the Entering Firm, and if designated, its Clearing Firm, would have advance notice that the Entering Firm is approaching a designated limit and could take steps to mitigate the potential that an automated breach action would be triggered.

Proposed Rule 7.19(c) would set forth the actions the Exchange would be authorized to take when a Pre-Trade Risk Control set by an Entering Firm or a Clearing Firm is breached, which would be referred to as ''Automated Breach Actions.'' These proposed actions would be automated; if a Pre-Trade Risk Control is breached, the Exchange would automatically take the designated action and would not need further direction from either the Entering Firm or Clearing Firm to take such action.

At the outset, proposed Rule 7.19(c)(1) would provide that if both an Entering Firm and its Clearing Firm set the same type of Pre-Trade Risk Control for the Entering Firm but have set different limits, the Exchange would enforce the more restrictive limit. For example, if an Entering Firm sets a Single Order Maximum Notional Value Risk Limit of $20 million and its Clearing Firm sets the same risk limit at $15 million, the Exchange will take action when the more restrictive limit is breached—*i.e.,* $15 million.

Proposed Rule 7.19(c)(2) would set forth the Automated Breach Action the Exchange would take if an order would breach the designated limit of either a Single Order Maximum Notional Value Risk Limit or Single Order Maximum Quantity Risk Limit. As proposed, the Exchange would reject the incoming order that would have breached the applicable limit.

Proposed Rule 7.19(c)(3)(A) would set forth the Automated Breach Actions the Exchange would take if a designated Gross Credit Risk Limit is breached. The Exchange proposes to provide options of which Automated Breach Action the Exchange would be authorized to take if a Gross Credit Risk Limit is breached. Such Automated Breach Actions would be taken at the MPID or sub-ID level that is associated with the designated Gross Credit Risk Limit. As proposed, when setting Gross Credit Risk Limits, the Entering Firm or Clearing Firm setting the limit would be required to indicate one of the following actions that the Exchange would take if such limit is breached:

- ''Notification Only.'' As set forth in proposed Rule 7.19(c)(3)(A)(i), if this option is selected, the Exchange would notify the Entering Firm or Clearing Firm that a limit has been breached and continue to accept new orders and order instructions and would not cancel any unexecuted orders in the Exchange Book.
- ''Block Only.'' As set forth in proposed Rule 7.19(c)(3)(A)(ii), if this option is selected, the Exchange would reject new orders and order instructions but would not cancel any unexecuted orders in the Exchange Book. The Exchange would continue to accept instructions from the Entering Firm to cancel one or more orders in full (including Auction-Only Orders) or any instructions specified in proposed Rule 7.19(e) (described below), but would not take any automated action to cancel orders.
- ''Cancel and Block.'' As set forth in proposed Rule 7.19(c)(3)(A)(iii), if this option is selected, in addition to the Block actions described above, the Exchange would also cancel all unexecuted orders in the Exchange Book other than Auction-Only Orders.

If an Entering Firm and its Clearing Firm each set different limits for a Gross Credit Risk Limit for the Entering Firm's activities on the Exchange, proposed Rule 7.19(c)(3)(B) would provide that the Exchange would enforce the action that was chosen by the party that set the limit that was breached. For example, if a Clearing Firm sets a lower limit and designates the ''Cancel and Block'' Automated Breach Action, if that limit is breached, the Exchange will implement that ''Cancel and Block'' action even if the Entering Firm designated a different Automated Breach Action.

Proposed Rule 7.19(c)(3)(C) would provide that if both the Entering Firm and Clearing Firm set the same Gross Credit Risk Limit and that limit is breached, the Exchange would enforce the most restrictive Automated Breach Action. As further proposed, for purposes of this Rule, the ''Cancel and Block'' action would be more restrictive than ''Block Only,'' which would be more restrictive than ''Notification Only.'' For example, if the Entering Firm selects the ''Block Only'' action for a Gross Credit Risk Limit and its Clearing Firm selects the ''Cancel and Block'' action for the same Gross Credit Risk Limit, if the limit is breached, the Exchange would take the ''Cancel and Block'' action for the Entering Firm's orders.

Proposed Rule 7.19(d) concerns how an Entering Firm's ability to enter orders and order instructions would be reinstated after a ''Block Only'' or ''Cancel and Block'' Automated Breach Action has been triggered. In such case, proposed Rule 7.19(d) provides that the Exchange would not reinstate the Entering Firm's ability to enter orders and order instructions on the Exchange (other than instructions to cancel one or more orders (including Auction-Only Orders) in full) until it has received notification that the Entering Firm can be reinstated. Proposed Rule 7.19(d)(1) provides that if the Gross Credit Risk Limit that was breached was set by the Entering Firm, the Entering Firm must seek reinstatement on the Exchange. Proposed Rule 7.19(d)(2) provides that if the Gross Credit Risk Limit that was breached was set by a Clearing Firm, the Entering Firm must seek reinstatement on the Exchange, unless the Clearing Firm designates that it must approve the Entering Firm's reinstatement, in which case both the Entering Firm and Clearing Firm must seek reinstatement. The Exchange proposes to include this functionality because the Clearing Firm bears the risk of any exposure of its correspondent Entering Firms.

Finally, proposed Rule 7.19(e) would set forth member organization-directed actions, *i.e.,* ''kill switch'' functionality. As proposed, member organizations would be provided with the ability to direct the Exchange to take bulk action with respect to orders, which differs from the Automated Breach Actions described above. The Exchange previously filed a proposed rule change describing risk management tools designed to allow member organizations to monitor and address exposure to risk.[9] Those tools function on a post-trade basis: Member organizations that choose to use this tool can monitor exposure as their trades execute, set limits, and receive alerts if such limits are breached. However, if a limit is breached, the member organization needs to direct the Exchange to take an action, which could include either a bulk block or bulk cancel message, or both.

The Exchange proposes to specify certain member organization-directed actions in proposed Rule 7.19(e). As described above, the risk management tool that would be provided to member organizations in connection with this proposed rule change would include information about an Entering Firm's Gross Credit Risk Limits at either an MPID or sub-ID level (at the direction of the Entering Firm). As further described above, these limits would be updated with information about an Entering Firm's unexecuted orders in the Exchange Book, orders routed on arrival, and executed orders. Because this tool would provide information to member organizations to determine whether to direct the Exchange to take action with respect to their orders, the Exchange proposes that proposed Rule 7.19 would supersede and replace the description of risk controls as set forth in the 2013 Risk Control Filing.

More specifically, proposed Rule 7.19(e) would specify that an Entering Firm, or if authorized pursuant to proposed Rule 7.19(b)(2)(A), its Clearing Firm, could direct the Exchange to take one or more of the following actions with respect to orders at either an MPID, or if designated, sub-ID Level: (1) Cancel all Auction-Only Orders; (2) Cancel all unexecuted orders in the Exchange Book other than Auction-Only Orders; or (3) Reject entry of any new orders and order instructions, provided that the Exchange would continue to accept instructions from Entering Firms to cancel one or more orders (including Auction-Only Orders) in full.

A member organization can currently direct the Exchange to take these actions with respect to its orders and with this proposed rule change, Clearing Firms designated by the Entering Firm could also take such action. A member organization that wants more control over when and which actions are taken with respect to its orders may choose to use these controls instead of the ''Block'' or ''Cancel and Block'' Automated Breach Actions described above. For example, for a member organization that selects the ''Notification Only'' Automated Breach Action, if it receives notification of a credit breach, it could choose to direct the Exchange to take an action described in proposed Rule 7.19(e).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, 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 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, and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the Exchange believes that the proposed rule will remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed optional Pre-Trade Risk Controls would provide both Entering Firms, and if designated, Clearing Firms, with the ability to manage risk, while also providing an alert system that would help to ensure that such firms are aware of developing issues. In addition, the Pre-Trade Risk Controls would provide Clearing Firms, who have assumed certain risks of the Entering Firms, greater control and flexibility over setting risk tolerance and exposure on behalf of their correspondent Entering Firms. As such, the Exchange believes that the Pre-Trade Risk Controls would provide a means to address potentially market-impacting events, helping to ensure the proper functioning of the market.

In addition, the Exchange believes that the proposed rule change is designed to protect investors and the public interest because the Pre-Trade Risk Controls are a form of impact mitigation that will aid Entering Firms and Clearing Firms in minimizing their risk exposure and reduce the potential for disruptive, market-wide events. The Exchange understands that member organizations implement a number of different risk-based controls, including those required by Rule 15c3–5. The proposed controls will serve as an additional tool for Entering Firms and Clearing Firms to assist them in identifying any risk exposure. The Exchange believes the Pre-Trade Risk Controls will assist Entering Firms and Clearing Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system.

Further, the Exchange believes that the proposed rule will foster cooperation and coordination with persons facilitating transactions in securities because the Exchange will provide alerts to Entering Firms and their Clearing Firms when the Entering Firm's trading reaches certain thresholds. As such, the Exchange will help Clearing Firms monitor the risk levels of their correspondent Entering Firms and provide tools for Clearing Firms, if designated, to take action.

Finally, the Exchange believes that the proposed rule change does not unfairly discriminate among the Exchange's member organizations because use of the Pre-Trade Risk Controls is optional and is not a prerequisite for participation on the Exchange. In addition, because all orders on the Exchange would pass through the risk checks, there would be no difference in the latency experienced by member organizations who have opted to use the Pre-Trade Risk Controls versus those who have not opted to use them.

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. In fact, the Exchange believes that the proposal will have a positive effect on competition because, by providing Entering Firms and their Clearing Firms additional means to monitor and control risk, the proposed rule will increase confidence in the proper functioning of the markets.

[9] *See* Securities Exchange Act Release No. 71164 (December 20, 2013), 78 FR 79044 (December 27, 2013) (SR–NYSE–2013–80) (Notice of filing and immediate effectiveness of proposed rule change) (the ''2013 Risk Control Filing'').

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

The Exchange believes the proposed Pre-Trade Risk Controls will assist Entering Firms and Clearing Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system. As a result, the level of competition should increase as public confidence in the markets is solidified.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or *up to 90 days* (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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–2019–68 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–2019–68. 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–2019–68 and should be submitted on or before January 7, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27082 Filed 12–16–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87719; File No. SR–CboeBZX–2019–102]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To List and Trade Shares of the Clearbridge Focus Value ETF Under Currently Proposed Rule 14.11(k)

December 11, 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 27, 2019, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes a rule change to list and trade shares of the Clearbridge Focus Value ETF under currently proposed Rule 14.11(k).

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has submitted a proposal and four subsequent amendments to add new Rule 14.11(k) for the purpose of permitting the listing and trading of Managed Portfolio Shares, which are securities issued by an actively managed open-end management investment company.[3]

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[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As proposed, the term "Managed Portfolio Share" means a security that (a) represents an interest in an investment company registered under the Investment Company Act of 1940 ("Investment Company") organized as an open-end management investment company, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a Creation Unit, or multiples thereof, in return for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value and delivered to the Authorized Participant (as defined in the Investment Company's Form N–1A filed with the SEC) through a Confidential Account; (c) when aggregated into a Redemption Unit, or multiples thereof, may be redeemed for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value delivered to the Confidential Account for the benefit of the Authorized Participant; and (d) the

Continued

Proposed Rule 14.11(k)(2)(A) would require the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Managed Portfolio Shares on the Exchange. As such, the Exchange is submitting this proposal in order to list and trade shares of the ClearBridge Focus Value ETF (the ''Fund'') under proposed Rule 14.11(k).

Description of the Fund and the Trust

The shares of the Fund (the ''Shares'') will be issued by ActiveShares ETF Trust (the ''Trust''), a statutory trust organized under the laws of the State of Maryland and registered with the Commission as an open-end management investment company.[4] The investment adviser to the Trust will be Precidian Funds LLC (the ''Adviser''). The Sub-Adviser to the Fund will be ClearBridge Investments, LLC (''ClearBridge''). Western Asset Management Company, LLC, (''Western Asset'' and, collectively with ClearBridge, the ''Sub-Adviser'') manages the portion of the Fund's cash and short-term instruments allocated to it by the Adviser. Legg Mason Investor Services, LLC (the ''Distributor'') will serve as the distributor of the Fund's Shares. All statements and representations made in this filing regarding the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of the Verified Intraday Indicative Value (''VIIV''),[5] reference assets, and intraday indicative values, and the applicability of Exchange rules shall constitute continued listing requirements for listing the Shares on the Exchange, as provided under proposed Rule 14.11(a).

Proposed Rule 14.11(k)(2)(D) provides that if the investment adviser to the Investment Company issuing Managed Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition of and/or changes to such Investment Company portfolio and/or the Creation Basket.[6] Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's portfolio composition or has access to information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket.[7] Proposed Rule 14.11(k)(2)(D) is similar to Rule 14.11(c)(5)(A)(i), related to Index Fund Shares, except that proposed Rule 14.11(k)(2)(D) relates to the establishment of a ''fire wall'' between the investment adviser and the broker-dealer as applicable to an Investment Company's portfolio and/or Creation Basket, not an underlying benchmark index, as is the case with index-based funds. Proposed Rule 14.11(k)(2)(D) is also similar to Rule 14.11(i)(7), related to Managed Fund Shares, except that proposed Rule 14.11(k)(2)(D) relates to the establishment of a ''fire wall'' between the investment adviser and the broker-dealer as applicable to an Investment Company's portfolio and/or Creation Basket, and not just the underlying portfolio, as is the case with Managed Fund Shares. The Adviser is not registered as a broker-dealer or affiliated with a broker-dealer. The Sub-Adviser is not registered as a broker-dealer, but is affiliated with a broker-dealer and has implemented and will maintain a ''fire wall'' with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund's portfolio and Creation Basket.

In the event (a) the Adviser or Sub-Adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio and/or the Creation Basket, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio and/or Creation Basket.

Further, proposed Rule 14.11(k)(2)(E) requires that any person or entity, including an AP Representative, custodian, Reporting Authority, distributor, or administrator, who has access to information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket. Moreover, if any such

portfolio holdings for which are disclosed within at least 60 days following the end of every calendar quarter. *See* Securities Exchange Act Release No. 86157 (June 19, 2019), 84 FR 29892 (June 25, 2019) and 87062 (September 23, 2019) (SR–CboeBZX–2019–047) (the ''Proposal'').

[4] The Trust is registered under the 1940 Act. The Trust has filed a registration statement on Form N–1A relating to the Fund (the ''Registration Statement''). An order granting exemptive relief to the Adviser was issued on May 20, 2019 (File No. 812–14405) (the ''Exemptive Order''). Investments made by the Fund will comply with the conditions set forth in the Exemptive Order. The description of the operation of the Trust and the Fund herein is based, in part, on the Exemptive Order. The Exemptive Order specifically notes that ''granting the requested exemptions is appropriate in and consistent with the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. It is further found that the terms of the proposed transactions, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transactions are consistent with the policy of each registered investment company concerned and with the general purposes of the Act.'' *See* Investment Company Act Release Nos. 33440 and 33477.

[5] Proposed Rule 14.11(k)(3)(B) defines the term VIIV as the indicative value of a Managed Portfolio Share based on all of the holdings of a series of Managed Portfolio Shares as of the close of business on the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, priced and disseminated in one second intervals during Regular Trading Hours by the Reporting Authority.

[6] Proposed Rule 14.11(K)(3)(E) defines the term ''Creation Basket'' as on any given business day the names and quantities of the specified instruments (and/or an amount of cash) that are required for an AP Representative to deposit in-kind on behalf of an Authorized Participant in exchange for a Creation Unit and the names and quantities of the specified instruments (and/or an amount of cash) that will be transferred in-kind to an AP Representative on behalf of an Authorized Participant in exchange for a Redemption Unit, which will be identical and will be transmitted to each AP Representative before the commencement of trading.

[7] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a result, the Adviser, the Sub-Adviser, and their respective related personnel will be subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violations, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket.

Description of the Fund

ClearBridge Focus Value ETF

The Fund seeks long-term capital appreciation. By employing fundamental research, in an effort to identify securities with favorable risk-adjusted return characteristics, the Fund's portfolio management team constructs the portfolio on a bottom-up basis. The Fund will invest primarily in equity securities of large capitalization companies, but may also make limited investments in mid-capitalization companies. While most investments will be in U.S. companies, the fund may also invest in American Depository Receipts (''ADRs'') and U.S.-listed shares of foreign companies. The team considers a number of variables such as business fundamentals, valuation, free cash flow generation, earnings growth, management quality and competitive positioning. The Fund will invest in a diversified portfolio typically consisting of the securities of 30 to 40 issuers.

In addition, the Fund may also invest in common stocks, preferred securities, and warrants and rights of U.S. exchange-listed companies, U.S. exchange traded notes, U.S. exchange listed real estate investment trusts (''REITs''), U.S. ETFs,[8] U.S. exchange-listed ADRs, U.S. exchange-listed equity futures contracts, and U.S. exchange-listed equity index futures contracts. All exchange-listed equity securities in which the Fund will invest will be listed and traded on U.S. national securities exchanges. The Fund may also hold cash without limitation, and may invest in short-term U.S. Treasury securities, government money market funds and may enter into repurchase agreements for cash management or defensive investment purposes.

The Exchange notes that the Fund's holdings will meet the generic listing standards applicable to series of Managed Fund Shares under Rule 14.11(i)(4)(C). While such standards do not apply directly to series of Managed Portfolio Shares, the Exchange believes that the overarching policy issues related to liquidity, market cap, diversity, and concentration of portfolio holdings that Rule 14.11(i)(4)(C) is intended to address are equally applicable to series of Managed Portfolio Shares.

Investment Restrictions

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets.[9] Illiquid securities and other illiquid assets include those subject to contractual or other restrictions on resale and other instruments or assets that lack readily available markets as determined in accordance with Commission staff guidance.[10] The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity. In any event, the Fund will not purchase any securities that are illiquid investments at the time of purchase.

According to the Registration Statement, the Fund will seek to qualify for treatment as a Regulated Investment Company (''RIC'') under the Internal Revenue Code.[11]

The Shares of the Fund will conform to the initial and continued listing criteria under proposed Rule 14.11(k). The Fund's holdings will be limited to and consistent with what is permissible under the Exemptive Order and described herein.

The Fund's investments will be consistent with its investment objective and will not be used to enhance leverage. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged (*e.g.,* 2X, –2X, 3X or –3X) ETFs.

Creations and Redemptions of Shares

Creations and redemptions of the Shares will occur as described in the Proposal. More specifically, in connection with the creation and redemption of Creation Units[12] and Redemption Units,[13] the delivery or receipt of any portfolio securities in-kind will be required to be effected through a separate confidential brokerage account (a ''Confidential Account'').[14] Authorized Participants (as defined in the Fund's Exemptive Application, ''AP'') will sign an agreement with an AP Representative[15] establishing the Confidential Account for the benefit of the AP. AP Representatives will be broker-dealers. An AP must be a Depository Trust Company (''DTC'') Participant that has executed a ''Participant Agreement'' with the Distributor with respect to the creation and redemption of Creation Units and Redemption Units and formed a Confidential Account for its benefit in accordance with the terms of the Participant Agreement. For purposes of creations or redemptions, all transactions will be effected through the respective AP's Confidential Account, for the benefit of the AP without

[8] For purposes of describing the holdings of the Fund, ETFs include Portfolio Depository Receipts (as described in Rule 14.11(b)); Index Fund Shares (as described in Rule 14.11(c)); and Managed Fund Shares (as described in Rule 14.11(i)). The ETFs in which the Fund may invest all will be listed and traded on U.S. national securities exchanges.

[9] *See* Rule 22e–4(b)(1)(iv), which prohibits a fund from acquiring any illiquid investment if, immediately after the acquisition, the fund would have invested more than 15% of its net assets in illiquid investments that are assets. *See* Investment Company Act Release No. 32315 (Oct. 13, 2016), 81 FR 82142 (Nov. 18, 2016) (adopting Rule 22e–4 under the 1940 Act). Prior to the adoption of Rule 22e–4 in 2016, the Commission had long-standing guidelines that required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), FN 34. *See also* Investment Company Act Release Nos. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); and 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A).

[10] A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release Nos. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); and 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

[11] 26 U.S.C. 851.

[12] Proposed Rule 14.11(k)(3)(F) defines the term ''Creation Unit'' as a specified minimum number of Managed Portfolio Shares issued by an Investment Company at the request of an Authorized Participant in return for a designated portfolio of instruments and/or cash.

[13] Proposed Rule 14.11(k)(3)(G) defines the term ''Redemption Unit'' as a specified minimum number of Managed Portfolio Shares that may be redeemed to an Investment Company at the request of an Authorized Participant in return for a portfolio of instruments and/or cash.

[14] Proposed Rule 14.11(k)(3)(D) defines the term ''Confidential Account'' as an account owned by an Authorized Participant and held with an AP Representative on behalf of the Authorized Participant. The account will be established and governed by contractual agreement between the AP Representative and the Authorized Participant solely for the purposes of creation and redemption, while keeping confidential the Creation Basket constituents of each series of Managed Portfolio Shares, including from the Authorized Participant. The books and records of the Confidential Account will be maintained by the AP Representative on behalf of the Authorized Participant.

[15] Proposed Rule 14.11(k)(3)(C) defines the term ''AP Representative'' as an unaffiliated broker-dealer with which an Authorized Participant has signed an agreement to establish a Confidential Account for the benefit of such Authorized Participant that will deliver or receive all consideration to or from the Investment Company in a creation or redemption. An AP Representative will be restricted from disclosing the Creation Basket. Each AP shall enter into its own separate Confidential Account agreement (''Confidential Account Agreement'') with an AP Representative.

disclosing the identity of such securities to the AP.

Each AP Representative will be given, before the commencement of trading each Business Day (defined below), the Creation Basket for that day. This information will permit an AP that has established a Confidential Account with an AP Representative, to instruct the AP Representative to buy and sell positions in the portfolio securities to permit creation and redemption of Creation Units and Redemption Units. Shares of the Fund will be issued and redeemed in Creation Units and Redemption Units of 5,000 or more Shares. The Fund will offer and redeem Creation Units and Redemption Units on a continuous basis at the net asset value (the ''NAV'') per share next determined after receipt of an order in proper form. The NAV per share of the Fund will be determined as of the close of regular trading on the Exchange on each day that the Exchange is open (a ''Business Day''). The Fund will sell and redeem Creation Units and Redemption Units only on Business Days. The Adviser anticipates that the initial price of a share will range from $20 to $60, and that the price of a Creation Unit will be at least $100,000.

To keep costs low and permit the Fund to be as fully invested as possible, Shares will be purchased and redeemed in Creation Units and Redemption Units and generally on an in-kind basis. Accordingly, except where the purchase or redemption will include cash under the circumstances described in the Exemptive Application, APs will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and APs redeeming their Shares will receive an in-kind transfer of specified instruments (''Redemption Instruments'') through the AP Representative in their Confidential Account.[16]

Placement of Purchase Orders

The Fund will issue Shares through the Distributor on a continuous basis at NAV. The Exchange represents that the issuance of Shares will operate in a manner similar to that of other ETFs. The Fund will issue Shares only at the NAV per share next determined after an order in proper form is received.

In the case of a creation, the AP would enter an irrevocable creation order with the Fund and direct the AP Representative to purchase the Creation Basket. The AP Representative would then purchase the necessary securities in the Confidential Account. In purchasing the necessary securities, the AP Representative will use methods, such as breaking the transaction into multiple transactions and transacting in multiple marketplaces, to avoid revealing the composition of the Creation Basket. Once the Creation Basket has been acquired in the Confidential Account, the AP Representative would contribute the Creation Basket in-kind to the Fund.

The Distributor will furnish acknowledgements to those placing such orders that the orders have been accepted, but the Distributor may reject any order which is not submitted in proper form, as described in the Fund's prospectus or Statement of Additional Information (''SAI''). The NAV of the Fund is expected to be determined once each Business Day at a time determined by the Trust's Board of Trustees (''Board''), currently anticipated to be as of the close of the regular trading session on the Exchange (ordinarily 4:00 p.m. E.T.) (the ''Valuation Time''). The Fund will establish a cut-off time (''Order Cut-Off Time'') for purchase orders in proper form. Such Order Cut-Off Time will be provided in the Registration Statement. To initiate a purchase of Shares, an AP must submit to the Distributor an irrevocable order to purchase such Shares after the most recent prior Valuation Time. All orders to purchase Creation Units must be received by the Distributor no later than the Order Cut-Off Time in each case on the date such order is placed (''Transmittal Date'') for the AP to receive the NAV per share next determined.[17]

Purchases of Shares will be settled in-kind and/or cash for an amount equal to the applicable NAV per share purchased plus applicable ''Transaction Fees,'' as discussed below. While the Fund will generally receive securities in-kind, the Adviser may determine from time to time that it is not in the Fund's best interests to receive securities in-kind, but rather to receive cash.

Authorized Participant Redemption

The Shares may be redeemed to the Fund in Redemption Unit size or multiples thereof as described below. Redemption orders of Redemption Units must be placed by an AP (''AP Redemption Order''). The Fund will establish in its Registration Statement an Order Cut-Off Time for redemption orders of Redemption Units in proper form. Redemption Units of the Fund will be redeemable at their NAV per share next determined after receipt of a request for redemption by the Trust in the manner specified below before the Order Cut-Off Time. To initiate an AP Redemption Order, an AP must submit to the Distributor an irrevocable order to redeem such Redemption Unit after the most recent prior Valuation Time, but not later than the Order Cut-Off Time.

In the case of a redemption, the AP would enter into an irrevocable redemption order, and then immediately instruct the AP Representative to sell the Creation Basket that it will receive in the redemption. As with the purchase of securities, the AP Representative will use methods, such as breaking the transaction into multiple transactions and transacting in multiple marketplaces, to avoid revealing the composition of the Creation Basket.

Consistent with the provisions of Section 22(e) of the 1940 Act and Rule 22e–2 thereunder, the right to redeem will not be suspended, nor payment upon redemption delayed, except for: (1) Any period during which the Exchange is closed other than customary weekend and holiday closings, (2) any period during which trading on the Exchange is restricted, (3) any period during which an emergency exists as a result of which disposal by the Fund of securities owned by it is not reasonably practicable or it is not reasonably practicable for the Fund to determine its NAV, and (4) for such other periods as the Commission may by order permit for the protection of shareholders.

Redemptions will occur primarily in-kind, although redemption payments may also be made partly or wholly in cash.[18] The Participant Agreement signed by each AP will require establishment of a Confidential Account to receive distributions of securities in-kind upon redemption. Each AP will be required to open a Confidential Account with an AP Representative in order to facilitate orderly processing of redemptions. While the Fund will generally distribute securities in-kind, the Adviser may determine from time to time that it is not in the Fund's best interests to distribute securities in-kind, but rather to sell securities and/or distribute cash. For example, the Adviser may distribute cash to facilitate orderly portfolio management in

[16] The Fund must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the 1933 Act.

[17] To the extent that the Fund allows creations or redemptions to be conducted in cash, such transactions will be effected in the same manner for all APs.

[18] The value of any positions not susceptible to in-kind settlement may be paid in cash.

connection with rebalancing or transitioning a portfolio in line with its investment objective, or if there is substantially more creation than redemption activity during the period immediately preceding a redemption request, or as necessary or appropriate in accordance with applicable laws and regulations.[19]

Net Asset Value

The NAV per share of the Fund will be computed by dividing the value of the net assets of the Fund (*i.e.,* the value of its total assets less total liabilities) by the total number of Shares of the Fund outstanding, rounded to the nearest cent. Expenses and fees, including, without limitation, the management, administration and distribution fees, will be accrued daily and taken into account for purposes of determining NAV. Interest and investment income on the Trust's assets accrue daily and will be included in the Fund's total assets. The NAV per share for the Fund will be calculated by the Fund's administrator and determined as of the close of the regular trading session on the Exchange (ordinarily 4:00 p.m., E.T.) on each day that the Exchange is open.

Shares of U.S. exchange-listed equity securities, including common stocks, preferred securities, securities of other investment companies and of REITs, and warrants and rights, as well as ETFs, exchange-listed ADRs, and U.S. exchange-listed futures will be valued at market value, which will generally be determined using the last reported official closing or last trading price on the exchange or market on which the securities are primarily traded at the time of valuation.

Availability of Information

The Fund's website (*www.leggmason.com*), which will be publicly available prior to the listing and trading of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's website will include additional quantitative information updated on a daily basis, including, for the Fund, (1) the prior Business Day's NAV, market closing price or mid-point of the bid/ask spread at the time of calculation of such NAV (the ''Bid/Ask Price''),[20] and a calculation of the premium and discount of the market closing price or Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. The website and information will be publicly available at no charge.

The Trust's SAI and the Fund's shareholder reports will be available free upon request from the Trust. These documents and forms may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.*

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the VIIV, as defined in proposed Rule 14.11(k)(3)(B) and as described further below, will be widely disseminated by the Reporting Authority[21] and/or one or more major market data vendors in one-second intervals during Regular Trading Hours.

Dissemination of the VIIV

With respect to trading of the Shares, the ability of market participants to buy and sell Shares at prices near the VIIV is dependent upon their assessment that the VIIV is a reliable, indicative real-time value for the Fund's underlying holdings. Market participants are expected to accept the VIIV as a reliable, indicative real-time value because (1) the VIIV will be calculated and disseminated based on the Fund's actual portfolio holdings, (2) the securities in which the Fund plans to invest are generally highly liquid and actively traded and therefore generally have accurate real time pricing available, and (3) market participants will have a daily opportunity to evaluate whether the VIIV at or near the close of trading is indeed predictive of the actual NAV. The VIIV for the Fund will be disseminated by the Reporting Authority and/or one or more major market data vendors in one-second intervals during Regular Trading Hours. If the Adviser determines that a portfolio security does not have a readily available market quotation, that fact along with the identity and weighting of that security in a Fund's VIIV calculation will be publicly disclosed on the Fund's website.[22]

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, including whether unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to proposed Rule 14.11(k)(4)(B)(iii)(a) and (b) in the Proposal, which set forth circumstances under which trading in the Shares of the Fund will be halted.

Specifically, Proposed Rule 14.11(k)(4)(B)(iii)(a) provides that the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable. These may include: (i) The extent to

[19] To the extent that the Fund allows creations or redemptions to be conducted in cash, such transactions will be effected in the same manner for all APs.

[20] The Bid/Ask Price of the Fund will be determined using the mid-point between the current NBB and NBO as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[21] Proposed Rule 14.11(k)(3)(H) defines the term ''Reporting Authority'' in respect of a particular series of Managed Portfolio Shares means the Exchange, the exchange that lists a particular series of Managed Portfolio Shares (if the Exchange is trading such series pursuant to unlisted trading privileges), an institution, or a reporting service designated by the Investment Company as the official source for calculating and reporting information relating to such series, including, the net asset value, the Verified Intraday Indicative Value, or other information relating to the issuance, redemption or trading of Managed Portfolio Shares. A series of Managed Portfolio Shares may have more than one Reporting Authority, each having different functions.

[22] The Exchange notes that this is consistent with the Exemptive Application, which provides the following: ''Applicants acknowledge that, if the bid/ask spread on a security is significant, the mid-point may not accurately reflect the price at which the security could be bought or sold, which may cause the VIIV to deviate from the actual purchase or sale price of a Fund's underlying portfolio securities. In light of this possibility, the Adviser will monitor the bid and ask quotations for any portfolio security that stops trading and, if the Adviser determines pursuant to Board-approved procedures that the current quotations for a portfolio security are no longer reliable for purposes of calculating the VIIV, which could be the situation when, for example, an Exchange institutes an extended trading halt in a portfolio security, that fact, along with the identity and weighting of that security in the Fund's VIIV calculation, will be publicly disclosed on the Fund's website. Applicants believe that this mix of information will permit market participants to calculate the effect of that security on the VIIV calculation, determine their own fair value of the disclosed portfolio security, and better judge the accuracy of that day's VIIV for the Fund. Nonetheless, the VIIV will continue to be calculated using the mid-point of the most recent bid and ask quotations. *See* Exemptive Application at 23.

which trading is not occurring in the securities and/or the financial instruments composing the portfolio; or (ii) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. The Adviser has represented to the Exchange that it will provide the Exchange with prompt notification upon the existence of any such condition or set of conditions.

Proposed Rule 14.11(k)(4)(B)(iii)(b) provides that, if the Exchange becomes aware that: (i) The Verified Intraday Indicative Value of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the net asset value with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (iii) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (iv) such holdings are not made available to all market participants at the same time, (except as otherwise permitted under the currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares), it will halt trading in such series until such time as the Verified Intraday Indicative Value, the net asset value, or the holdings are available, as required.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the Exchange only during Regular Trading Hours as provided in proposed Rule 14.11(k)(2)(B). As provided in BZX Rule 11.11(a), the minimum price variation for quoting and entry of orders in securities traded on the Exchange is $0.01, with the exception of securities that are priced less than $1.00, for which the minimum price variation for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under Rule 14.11(k) as well as all terms in the Exemptive Order. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 under the Act.[23] A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares of the Fund that the NAV per share of the Fund will be calculated daily and will be made available to all market participants at the same time.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Managed Portfolio Shares. As part of these surveillance procedures and consistent with proposed Rule 14.11(k)(2)(C), the Adviser will upon request make available to the Exchange and/or FINRA, on behalf of the Exchange, the daily portfolio holdings of the Fund. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, underlying equity securities and U.S. exchange-listed futures with other markets and other entities that are members of the Intermarket Surveillance Group (''ISG''), and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading such securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, underlying equity securities and U.S. exchange-listed futures from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[24]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular (''Circular'') of the special characteristics and risks associated with trading the Shares. Specifically, the Circular will discuss the following: (1) The procedures for purchases and redemptions of Shares; (2) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (3) how information regarding the VIIV is disseminated; (4) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) trading information; and (6) that the portfolio holdings will be disclosed within at least 60 days following the end of every calendar quarter.

In addition, the Circular will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Circular will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Circular will also disclose that the NAV for the Shares will be calculated after 4:00 p.m., E.T. each trading day.

2. Statutory Basis

The Exchange believes that this proposal is consistent with Section 6(b) of the Act[25] in general and Section 6(b)(5) of the Act[26] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that, to the extent that the Proposal and, thus proposed Rule 14.11(k), is approved by the Commission, this proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Fund would meet each of the rules relating to listing and trading of Managed Portfolio Shares and, to the extent that the Fund is not in compliance with such rules, the Exchange would either prevent the Fund from listing and trading if it hadn't started trading on the Exchange or would commence delisting procedures under Exchange Rule 14.12. More specifically, the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 14.12 for, the Fund under any of the following

[23] *See* 17 CFR 240.10A–3.

[24] For a list of the current members of ISG, *see www.isgportal.org.*

[25] 15 U.S.C. 78f.

[26] 15 U.S.C. 78f(b)(5).

circumstances: (a) If, following the initial twelve-month period after commencement of trading on the Exchange, there are fewer than 50 beneficial holders of the Fund for 30 or more consecutive trading days; (b) if the Exchange has halted trading in a Fund because the VIIV is interrupted pursuant to Rule 14.11(k)(4)(B)(iii)(b) and such interruption persists past the trading day in which it occurred or is no longer available; (c) if the Exchange has halted trading in a Fund because the net asset value with respect to such Fund is not disseminated to all market participants at the same time, the holdings of such Fund are not made available on at least a quarterly basis as required under the 1940 Act, or such holdings are not made available to all market participants at the same time pursuant to Rule 14.11(k)(4)(B)(iii)(b) and such issue persists past the trading day in which it occurred; (d) if the Exchange has halted trading in the Fund pursuant to Rule 14.11(k)(4)(B)(iii)(a) and such issue persists past the trading day in which it occurred; (e) if the Fund has failed to file any filings required by the Commission or if the Exchange is aware that the Fund is not in compliance with the conditions of any currently applicable exemptive order or no-action relief granted by the Commission or Commission staff with respect to the Fund; (f) if any of the continued listing requirements set forth in Rule 14.11(k) are not continuously maintained; (g) if any of the applicable Continued Listing Representations, as defined in Rule 14.11(a), for the Fund are not continuously met; or (h) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

The Adviser is not registered as a broker-dealer or affiliated with a broker-dealer. The Sub-Adviser is not registered as a broker-dealer, but is affiliated with a broker-dealer and has implemented and will maintain a ''fire wall'' with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund's portfolio and Creation Basket.

In the event (a) the Adviser or Sub-Adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio and Creation Basket, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio and Creation Basket.

Further, proposed Rule 14.11(k)(2)(E) requires that any person or entity, including an AP Representative, custodian, Reporting Authority, distributor, or administrator, who has access to information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket.

The Exchange further believes that the proposed rules are designed to prevent fraudulent and manipulative acts and practices related to the listing and trading of Managed Portfolio Shares because they provide meaningful requirements about both the data that will be made publicly available about the Shares as well as the information that will only be available to certain parties and the controls on such information. Specifically, the Exchange believes that the requirements related to information protection enumerated under proposed Rule 14.11(k)(2)(E) will act as a strong safeguard against misuse and improper dissemination of information related to the Fund's portfolio composition or changes thereto or the Creation Basket. The requirement that any person or entity implement procedures to prevent the use and dissemination of material nonpublic information regarding the portfolio or Creation Basket will act to prevent any individual or entity from sharing such information externally and the internal ''fire wall'' requirements applicable where an entity is a registered broker-dealer or affiliated with a broker-dealer will act to make sure that no entity will be able to misuse the data for their own purposes. As such, the Exchange believes that this proposal is designed to prevent fraudulent and manipulative acts and practices.

The Exchange further believes that the proposal is designed to prevent fraudulent and manipulative acts and practices related to the listing and trading of Managed Portfolio Shares and to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange would halt trading under certain circumstances under which trading in the Shares may be inadvisable. Specifically, trading in the Shares will be subject to proposed Rule 14.11(k)(4)(B)(iii)(a), which provides that the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable. These may include: (i) The extent to which trading is not occurring in the securities and/or the financial instruments composing the portfolio; or (ii) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[27] The Adviser has represented to the Exchange that it will provide the Exchange with prompt notification upon the existence of any such condition or set of conditions. Trading in the Shares will also be subject to proposed Rule 14.11(k)(4)(B)(iii)(b), which provides that if the Exchange becomes aware that: (i) The Verified Intraday Indicative Value of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the net asset value with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (iii) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (iv) such holdings are not made available to all market participants at the same time, (except as otherwise permitted under

[27] The Exemptive Application provides that the Investment Company or their agent will request that the Exchange halt trading in the applicable series of Managed Portfolio Shares where: (i) The intraday indicative values calculated by the pricing verification agent(s) differ by more than 25 basis points for 60 seconds in connection with pricing of the Verified Intraday Indicative Value; or (ii) holdings representing 10% or more of a series of Managed Portfolio Shares' portfolio have become subject to a trading halt or otherwise do not have readily available market quotations. Any such requests will be one of many factors considered in order to determine whether to halt trading in a series of Managed Portfolio Shares and the Exchange retains sole discretion in determining whether trading should be halted. As provided in the Application and Notice, each series of Managed Portfolio Shares would employ a pricing verification agent to continuously compare two intraday indicative values during Regular Trading Hours in order to ensure the accuracy of the Verified Intraday Indicative Value.

the currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares), it will halt trading in such series until such time as the Verified Intraday Indicative Value, the net asset value, or the holdings are available, as required.

With respect to the proposed listing and trading of Shares of the Fund, the Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in Rule 14.11(k). The Fund will invest primarily in equity securities of large capitalization companies, but may also make limited investments in mid-capitalization companies. While most investments will be in U.S. companies, the fund may also invest in ADRs and U.S.-listed shares of foreign companies. The team considers a number of variables such as business fundamentals, valuation, free cash flow generation, earnings growth, management quality and competitive positioning. The Fund will invest in a diversified portfolio typically consisting of the securities of 30 to 40 issuers.

In addition, the Fund may also invest in common stocks, preferred securities, and warrants and rights of U.S. exchange-listed companies, U.S. exchange traded notes, U.S. exchange listed REITs, U.S. ETFs, U.S. exchange-listed ADRs, U.S. exchange-listed equity futures contracts, and U.S. exchange-listed equity index futures contracts. The Fund may also hold cash without limitation, and may invest in short-term U.S. Treasury securities, government money market funds and may enter into repurchase agreements for cash management or defensive investment purposes.

The Exchange notes that the Fund's holdings will meet the generic listing standards applicable to series of Managed Fund Shares under Rule 14.11(i)(4)(C). All equity securities in which the Fund will invest will be listed and traded on U.S. national securities exchanges. Price information for the U.S. exchange-listed equity securities held by the Fund will be available through major market data vendors or securities exchanges listing and trading such securities. Price information for any other U.S. exchange-listed instruments held by the Fund will be available through major market data vendors or exchanges listing and trading such instruments. The Fund's investments will be consistent with its investment objective and will not be used to enhance leverage. The Fund will not invest in non-U.S. exchange-listed securities. All futures held by the Fund will be listed on U.S. futures exchanges. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, underlying equity securities and U.S. exchange-listed futures with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading such securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, underlying equity securities, and U.S. exchange-listed futures from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

With respect to trading of the Shares, the ability of market participants to buy and sell Shares at prices near the VIIV is dependent upon their assessment that the VIIV is a reliable, indicative real-time value for the Fund's underlying holdings. Market participants are expected to accept the VIIV as a reliable, indicative real-time value because (1) the VIIV will be calculated and disseminated based on the Fund's actual portfolio holdings, (2) the securities in which the Fund plans to invest are generally highly liquid and actively traded and therefore generally have accurate real time pricing available, and (3) market participants will have a daily opportunity to evaluate whether the VIIV at or near the close of trading is indeed predictive of the actual NAV.[28]

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation that the NAV per share of the Fund will be calculated daily and that the NAV will be made available to all market participants at the same time. Investors can also obtain the Fund's SAI, shareholder reports, Form N–CEN, Form N–CSR, and Form N–PORT. The Fund's SAI and shareholder reports will be available free upon request from the applicable fund, and those documents and the Form N–CSR and Form N–PORT may be viewed on-screen or downloaded from the Commission's website. In addition, with respect to the Fund, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Quotation and last sale information for the Shares will be available via the CTA high-speed line. Information regarding the VIIV will be widely disseminated every second throughout Regular Trading Hours by the Reporting Authority and/or one or more major market data vendors. The website for the Fund will include a prospectus for the Fund that may be downloaded, and additional data relating to NAV and other applicable quantitative information, updated on a daily basis.

Moreover, prior to the commencement of trading, the Exchange will inform its members in a Circular of the special characteristics and risks associated with trading the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18 or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to proposed Rule 14.11(k)(4)(B)(iii)(a) and (b), which set forth circumstances under which Shares of the Fund will be halted.

In addition, as noted above, investors will have ready access to the VIIV, and quotation and last sale information for the Shares. The Shares will conform to the initial and continued listing criteria under proposed Rule 14.11(k). The Fund's holdings will be limited to and consistent with what is permissible under the Exemptive Order and described herein. The Fund's investments will be consistent with its investment objective and will not be used to enhance leverage. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged (*e.g.,* 2X, –2X, 3X or –3X) ETFs.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the VIIV and quotation and last sale information for the Shares.

For the above reasons, the Exchange believes that the proposed rule change

[28] The statements in the Statutory Basis section of this filing relating to pricing efficiency, arbitrage, and activities of market participants, including market makers and APs, are based on statements in the Exemptive Order, representations by Precidian, and review by the Exchange.

is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an actively-managed exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be 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–CboeBZX–2019–102 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2019–102. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBZX–2019–102 and should be submitted on or before January 7, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27089 Filed 12–16–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87716; File No. SR–NASDAQ–2019–089]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend Rule 5815 To Preclude Stay During Hearing Panel Review of Staff Delisting Determinations in Certain Circumstances

December 11, 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 27, 2019, The Nasdaq Stock Market LLC (''Nasdaq'' or the ''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 Exchange Rule 5815 regarding review of Nasdaq Staff (''Staff'') Delisting Determinations by Hearings Panels. The proposed change would preclude the stay of a Staff Delisting Determination during the review period in three specified circumstances outlined below.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq administers a series of rules that govern the initial and continued listing qualifications required of companies listed on the Exchange.[3] Newly listing companies must demonstrate compliance with all initial listing requirements before they are listed. Once listed, Nasdaq staff (''Staff'') monitors each company to ensure

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[29] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Nasdaq Rules 5300, 5400, and 5500 Series, outlining requirements for companies seeking to conduct an initial listing on Nasdaq Global Select Market, Nasdaq Global Market and Nasdaq Capital Market, respectively, as well as requirements for continued listing once an initial listing has been completed.

continued compliance with the Listing Rules. In the event that a company fails to maintain compliance with the Listing Rules, Staff will issue a notification informing the company of the deficiency. Where allowed by Nasdaq's rules, Staff's notification may provide for a cure or compliance period, allow the company to submit a plan of compliance for Staff to review, or state the Staff's determination that the company should be delisted from the Exchange (a ''Delisting Determination'').[4] In instances where the company is allowed a cure or compliance period, Staff will send a Delisting Determination at the end of the cure or compliance period if the company has not regained compliance; in instances where the company is allowed to submit a plan of compliance, Staff will send a Delisting Determination if Staff does not accept the company's plan of compliance or if the company does not timely complete its plan and regain compliance. The Delisting Determination will inform the company of the factual basis for the Staff's determination, provide instructions regarding obligations to disclose the Delisting Determination to the public, and inform the company of its right for review of the Delisting Determination by a Hearings Panel.

Nasdaq Rule 5815(a) allows a company to request a written or oral hearing before a Hearings Panel to review a Delisting Determination, public reprimand letter or denial of a listing application. Under the existing rules, this request for a hearing generally will stay the suspension and delisting action pending the issuance of a written decision from the Hearings Panel.[5]

The Exchange proposes to amend Rule 5815 to remove the stay provision in certain situations so that a company's securities will be suspended from trading on Nasdaq during the pendency of the Hearings Panel's review. Specifically, removal of the stay provision will apply to companies that have received a Delisting Determination: In the case of proposed 5815 (a)(1)(B)(ii)(a), following the completion of a business combination with an operating company that fails to satisfy the requirements of Nasdaq Rule IM–5101–2; in the case of proposed 5815 (a)(1)(B)(ii)(b), following a business combination with a non-Nasdaq entity that results in a change of control under Rule 5110(a) where the initial listing application has yet to be approved; and in the case of proposed 5815 (a)(1)(B)(ii)(c), in connection with a company that has declared bankruptcy or announced liquidation pursuant to rule 5110(b). After considering the record in the matter, including an oral hearing if elected by the company, the Hearings Panel can reinstate the company and allow trading to continue on Nasdaq.[6]

Companies Whose Business Plan Is To Complete One or More Acquisitions and Business Combinations With non-Nasdaq Entities Resulting in a Change of Control

Under Listing Rule IM–5101–02, Nasdaq will permit the listing of a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time. Such a company is required to keep the proceeds of its initial public offering in an escrow account and, until the company has completed one or more business combinations having an aggregate fair market value of at least 80% of the value of the escrow account, must meet the requirements for initial listing following each business combination.[7] Nasdaq Staff may, after having reviewed such a company, determine that the combined company does not meet the initial listing requirements and, in such a case, will issue a Delisting Determination.

Similarly, a Nasdaq-listed company must apply for initial listing on the Exchange in connection with a transaction whereby the company combines with a non-Nasdaq entity, resulting in a change of control of the company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing.[8] If the company's application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Delisting Determination.[9]

In each case, under existing Nasdaq rules, if a company requests review by a Hearings Panel, the Delisting Determination is stayed during the pendency of such review and the company's shares will continue to trade on the Exchange. The proposed rule change will modify the rules so that suspension of the company's shares is not stayed in connection with a Delisting Determination for the following reasons.

For both categories of companies outlined above, the Exchange believes immediate suspension is appropriate and necessary in order to prevent a company from listing shares on the Exchange despite it having never established compliance with the Exchange's initial listing requirements. In each case, the company that must satisfy the initial listing requirements is effectively a new business entity and, as a result, is required by Nasdaq's rules to demonstrate compliance with the Exchange's initial listing standards. To allow such companies to trade on the Exchange without first demonstrating compliance with the initial listing standards misleads the investing public by giving the appearance that the company has met the standards imposed by Nasdaq. Moreover, the company could then use the benefits of its Nasdaq listing and trading to achieve compliance with the initial listing requirements it does not satisfy.[10]

Nasdaq believes that adopting this rule change will align the process for listing a company following a business combination (with an acquisition

[4] *See* Nasdaq Rule 5810, listing the categories of deficiency notifications, information contained in deficiency notifications and Delisting Determinations, company disclosure obligations upon being informed of a deficiency or delisting, and types of deficiencies and notifications.

[5] *See* Nasdaq Rule 5815(a)(1). In the case of a Delisting Determination related to the requirements to timely file periodic reports with the Commission, the delisting action is only stayed for 15 calendar days unless the company specifically requests and the Hearings Panel grants a further stay.

[6] The proposed rule change would suspend the security from trading under proposed Rule 5815(a)(1)(B)(ii), rather than halt trading in the security pursuant to Nasdaq's authority under Rule 4120(a)(5).

[7] *See* Nasdaq Rule IM–5101–2.

[8] *See* Nasdaq Rule 5110(a).

[9] Nasdaq Staff provides written notice to a company if it determines that a transaction, as then proposed, will result in a change of control pursuant to Listing Rule 5110(a). In this notification, Nasdaq Staff advises the company that the combined entity will be required to submit an initial listing application and listing agreement prior to consummating the transaction, satisfy all initial inclusion criteria immediately upon consummation of the transaction and pay all required fees. Upon receipt of this notification, the company may appeal Staff's determination that Listing Rule 5110(a) is applicable to the transaction. As such, a company would only be subject to suspension under the proposed rule if it does not contest the applicability of Rule 5110(a), or if the Panel has already concluded that the rule is applicable, and if the company does not satisfy the initial inclusion requirements upon consummation of the transaction. *See* Nasdaq FAQ 413, available at *https://listingcenter.nasdaq.com/Material_Search.aspx?materials=413&mcd=LQ&criteria=2.*

[10] In 2011, the Securities and Exchange Commission noted that ''. . . the listing standards provide the means for an exchange to screen issuers that seek to become listed, and to provide listed status only to those that are bona fide companies with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market and assuring compliance with its listing standards.'' Securities Exchange Act Release No. 65708 (November 8, 2011), 76 FR 70799 at 70802 (November 15, 2011) (approving SR–NASDAQ–2011–073).

company or following a business combination resulting in a change of control) with the process for other companies that must meet the initial listing requirements before they are allowed to list and trade on Nasdaq.

Bankruptcy

Under Nasdaq Rule 5110(b), Staff may use its discretionary authority to delist a company's listing in the event it has filed for protection under the federal bankruptcy laws, or comparable foreign laws, or has announced that liquidation has been authorized by its board of directors, even if the company's securities otherwise meet all requirements for continued listing on the Exchange.[11] The proposed rule change will modify the rules so that suspension in trading in the company's shares is not stayed when a company has requested an appeal after received a Delisting Determination for these reasons.

Nasdaq believes that it is appropriate to eliminate the stay during the pendency of the Hearings Panel's review where Nasdaq Staff has determined to delist a company in bankruptcy proceedings. In these cases, the company has acknowledged its serious financial straits and, in Nasdaq's experience, there is generally no residual equity for the current stockholders. Continued trading of the company's shares during the duration of the Hearings Panel's review is inadvisable in light of these facts and could create investor confusion about the company's ability to satisfy Nasdaq's listing requirements.[12] Instead, Nasdaq believes it would better enhance investor protection if the company's shares were suspended during the review process.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[13] in general, and furthers the objectives of Section 6(b)(5) of the Act,[14] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by preventing companies that have not demonstrated compliance with the Exchange's initial listing standards, and companies that have sought bankruptcy protection, from trading on the Exchange during the pendency of the Hearings Panel's review of a Delisting Determination. Nasdaq believes that allowing such companies to continue trading on the Exchange is confusing to investors and raises investor protection concerns.

In the case of companies whose business plan is to complete one or more acquisitions and companies that complete a business combinations with a non-Nasdaq entity resulting in a change in control, allowing continued trading on the Exchange would permit companies that are effectively new entities to be listed without having completed the standard vetting process conducted by the Exchange of all new listed companies and demonstrating compliance with all initial listing requirements. Likewise, due to the uncertainty of the outcome, and the limited information provided during bankruptcy proceedings, continued listing of a company's shares on the Exchange during such proceedings exposes investors to increased risk. The proposed rule will protect investors by preventing continued trading in such company's securities until an independent Hearings Panel reviews the Delisting Determination and determines that continued trading on Nasdaq is appropriate.

The proposed rule change is also consistent with Section 6(b)(7) of the Act in that it provides a fair procedure for the prohibition or limitation by the Exchange of any person with respect to access to services offered. Under the proposed rule change, companies whose business plan is to complete one or more acquisitions or a business combination with a non-Nasdaq entity resulting in a change of control would be treated the same as any other company that is applying for listing on The Nasdaq Stock Market. No company may trade on The Nasdaq Stock Market until it demonstrates compliance with the listings qualifications rules of the Exchange. This standard is applied to new companies and companies that previously traded on the Exchange but have now undergone a change in business status that requires demonstration of compliance with the Exchange's listing rules.

In the case of a company undergoing bankruptcy, the proposed rule change is fair because the company's shares will be suspended only for the duration of an independent Hearing Panel's consideration of the company's appeal. The proposed rule would not immediately delist a company's shares. A company subject to a Delisting Determination pursuant to bankruptcy would be given an opportunity to present its case to an impartial Hearings Panel. Once the Hearings Panel has issued a written decision, the company's shares may then resume trading if the Hearings Panel deems it appropriate. Fairness requirements do not mandate continued trading, only the ability to have an impartial Hearings Panel review the Staff's Delisting Determination. Limitations on trading during the pendency of the Hearings Panel's review is appropriate in light of the need to protect prospective investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule would be applied equally to all listed companies whose business plan is to complete one or more acquisitions, that complete a business combinations with a non-Nasdaq entity resulting in a change in control, or that seek bankruptcy protection. In addition, the proposed rule change will align the process for listing a new company following a business combination with an acquisition company or following a business combination resulting in a change of control with the process for other newly listing companies, which must meet the initial listing requirements prior to being listed.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine

[11] Nasdaq Rule 5110(b) also requires a company emerging from bankruptcy protection to demonstrate compliance with the Exchange's initial listing standards in order to be listed on the Exchange.

[12] Rule 5110(b) requires a company emerging from bankruptcy protection to demonstrate compliance with the Exchange's initial listing standards in order to continue to be listed on the Exchange. Of 37 Delisting Determinations related to bankruptcy between 2016 and 2018, only one company remained listed and demonstrated compliance with the initial listing requirements upon emerging from bankruptcy.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2019–089 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2019–089. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2019–089, and should be submitted on or before January 7, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27080 Filed 12–16–19; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Class Waiver of the Nonmanufacturer Rule

AGENCY: U.S. Small Business Administration.

ACTION: Notice of intent to waive the Nonmanufacturer Rule for commercially available off-the-shelf laptop and tablet computers under NAICS code 334111/PSC 7435.

SUMMARY: The U.S. Small Business Administration (SBA) is considering granting a request for a class waiver of the Nonmanufacturer Rule (NMR) for commercially available off-the-shelf laptop and tablet computers under North American Industry Classification System (NAICS) code 334111 and Product Service Code (PSC 7435). This U.S. industry comprises establishments primarily engaged in manufacturing commercially available off-the-shelf laptop and tablet computers. According to the request, no small business manufacturers supply this product to the Federal government. If granted, the class waiver would allow otherwise qualified regular dealers to supply the waived item(s), regardless of the business size of the manufacturer, on a Federal contract set aside for small business, service-disabled veteran-owned small business (SDVOSB), women-owned small business (WOSB), economically disadvantaged women-owned small business (EDWOSB), historically underutilized business zones (HUBZone), or participants in the SBA's 8(a) Business Development (BD) program.

DATES: Comments and source information must be submitted by January 16, 2020.

ADDRESSES: You may submit comments and source information via the Federal Rulemaking Portal at *https://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *https://www.regulations.gov,* please submit the information to Carol Hulme, Program Analyst, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW, 8th Floor, Washington, DC 20416. Highlight the information that you consider to be CBI, and explain why you believe this information should be held confidential. SBA will review the information and make a final determination as to whether the information will be published.

FOR FURTHER INFORMATION CONTACT: Carol Hulme, Program Analyst, by telephone at 202–205–6347; or by email at *Carol-Ann.Hulme@sba.gov.*

SUPPLEMENTARY INFORMATION: Sections 8(a)(17) and 46 of the Small Business Act (Act), 15 U.S.C. 637(a)(17) and 657s, and SBA's implementing regulations require that recipients of Federal supply contracts (except those valued between $3,500 and $250,000) set aside for small business, SDVOSB, WOSB, EDWOSB, HUBZone, or BD program participants, provide the product of a small business manufacturer or processor if the recipient is not the actual manufacturer or processor of the product. This requirement is commonly referred to as the Nonmanufacturer Rule (NMR). 13 CFR 121.406(b). Sections 8(a)(17)(B)(iv)(II) and 46(a)(4)(B) of the Act authorize SBA to waive the NMR for a ''class of products'' for which there are no small business manufacturers or processors available to participate in the Federal market.

As implemented in SBA's regulations at 13 CFR 121.1202(c), in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or been awarded a contract to supply the class of products within the last 24 months.

The SBA defines ''class of products'' based on a combination of (1) the six-digit NAICS code, (2) the four-digit PSC, and (3) a description of the class of products.

The SBA is currently processing a request to waive the NMR for commercially available off-the-shelf laptop and tablet computers under NAICS code 334111 and PSC 7435. Table 1 below identifies manufacturers of these products that SBA is aware of:

TABLE 1

Manufacturer	Product
Acer America Corp	Laptops.
American Sunrex Corp	Laptops.
Apple, Inc	Laptops.
Asus USA	Laptops.
Clevo	Laptops.
Compal Electronics	Laptops.
Dell Technologies Inc	Laptops.
Elitegroup Computer Systems.	Laptops.
Eurocom Corporation	Laptops.

TABLE 1—Continued

Manufacturer	Product
Flextronics Corporation d/b/a Flex.	Laptops.
Fujitsu America Inc	Laptops.
Gigabyte Technology	Laptops.
Google, LLC	Laptops.
Hasee Computer Co., Ltd	Laptops.
Hewlett-Packard Enterprise Co.	Laptops.
Hon Hai Precision Industry Co., Ltd. d/b/a Foxconn Technology Group.	Laptops.
International Business Machines d/b/a IBM.	Laptops.
Inventec Corp	Laptops.
Lenovo Group Ltd	Laptops.
LG Electronics, Inc	Laptops.
Microsoft Corp	Laptops.
NEC Corporation of America	Laptops.
Panasonic Corp	Laptops.
Pegatron Corp	Laptops.
Positivo Tecnologia SA fka Positivo Informatica SA.	Laptops.
Quantra Computer Inc	Laptops.
Samsung Electronics Co. Ltd	Laptops.
Shenzhen Daystar Connect Technology Co. Ltd.	Laptops.
Sony Corp	Laptops.
Toshiba International Corporation.	Laptops.
TriGem Computer Inc	Laptops.
Wistron Corp	Laptops.
Apple Inc	Tablets.
Asus USA	Tablets.
Dell Technologies Inc	Tablets.
Fujitsu America Inc	Tablets.
Google LLC	Tablets.
Hewlett-Packard Enterprise Co.	Tablets.
HTC Corp	Tablets.
Huawei Investment & Holding Co. Ltd.	Tablets.
Lenovo Group Ltd	Tablets.
LG Electronics Inc	Tablets.
Microsoft Corp	Tablets.
Motorola Solutions Inc	Tablets.
Micro-Star International Co. Ltd.	Tablets.
NEC Corporation of America	Tablets.
Nokia Oyj	Tablets.
Nvidia Corporation	Tablets.
Panasonic Corporation	Tablets.
Pegatron Corp	Tablets.
Quanta Computer Inc	Tablets.
Samsung Electronics Co. Ltd	Tablets.
Sony Corp	Tablets.
Toshiba International Corp	Tablets.
Trimble, Inc	Tablets.
Xiaomi United States	Tablets

The SBA invites the public to comment on this pending request to waive the NMR for commercially available off-the-shelf laptop and tablet computers under NAICS code 334111 and PSC 7435. For purposes of this waiver SBA will be using the Federal Acquisition Regulation definition for COTS. (FAR) 2.101 (48 U.S.C. 2.101). SBA has already adopted the FAR definition for COTS for purposes of the government contracting programs. 13. CFR 125.1. The FAR definition for COTS states the following:

(1) Means any item or supply (including construction material) that is—(i) A commercial item (as defined in paragraph (1) of the definition in this section); (ii) Sold in substantial quantities in the commercial marketplace; and (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and (2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Under the proposed language of this waiver SBA would be granting a class waiver only for laptops and computers procured by the government that meet that definition. Specialty laptops and computers that are modified to meet demands of the Federal Government would not be included in the waiver. SBA is requesting comment on the specific nature of this waiver, specifically the SBA's use of the COTS language in a class waiver and whether the proposed language of the waiver is appropriate given the commercial and Government markets for computers and laptops. The public may comment or provide source information on any small business manufacturers of this class of products that are available to participate in the Federal market. The public comment period will run for 30 days after the date of publication in the **Federal Register**.

More information on the NMR and class waivers can be found at *https://www.sba.gov/contracting/contracting-officials/non-manufacturer-rule/non-manufacturer-waivers.*

David Loines,

Director, Office of Government Contracting.

[FR Doc. 2019–27119 Filed 12–16–19; 8:45 am]

BILLING CODE 8026–03–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of amendments.

SUMMARY: Effective August 23, 2018, the U.S. Trade Representative imposed additional duties on goods of China with an annual trade value of approximately $16 billion as part of the action in the Section 301 investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation. The U.S. Trade Representative's determination included a decision to establish a product exclusion process. The U.S. Trade Representative initiated the exclusion process in September 2018, and stakeholders have submitted requests for the exclusion of specific products. In July, September and October 2019, the U.S. Trade Representative granted exclusion requests. This notice makes amendments to certain notes in the Harmonized Tariff Schedule of the United States (HTSUS). The U.S. Trade Representative will continue to issue decisions as necessary.

DATES: The amendments announced in this notice are retroactive to the date the original exclusions were published and do not extend the period for the original exclusions. U.S. Customs and Border Protection will issue instructions on entry guidance and implementation.

FOR FURTHER INFORMATION CONTACT: For general questions about this notice, contact Assistant General Counsel Philip Butler or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusions identified in the Annex to this notice, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

For background on the proceedings in this investigation, please see the prior notices issued in the investigation, including 82 FR 40213 (August 23, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), 83 FR 40823 (August 16, 2018), 83 FR 47236 (September 18, 2018), 83 FR 47974 (September 21, 2018), 83 FR 65198 (December 19, 2018), 84 FR 7966 (March 5, 2019), 84 FR 20459 (May 9, 2019), 84 FR 29576 (June 24, 2019), 84 FR 37381 (July 31, 2019), 84 FR 49600 (September 20, 2019), and 84 FR 52553 (October 2, 2019).

Effective August 23, 2018, the U.S. Trade Representative imposed additional 25 percent duties on goods of China classified in 279 8-digit subheadings of the HTSUS, with an approximate annual trade value of $16 billion. *See* 83 FR 40823. The U.S. Trade Representative's determination included a decision to establish a process by which U.S. stakeholders can request exclusion of particular products classified within an 8-digit HTSUS subheading covered by the $16 billion action from the additional duties. The U.S. Trade Representative issued a notice setting out the process for the product exclusions, and opened a public docket. *See* 83 FR 47236 (the September 18 notice).

Under the September 18 notice, requests for exclusion had to identify the product subject to the request in terms of the physical characteristics that distinguish it from other products within the relevant 8-digit subheading covered by the $16 billion action. Requestors also had to provide the 10-digit subheading of the HTSUS most applicable to the particular product requested for exclusion, and could submit information on the ability of U.S. Customs and Border Protection to administer the requested exclusion. Requestors were asked to provide the quantity and value of the Chinese-origin product that the requestor purchased in the last three years. With regard to the rationale for the requested exclusion, requests had to address the following factors:

• Whether the particular product is available only from China and specifically whether the particular product and/or a comparable product is available from sources in the United States and/or third countries.

• Whether the imposition of additional duties on the particular product would cause severe economic harm to the requestor or other U.S. interests.

• Whether the particular product is strategically important or related to ''Made in China 2025'' or other Chinese industrial programs.

The September 18 notice stated that the U.S. Trade Representative would take into account whether an exclusion would undermine the objective of the Section 301 investigation.

The September 18 notice required submission of requests for exclusion from the $16 billion action no later than December 18, 2018, and noted that the U.S. Trade Representative periodically would announce decisions. In July 2019, the U.S. Trade Representative granted an initial set of exclusion requests. *See* 84 FR 37381. The U.S. Trade Representative granted additional exclusions in September and October 2019. *See* 84 FR 49600 and 84 FR 52553.

B. Amendments to Certain Exclusions

To correct technical and ministerial errors and in order to conform to the U.S. Trade Representative's intent to grant certain exclusions, the Annex to this notice includes amendments to certain notes in the HTSUS.

In order to clarify a periodic revision to the HTSUS, subparagraph A(1) of the Annex modifies the text to U.S. note 20(v)(86) to subchapter III of chapter 99 of the HTSUS, as set out in the Annex of the notice published at 84 FR 49600 (September 20, 2019).

Subparagraphs A(2–7) of the Annex correct errors in U.S. notes 20(v)(21), 20(v)(22), 20(v)(36), 20(v)(71), 20(v)(72), and 20(v)(87) to subchapter III of chapter 99 of the HTSUS, as set out in the Annex of the notice published at 84 FR 49600 (September 20, 2019).

In order to conform to the U.S. Trade Representative's intent to grant certain exclusion requests, Subparagraphs A(8–9) of the Annex make amendments to U.S. notes 20(v)(20) and 20(v)(37) to subchapter III of chapter 99 of the HTSUS, as set out in the annex of the notice published at 84 FR 49600 (September 20, 2019).

The U.S. Trade Representative will continue to issue determinations on a periodic basis as needed.

Annex

A. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 23, 2018:

1. U.S. note 20(v)(21) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''2.44 mm'' and inserting ''2.44 m'' in lieu thereof.

2. U.S. note 20(v)(22) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''47.5 cm in width, 61.0 cm in length and 24 mm in thickness'' and inserting ''45.72 cm in width, 60.96 cm in length and 0.6096 mm in thickness'' in lieu thereof.

3. U.S. note 20(v)(36) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''1.12 cm or more but not exceeding 1.52 cm in width and 1.93 cm or more but not exceeding 2.29 cm in length'' and inserting ''1.12 m or more but not over 1.52 m in width and 1.93 m or more but not over 2.29 m in length'' in lieu thereof.

4. U.S. note 20(v)(71) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''25 W but not exceeding 2.0 kW'' and inserting ''exceeding 750 W but not over 1.8 kW'' in lieu thereof.

5. U.S. note 20(v)(72) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is deleted.

6. U.S. note 20(v)(20) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''1.5 m or more in width, printed in various colors, valued at $1.60 to $1.90 per kg'' and inserting ''0.6 m or more in width, whether or not printed in various colors, valued at $0.88 or more but not over $2.42 per kg'' in lieu thereof.

7. U.S. note 20(v)(37) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''plastic sheeting made of plain-woven, high-density polyethylene fabric coated on both sides with low-density polyethylene, in rolls measuring 5 m in width'' and inserting ''plastic sheeting, core/scrim woven layer of high-density polyethylene (HDPE) textile strip, coated on both sides with low density polyethylene (LDPE), with a layer of visible black file of linear LDPE, polyvinyl chloride free, weighing not over 1.492 kg/m2, in rolls each not over 5 m in width'' in lieu thereof.

8. U.S. note 20(v)(86) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''(described in statistical reporting numbers 8711.60.0050 or 8711.60.0090)'' and inserting ''(described in statistical reporting numbers 8711.60.0050 or 8711.60.0090, effective July 1, 2019; described in statistical reporting number 8711.60.0000, effective prior to July 1, 2019)'' in lieu thereof.

9. U.S. note 20(v)(87) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''not exceeding 250 W'' (described in statistical reporting numbers 8711.60.0050)'' and inserting ''of 1.0 kW or more but not over 2.1 kW (described in statistical reporting number 8711.60.0090, effective July 1, 2019; described in statistical reporting number 8711.60.0000, prior to July 1, 2019)''.

Joseph Barloon,

General Counsel, Office of the U.S. Trade Representative.

[FR Doc. 2019–27072 Filed 12–16–19; 8:45 am]

BILLING CODE P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of product exclusions.

SUMMARY: In September 2018, the U.S. Trade Representative imposed additional duties on goods of China with an annual trade value of approximately $200 billion as part of the action in the Section 301

investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation. The U.S. Trade Representative initiated a product exclusion process in June 2019, and interested persons have submitted requests for the exclusion of specific products. This notice announces the U.S. Trade Representative's determination to grant certain exclusion requests, as specified in the Annex to this notice, and corrects a ministerial error in a previously announced exclusion.

DATES: The product exclusions announced in this notice will apply as of the September 24, 2018, effective date of the $200 billion action, to August 7, 2020. The amendment announced in this notice is retroactive to the date the original exclusion was published.

FOR FURTHER INFORMATION CONTACT: For general questions about this notice, contact Assistant General Counsels Philip Butler or Megan Grimball, or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusions identified in the Annex to this notice, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

For background on the proceedings in this investigation, please see the prior notices issued in the investigation, including 82 FR 40213 (August 23, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), 83 FR 47974 (September 21, 2018), 83 FR 49153 (September 28, 2018), 83 FR 65198 (December 19, 2018), 84 FR 7966 (March 5, 2019), 84 FR 20459 (May 9, 2019), 84 FR 29576 (June 24, 2019), 84 FRN 38717 (August 7, 2019), 84 FR 46212 (September 3, 2019), 84 FR 49591 (September 20, 2019), 84 FR 57803 (October 28, 2019), 84 FR 61674 (November 13, 2019), and 84 FR 65882 (November 29, 2019).

Effective September 24, 2018, the U.S. Trade Representative imposed additional 10 percent duties on goods of China classified in 5,757 full and partial subheadings of the Harmonized Tariff Schedule of the United States (HTSUS), with an approximate annual trade value of $200 billion. *See* 83 FR 47974, as modified by 83 FR 49153. In May 2019, the U.S. Trade Representative increased the additional duty to 25 percent. *See* 84 FR 20459. On June 24, 2019, the Trade Representative established a process by which U.S. stakeholders may request exclusion of particular products classified within an 8-digit HTSUS subheading covered by the $200 billion action from the additional duties. *See* 84 FR 29576 (the June 24 notice).

Under the June 24 notice, requests for exclusion had to identify the product subject to the request in terms of the physical characteristics that distinguish the product from other products within the relevant 8-digit subheading covered by the $200 billion action. Requestors also had to provide the 10-digit subheading of the HTSUS most applicable to the particular product requested for exclusion, and could submit information on the ability of U.S. Customs and Border Protection to administer the requested exclusion. Requestors were asked to provide the quantity and value of the Chinese-origin product that the requestor purchased in the last three years. With regard to the rationale for the requested exclusion, requests had to address the following factors:

- Whether the particular product is available only from China and specifically whether the particular product and/or a comparable product is available from sources in the United States and/or third countries.
- Whether the imposition of additional duties on the particular product would cause severe economic harm to the requestor or other U.S. interests.
- Whether the particular product is strategically important or related to ''Made in China 2025'' or other Chinese industrial programs.

The June 24 notice stated that the U.S. Trade Representative would take into account whether an exclusion would undermine the objective of the Section 301 investigation.

The June 24 notice required submission of requests for exclusion from the $200 billion action no later than September 30, 2019, and noted that the U.S. Trade Representative would periodically announce decisions. In August 2019, the U.S. Trade Representative granted an initial set of exclusion requests. *See* 84 FR 38717. The U.S. Trade Representative granted additional exclusions in September, October, and November 2019. *See* 84 FR 49591, 84 FR 57803, 84 FR 61674, and 84 FR 65882. The Office of the United States Trade Representative (USTR) regularly updates the status of each pending request on the USTR Exclusions Portal at *https://exclusions.ustr.gov/s/docket?docketNumber=USTR-2019-0005.*

B. Determination To Grant Certain Exclusions

Based on the evaluation of the factors set out in the June 24 notice, which are summarized above, pursuant to sections 301(b), 301(c), and 307(a) of the Trade Act of 1974, as amended, and in accordance with the advice of the interagency Section 301 Committee, the U.S. Trade Representative has determined to grant the product exclusions set out in the Annex to this notice. The U.S. Trade Representative's determination also takes into account advice from advisory committees and any public comments on the pertinent exclusion requests.

As set out in the Annex, the exclusions are reflected in 9 ten-digit HTSUS subheadings and 35 specially prepared product descriptions, which cover 75 separate exclusion requests.

In accordance with the June 24 notice, the exclusions are available for any product that meets the description in the Annex, regardless of whether the importer filed an exclusion request. Further, the scope of each exclusion is governed by the scope of the product descriptions in the Annex, and not by the product descriptions set out in any particular request for exclusion.

To correct a ministerial error and in order to conform to the U.S. Trade Representative's intent to grant an exclusion requested, the Annex to this notice also includes an amendment to a note in the HTSUS.

Paragraph A, subparagraphs (3)–(6) are conforming amendments to the HTSUS reflecting the modifications made by the Annex.

Paragraph B, subparagraph (1) is a ministerial correction of U.S. note 20(ll)(53) to subchapter III of chapter 99 of the HTSUS that modifies the product description value published in the annex to the notice published at 84 FR 57803 (October 28, 2019). Paragraph B, subparagraphs (2)–(4), make conforming amendments to note 20(ll) published at 84 FR 57803 (October 28, 2019), note 20(mm) published at 84 FR 61674 (November 13, 2019), and note 20(nn) published at 84 FR 65882 (November 29, 2019).

As stated in the September 20, 2019 notice, the exclusions will apply from September 24, 2018, to August 7, 2020. U.S. Customs and Border Protection will issue instructions on entry guidance and implementation.

The U.S. Trade Representative will continue to issue determinations on pending requests on a periodic basis.

Joseph Barloon,

General Counsel, Office of the U.S. Trade Representative.

Annex

A. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on September 24, 2018, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is modified:

1. By inserting the following new heading 9903.88.36 in numerical sequence, with the material in the new heading inserted in the columns of the HTSUS labeled ''Heading/Subheading'', ''Article Description'', and ''Rates of Duty 1—General'', respectively:

Heading/ subheading	Article description	Rates of duty		
		1		2
		General	Special	
''9903.88.36	Articles the product of China, as provided for in U.S. note 20(oo) to this subchapter, each covered by an exclusion granted by the U.S. Trade Representative.	The duty provided in the applicable subheading''.		

2. by inserting the following new U.S. note 20(oo) to subchapter III of chapter 99 in numerical sequence:

''(oo) The U.S. Trade Representative determined to establish a process by which particular products classified in heading 9903.88.03 and provided for in U.S. notes 20(e) and (f) to this subchapter could be excluded from the additional duties imposed by heading 9903.88.03, and by which particular products classified in heading 9903.88.04 and provided for in U.S. note 20(g) to this subchapter could be excluded from the additional duties imposed by heading 9903.88.04. See 83 FR 47974 (September 21, 2018) and 84 FR 29576 (June 24, 2019). Pursuant to the product exclusion process, the U.S. Trade Representative has determined that the additional duties provided for in heading 9903.88.03 or in heading 9903.88.04 shall not apply to the following particular products, which are provided for in the enumerated statistical reporting numbers:

(1) 0304.72.5000
(2) 0304.83.1015
(3) 0304.83.1020
(4) 0304.83.5090
(5) 8507.20.4000
(6) 8708.50.8500
(7) 8708.94.7510
(8) 8708.99.8105
(9) 8712.00.1520
(10) Bananas, freeze-dried and sliced, put up for retail sale in packages each having a net weight of 15 g (described in statistical reporting number 0803.90.0045)
(11) Apples, freeze-dried and sliced, put up for retail sale in packages each having a net weight of 15 g (described in statistical reporting number 0813.30.0000)
(12) Peaches, freeze-dried and sliced, put up for retail sale in packages each having a net weight of 15 g (described in statistical reporting number 0813.40.4000)
(13) Pears, freeze-dried and sliced, put up for retail sale in packages each having a net weight of 15 g (described in statistical reporting number 0813.40.9000)
(14) Mixtures of strawberries and bananas, freeze-dried and sliced, put up for retail sale in packages each having a net weight of 15 g (described in statistical reporting number 0813.50.0020)
(15) Mixed seasoning of Himalayan salt, tomato flake, lemon peel, basil, black pepper and sage, put up for retail sale in packages each weighing 200 g (described in statistical reporting number 2103.90.8000)
(16) Molded blocks of wood pulp cellulose sponge, each measuring not over 105 cm by 105 cm by 40 cm (described in statistical reporting number 4823.70.0040)
(17) Satin woven fabrics of artificial filament yarn, consisting of 63 percent rayon and 37 percent combed cotton, dyed, weighing not over 211 g/m^2 (described in statistical reporting number 5408.32.9050)
(18) Nonwoven rug pads, each comprising a 100 percent polyester fiber fabric, face laminated to a thermoplastic elastomer and weighing over 150 g/m^2 (described in statistical reporting number 5603.94.1090)
(19) Ropes of man-made fibers, each measuring 1.7 m or more but not over 6.1 m in length with breaking strength of 22 kg or more but not over 230 kg, with hooks of base metal and locking mechanisms to maintain tension on the rope (described in statistical reporting number 5609.00.3000)
(20) Gates for confining children or pets, of steel not coated or plated with precious metals (described in statistical reporting number 7323.99.9040)
(21) Steel electrical boxes, designed for lighting fixtures, switches, receptacles or outlet devices, such boxes weighing 0.4 kg or more but not over 3.5 kg, 10.2 cm in length or more, 5 cm or more but not over 10.2 cm in width and 12 cm in height, the foregoing UL listed (described in statistical reporting number 7326.90.8688)
(22) Telescoping multi-position ladders of aluminum, each with maximum reach height of 4.2 m or more but not over 7.9 m, with locks to adjust the telescoping positions and with load rating of 136 kg or more but not over 170 kg (described in statistical reporting number 7616.99.5130)
(23) Towers of aluminum, unassembled, each designed to be mounted on a boat, incorporating at least one point to which a tow rope may be fastened for towing individuals participating in water sports such as wakeboarding, the assembled tower measuring not over 1.9 m in height and no more than 2.5 m in width (described in statistical reporting number 8302.49.6055)
(24) Towers of aluminum, unassembled, each designed to be mounted on the body of a boat, incorporating a tow point for towing individuals participating in water sports such as wakeboarding, the assembled tower measuring not over 1.6 m in height and not over 2.5 m in width

(described in statistical reporting number 8302.49.6055)
(25) Digital electronic scales, not for personal use, not for continuous weighing, other than constant-weight scales, each measuring no more than 195 mm by 165 mm by 60 mm, having a maximum weight capacity of 5 kg, and having the ability to reset tare (zero point reset) multiple times while adding to the article being weighed (described in statistical reporting number 8423.81.0040)
(26) Electronic calculators for desktop use, solar-powered with battery backup (other than with engineering, trigonometric, scientific or construction functions), each measuring 11 cm or more but not over 25 cm in length, 7 cm or more but not over 19.5 cm in width, and 1 cm or more but not over 5 cm in height and weighing 0.058 kg or more but not over 0.34 kg (described in statistical reporting number 8470.10.0040)
(27) Electronic calculators, handheld, solar-powered or battery powered (other than with engineering, trigonometric or scientific functions), each measuring 10 cm or more but not over 16 cm in length, 5 cm or more but not over 9 cm in width, and 0.5 cm or more but not over 2 cm in height and weighing 0.02 kg or more but not over 1 kg (described in statistical reporting number 8470.10.0040)
(28) Electronic calculators, handheld, solar-powered or battery powered, with scientific, trigonometric or other advanced mathematical functions, each measuring 11 cm or more but not over 18 cm in length, 6.5 cm or more but not over 9 cm in width and 1 cm or more but not over 3 cm in height and weighing 0.04 kg or more but not over 0.25 kg (described in statistical reporting number 8470.10.0040)
(29) Electronic calculating machines, each incorporating a 2 color ink roller printing device, that operates with an external source of power, with a vacuum fluorescent display (VFD), measuring 24 cm or more but not over 27 cm in length, 18 cm or more but not over 21 cm in width and 5 cm or more but not over 7 cm in height and weighing 0.5 kg or more but not over 1.5 kg each (described in statistical reporting number 8470.21.0000)
(30) Electronic calculating machines, each incorporating a parallel ribbon ink printing device, that operates with an external source of power, with a vacuum fluorescent display (VFD), measuring 31.75 cm or more but not over 34.3 cm in length, 21.5 cm or more but not over 25.4 cm in width and 7.5 cm or more but not over 9 cm in height and weighing 1.6 kg or more but not over 2 kg each (described in statistical reporting number 8470.21.0000)
(31) Electronic calculating machines, each incorporating a ribbon ink printing device, that operates with an external source of power, with a vacuum fluorescent display (VFD), measuring 32 cm or more but not over 35 cm in length, 22 cm or more but not over 26 cm in width and 8 cm or more but not over 9 cm in height and weighing 1.75 kg or more but not over 2 kg each (described in statistical reporting number 8470.21.0000)
(32) Electronic calculating machines, each incorporating an ink roller printing device, capable of operating with an external source of power or battery power, with liquid crystal display (LCD), measuring 19 cm or more but not over 26.5 cm in length, 8 cm or more but not over 20 cm in width and 4 cm or more but not over 7 cm in height and weighing 0.3 kg or more but not over 0.7 kg each (described in statistical reporting number 8470.21.0000)
(33) Other static converters, rectifiers and rectifying apparatus, with ABS plastic damage resistant box, input and output voltage cables, weighing not more than 0.35 kg, measuring not more than 17 cm in length and 12 cm in width (described in statistical reporting number 8504.40.9550)
(34) Light-emitting diode (LED) headlights, light bars and cube lights, of a kind designed to be mounted on off-road, all-terrain vehicles (described in statistical reporting number 8512.20.2040)
(35) Brake drums of grey cast iron for the motor vehicles of headings 8701 to 8705 (other than tractors for agricultural purposes), with an inside diameter of 38 cm or more but not over 42 cm (described in statistical reporting number 8708.30.5020)
(36) Brake discs of grey cast iron for the motor vehicles of headings 8701 to 8705 (other than tractors for agricultural purposes), with an outside diameter of 32 cm or more but not over 44 cm (described in statistical reporting number 8708.30.5030)
(37) Wheel hubs of cast iron, for off-road vehicles of headings 8701 to 8705, each weighing 2 kg or more but not exceeding 4 kg (described in statistical reporting number 8708.99.5300)
(38) Upholstered dining chairs, with a wooden frame, other than of teak (described in statistical reporting number 9401.61.4011)
(39) Chairs with three legs, with frames of steel held together by elastic cord and textile seating material, for outdoor non-household use (described in statistical reporting number 9401.79.0015)
(40) Chairs, each with four legs, a frame of aluminum held together by elastic cord and textile seating material, for outdoor non-household use (described in statistical reporting number 9401.79.0015)
(41) Entry tables of wood other than bent-wood, each measuring 180 cm or more but not over 185 cm in length, 80 cm or more but not over 83 cm in height and over 40 but not over 45 cm in width, with tin top (described in statistical reporting number 9403.60.8081)
(42) 8-light circular electric household chandeliers, of base metal other than brass (described in statistical reporting number 9405.10.6010)
(43) Electric household table lamps, with bases of wood, presented with shades, not more than 64 cm in height, each weighing not more than 3 kg (described in statistical reporting number 9405.20.8010)
(44) Non-electrical wall candelabras, of wood, each with 3 wrought iron candle holders (described in statistical reporting number 9405.50.4000)''

3. by amending the last sentence of the first paragraph of U.S. note 20(e) to subchapter III of chapter 99:

a. By deleting the word ''or'' where it appears after the phrase ''U.S. note 20(mm) to subchapter III of chapter 99;''; and

b. by inserting the phrase ''; or (6) heading 9903.88.36 and U.S. note 20(oo) to subchapter III of chapter 99'' after the phrase ''U.S. note 20(nn) to subchapter III of chapter 99''.

4. by amending U.S. note 20(f) to subchapter III of chapter 99;

a. by deleting the word ''or'' where it appears after the phrase ''U.S. note 20(mm) to subchapter III of chapter 99;''; and

b. by inserting the phrase ''; or (6) heading 9903.88.36 and U.S. note 20(oo) to subchapter III of chapter 99'' after the phrase ''U.S. note 20(nn) to subchapter III of chapter 99''.

5. by amending the Article Description of heading 9903.88.03:

a. By deleting ''9903.88.34 or'' and inserting ''9903.88.34,'' in lieu thereof; and

b. by inserting ''or 9903.88.36,'' after ''9903.88.35,''.

6. By amending the Article Description of heading 9903.88.04:

a. By deleting ''9903.88.33 or'' and inserting ''9903.88.33,'' in lieu thereof; and

b. By inserting ''or 9903.88.36,'' after ''9903.88.34,''.

B. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on September 24, 2018:

1. U.S. note 20(ll)(53) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is modified by deleting ''21'' and inserting ''55'' in lieu thereof.

2. The second sentence of U.S. note 20(ll) to subchapter III of chapter 99 is amended by inserting ''or in heading 9903.88.04'' after ''provided for in heading 9903.88.03''.

3. The second sentence of U.S. note 20(mm) to subchapter III of chapter 99 is amended by inserting ''or in heading 9903.88.04'' after ''provided for in heading 9903.88.03''.

4. The second sentence of U.S. note 20(nn) to subchapter III of chapter 99 is amended by inserting ''or in heading 9903.88.04'' after ''provided for in heading 9903.88.03''.

[FR Doc. 2019–27075 Filed 12–16–19; 8:45 am]

BILLING CODE 3290–F0–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Product Exclusion and Amendments: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of product exclusion and amendments.

SUMMARY: Effective July 6, 2018, the U.S. Trade Representative imposed additional duties on goods of China with an annual trade value of approximately $34 billion as part of the action in the Section 301 investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation. The U.S. Trade Representative's determination included a decision to establish a product exclusion process. The U.S. Trade Representative initiated the exclusion process in July 2018, and stakeholders have submitted requests for the exclusion of specific products. In December 2018, and March, April, May, June, July, September, and October 2019, the U.S. Trade Representative granted exclusion requests. This notice announces the U.S. Trade Representative's determination to grant an additional exclusion request, as specified in the Annex to this notice, and makes amendments to certain notes in the Harmonized Tariff Schedule of the United States (HTSUS). The U.S. Trade Representative will continue to issue decisions as necessary.

DATES: The product exclusion will apply as of the July 6, 2018 effective date of the $34 billion action, and will extend to October 1, 2020 at 11:59 p.m. EDT. The amendments announced in this notice are retroactive to the date the original exclusions were published and do not extend the period for the original exclusions. U.S. Customs and Border Protection will issue instructions on entry guidance and implementation.

FOR FURTHER INFORMATION CONTACT: For general questions about this notice, contact Assistant General Counsel Philip Butler or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusions identified in the Annex to this notice, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

For background on the proceedings in this investigation, please see the prior notices issued in the investigation, including 82 FR 40213 (August 23, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), 83 FR 40823 (August 16, 2018), 83 FR 47974 (September 21, 2018), 83 FR 65198 (December 19, 2018), 83 FR 67463 (December 28, 2018), 84 FR 7966 (March 5, 2019), 84 FR 11152 (March 25, 2019), 84 FR 16310 (April 18, 2019), 84 FR 21389 (May 14, 2019), 84 FR 25895 (June 4, 2019), 84 FR 32821 (July 9, 2019), 84 FR 49564 (September 20, 2019), and 84 FR 52567 (October 2, 2019).

Effective July 6, 2018, the U.S. Trade Representative imposed additional 25 percent duties on goods of China classified in 818 8-digit subheadings of the HTSUS, with an approximate annual trade value of $34 billion. *See* 83 FR 28710. The U.S. Trade Representative's determination included a decision to establish a process by which U.S. stakeholders can request exclusion of particular products classified within an 8-digit HTSUS subheading covered by the $34 billion action from the additional duties. The U.S. Trade Representative issued a notice setting out the process for the product exclusions, and opened a public docket. *See* 83 FR 32181 (the July 11 notice).

Under the July 11 notice, requests for exclusion had to identify the product subject to the request in terms of the physical characteristics that distinguish it from other products within the relevant 8-digit subheading covered by the $34 billion action. Requestors also had to provide the 10-digit subheading of the HTSUS most applicable to the particular product requested for exclusion, and could submit information on the ability of U.S. Customs and Border Protection to administer the requested exclusion. Requestors were asked to provide the quantity and value of the Chinese-origin product that the requestor purchased in the last three years. With regard to the rationale for the requested exclusion, requests had to address the following factors:

- Whether the particular product is available only from China and specifically whether the particular product and/or a comparable product is available from sources in the United States and/or third countries.
- Whether the imposition of additional duties on the particular product would cause severe economic harm to the requestor or other U.S. interests.
- Whether the particular product is strategically important or related to ''Made in China 2025'' or other Chinese industrial programs.

The July 11 notice stated that the U.S. Trade Representative would take into account whether an exclusion would undermine the objective of the Section 301 investigation.

The July 11 notice required submission of requests for exclusion from the $34 billion action no later than October 9, 2018, and noted that the U.S. Trade Representative periodically would announce decisions. In December 2018, the U.S. Trade Representative granted an initial set of exclusion requests. *See* 83 FR 67463. The U.S. Trade Representative granted additional exclusions in March, April, May, June, July, September, and October 2019. *See* 84 FR 11152, 84 FR 16310, 84 FR 21389, 84 FR 25895, 84 FR 32821, 84 FR 49564 and 84 FR 52567.

B. Determination To Grant Certain Exclusions

Based on the evaluation of the factors set out in the July 11 notice, which are summarized above, pursuant to sections 301(b), 301(c), and 307(a) of the Trade Act of 1974, as amended, and in accordance with the advice of the interagency Section 301 Committee, the U.S. Trade Representative has determined to grant the product exclusion set out in the Annex to this notice. The U.S. Trade Representative's determination also takes into account advice from advisory committees and any public comments on the pertinent exclusion request.

Exclusions from the duties have been established in two different formats: (1) As an exclusion for an existing 10-digit subheading from within an 8-digit subheading covered by the $34 billion action, or (2) as an exclusion reflected in specially prepared product descriptions. The exclusion announced in this notice takes the form of a 10-digit HTSUS subheading.

In accordance with the July 11 notice, the exclusion is available for any product that meets the description in the Annex, regardless of whether the importer filed an exclusion request. Further, the scope of the exclusion is governed by the scope of the 10-digit HTSUS subheading in the Annex to this notice, and not by the product descriptions set out in any particular request for exclusion.

Paragraph A is a conforming amendment to the HTSUS reflecting the modification made by the Annex to this notice.

C. Amendments to Certain Exclusions

To correct technical and ministerial errors and in order to conform to the U.S. Trade Representative's intent to grant certain exclusions requested, the Annex to this notice includes amendments to certain notes in the HTSUS.

Subparagraphs B(1–5) correct errors in U.S. notes 20(q)(25), 20(q)(26), 20(q)(201), 20(q)(235) and 20(q)(252) to subchapter III of chapter 99 of the HTSUS, as set out in the Annex of the notice published at 84 FR 49564 (September 20, 2019).

In order to conform to the U.S. Trade Representative's intent to grant certain exclusion requests, subparagraphs B(6–7) of the Annex make amendments to U.S. notes 20(n)(11) and 20(n)(85) to subchapter III of chapter 99 of the HTSUS, as set out in the Annex of the notice published at 84 FR 32821 (July 9, 2019). Subparagraphs B(8–14) of the Annex make amendments to notes 20(q)(27), 20(q)(28), 20(q)(58), 20(q)(195), 20(q)(217), 20(q)(291) and 20(q)(293) to subchapter III of chapter 99 of the HSTUS, as set out in the Annex of the notice published at 84 FR 49564 (September 20, 2019), to conform to this intent.

The U.S. Trade Representative will continue to issue determinations on a periodic basis as needed.

Annex

A. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on July 6, 2018, and before October 2, 2020, U.S. note 20(x) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is modified by inserting the following exclusion in numerical order after exclusion (92): ''(93) 9030.90.4600''.

B. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on July 6, 2018:

1. U.S. note 20(q)(25) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''Rotary compressors, each exceeding 746 W (1 horsepower) but not exceeding 2,984 W (4 horsepower), with a cooling capacity ranging from 2,300 W (7,960 BTU) to 5,500 W (18,766 BTU) (described in statistical reporting number 8414.30.8060)'' and inserting ''Rotary compressors, each exceeding 746 W but not exceeding 2,238 W, with a cooling capacity ranging from 2.3 kW to 5.5 kW (described in statistical reporting number 8414.30.8060)'' in lieu thereof.

2. U.S. note 20(q)(26) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''Rotary compressors, each exceeding 746 W (1 horsepower) but not exceeding 2,984 W (4 horsepower), with a cooling capacity ranging from 750 to 1400 W (described in statistical reporting number 8414.30.8060)'' and inserting ''Rotary compressors, each exceeding 746 W but not exceeding 2,238 W, with a cooling capacity of 750 W or more but not exceeding 1.4 kW (described in statistical reporting number 8414.30.8060)'' in lieu thereof.

3. U.S. note 20(q)(201) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''electric transformers, static converters and''.

4. U.S. note 20(q)(235) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''Single-pole, double-throw switches, for a voltage not exceeding 100 V, each with a movable contact arm permitting the opening and closing of contact points (described in statistical reporting number 8536.50.9065)'' and inserting ''Single-pole, double-throw switches, each with a movable contact arm permitting the opening and closing of contact points, of a rating not over 1,000 V (described in statistical reporting number 8536.50.9065)'' in lieu thereof.

5. U.S. note 20(q)(252) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''of less than 1 W and an operating frequency of less than 100 MHz (described in statistical reporting number 8541.29.0095)'' and inserting ''of 1W or more (described in statistical reporting number 8541.29.0095)'' in lieu thereof.

6. U.S. note 20(n)(11) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''$72'' and inserting ''$96'' in lieu thereof.

7. U.S. note 20(n)(85) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''$2.50'' and inserting ''$3.20'' in lieu thereof.

8. U.S. note 20(q)(27) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''$250 but not over $500'' and inserting ''$200 but not over $1500'' in lieu thereof.

9. U.S. note 20(q)(28) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''$500 but not over $900'' and inserting ''$200 but not over $1500'' in lieu thereof.

10. U.S. note 20(q)(58) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''polymer filtration systems of a kind used to separate solid contaminants from liquid polymers, each valued over $30,000 but not over $40,000'' and inserting ''filtration or purifying machinery for liquid chemical polymers, of steel housing, with sintered metal cylindrical filters'' in lieu thereof.

11. U.S. note 20(q)(195) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''stators and rotors, 2 or 4 pole type, valued over $4,700 but not over $4,900'' and inserting ''stators and rotors for electric motors and generators (excluding generating sets), 2 or 4 pole type, valued $85 or more but not over $1,700'' in lieu thereof.

12. U.S. note 20(q)(217) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''not over $1.50'' and inserting ''at not over $4'' in lieu thereof.

13. U.S. note 20(q)(291) to subchapter III of chapter 99 of the Harmonized

Tariff Schedule of the United States is modified by deleting ''for radiation therapy, affixed to the treatment table when used, each valued over $18 but not over $23'' and inserting ''of polycaprolactone for the use of immobilizing patients, during the use of alpha, beta or gamma radiations, for radiography or radiotherapy'' in lieu thereof.

14. U.S. note 20(q)(293) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''$2'' and inserting ''$8.50'' in lieu thereof.

Joseph Barloon,

General Counsel, Office of the U.S. Trade Representative.

[FR Doc. 2019–27070 Filed 12–16–19; 8:45 am]

BILLING CODE 3290–F0–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2019–0093]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

Under part 235 of title 49 of the Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that by a document dated October 28, 2019, the National Railroad Passenger Corporation (Amtrak), petitioned the Federal Railroad Administration (FRA) seeking approval to discontinue or modify a signal system. FRA assigned the petition Docket Number FRA–2019–0093.

Applicant: National Railroad Passenger Corporation, Mr. Nicholas J. Croce III, PE, Deputy Chief Engineer, C&S, 2995 Market Street, Philadelphia, PA 19104.

Specifically, Amtrak requests permission to replace a Model 14 Interlocking machine with a non-vital microprocessor with all signals displaying ''restricting'' as their most permissive aspect.

Amtrak will designate the territory currently known as Q Interlocking on the New York Division, Sunnyside Yard, Queens, New York, NY, as a non-vital switching center. The interlocking machine for Q Interlocking will be retired and replaced with a non-vital microprocessor-based control system. All territory impacted by the modification is within yard limits and is not designated as mainline track.

Amtrak's reason for the modification is to eliminate legacy equipment that is beyond its useful life and has no support for major repairs or modifications.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *http://www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 31, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.* See also *http://www.regulations.gov/#!privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2019–27073 Filed 12–16–19; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2019–0100]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

Under part 235 of title 49 of the Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that by a document dated November 20, 2019, CSX Transportation (CSXT) petitioned the Federal Railroad Administration (FRA) seeking approval to discontinue or modify a signal system. FRA assigned the petition Docket Number FRA–2019–0100.

Applicant: CSX Transportation, Mr. Carl A. Walker, Chief Engineer Communications & Signals, 500 Water Street, Speed Code J–350, Jacksonville, FL 32202.

Specifically, CSXT requests approval to modify the Edgeton automatic railroad crossing-at-grade, at milepost S–154.73, Aberdeen Subdivision, Raleigh, NC. The modification will consist of the removal of existing relay logic interlocking and the installation of microprocessor-based equipment to control the interlocking with the removal of the numbers 1 and 3 power-operated split point derails.

CSXT explains the installation of microprocessor interlocking control and upgrades to track circuits and wayside devices and the retirement of split point derails will allow for safer operational movements through the interlocking.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 31, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.* See also *http://www.regulations.gov/#!privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2019–27071 Filed 12–16–19; 8:45 am]

BILLING CODE 4910–06–P

FEDERAL REGISTER

Vol. 84 Tuesday,

No. 242 December 17, 2019

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Foreign Tax Credit Guidance Related to the Tax Cuts and Jobs Act, Overall Foreign Loss Recapture, and Foreign Tax Redeterminations; Final Rule and Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9882]

RIN 1545–BP19; 1545–BK55; 1545–AC09

Foreign Tax Credit Guidance Related to the Tax Cuts and Jobs Act, Overall Foreign Loss Recapture, and Foreign Tax Redeterminations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations, and removal of temporary regulations.

SUMMARY: This document contains final regulations that provide guidance relating to the determination of the foreign tax credit under the Internal Revenue Code. The guidance relates to changes made to the applicable law by the Tax Cuts and Jobs Act, which was enacted on December 22, 2017. This document finalizes the proposed regulations published on December 7, 2018. This document also finalizes proposed regulations on overall foreign losses that were published on June 25, 2012, and finalizes certain portions of proposed regulations published on November 7, 2007, relating to a U.S. taxpayer's obligation to notify the IRS of a foreign tax redetermination.

DATES:

Effective Date: These regulations are effective on December 17, 2019.

Applicability Dates: For dates of applicability, see §§ 1.861–8(h), 1.861–9(k), 1.861–10(f), 1.861–11(h), 1.861–13(d), 1.861–17(i), 1.901(j)–1(b), 1.904–1(e), 1.904–2(k), 1.904–3(h), 1.904–4(q), 1.904–5(o), 1.904–6(d), 1.904(b)–3(f), 1.904(f)–12(j)(6), 1.904(g)–3(l), 1.905–3(d), 1.954–1(h), 1.960–7, 1.965–9(c), and 1.986(a)–1(f).

FOR FURTHER INFORMATION CONTACT: Concerning §§ 1.861–8 through 1.861–13, 1.861–17, and 1.904(b)–3, Jeffrey P. Cowan, (202) 317–4924; concerning §§ 1.901(j)–1, 1.904–1 through 1.904–6, 1.904(f)–12, 1.904(g)–3, 1.905–3, 1.954–1, 1.986(a)–1, Jeffrey L. Parry, (202) 317–4916, or Larry R. Pounders, (202) 317–5465; concerning § 1.960–1 through 1.960–7, Suzanne M. Walsh, (202) 317–4908; concerning §§ 1.965–5 and 1.965–9, Karen J. Cate, (202) 317–4667 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. Proposed Regulations Implementing the TCJA

On December 7, 2018, the Department of the Treasury (the ''Treasury Department'') and the IRS published proposed regulations (REG–105600–18) relating to foreign tax credits in the **Federal Register** (83 FR 63200) (the ''2018 FTC proposed regulations''). The 2018 FTC proposed regulations relate to changes made by the Tax Cuts and Jobs Act (Pub. L. 115–97, 131 Stat. 2054, 2208 (2017)) (the ''TCJA'') and other foreign tax credit issues. Terms used but not defined in this preamble have the meaning provided in these regulations (the ''final regulations'').

A public hearing on the proposed regulations was scheduled for March 14, 2019, but it was not held because there were no requests to speak. The Treasury Department and the IRS also received written comments with respect to the 2018 FTC proposed regulations. Certain portions of the proposed regulations relating to §§ 1.78–1, 1.861–12(c)(2), and 1.965–7(e) were finalized as part of TD 9866, published in the **Federal Register** (84 FR 29288) on June 21, 2019. Comments received that do not pertain to the rules in the proposed regulations or that are otherwise outside the scope of this rulemaking are generally not addressed in this preamble but may be considered in future guidance projects addressing the issues discussed in the comments. All written comments received in response to the 2018 FTC proposed regulations are available at *www.regulations.gov* or upon request.

II. Proposed Regulations Relating to Overall Foreign Loss Recapture on Property Dispositions

On June 25, 2012, the **Federal Register** published a notice of proposed rulemaking at 77 FR 37837 (the ''2012 OFL proposed regulations'') proposing rules for the coordination of the rules for determining high-taxed income with capital gains adjustments and the allocation and recapture of overall foreign losses and overall domestic losses, as well as the coordination of the recapture of overall foreign losses on certain dispositions of property and other rules concerning overall foreign losses and overall domestic losses. One comment was received concerning the 2012 OFL proposed regulations. A public hearing was not requested and none was held.

III. Proposed and Temporary Regulations Under Sections 905(c) and 986(a)

On June 23, 1988, the **Federal Register** published a notice of proposed rulemaking by cross-reference to temporary regulations (TD 8210) (the ''1988 temporary regulations'') at 53 FR 23659 and 53 FR 23611, respectively, relating to a taxpayer's obligation under section 905(c) to notify the IRS of a foreign tax redetermination or to make adjustments to the pools of post-1986 undistributed earnings and foreign income taxes of the taxpayer's foreign subsidiaries. The 1988 temporary regulations also provided guidance regarding the civil penalty under section 6689 for failure to file the notice required under section 905(c). In response to the written comments received on the 1988 temporary regulations, on March 16, 1990, the Treasury Department and the IRS issued Notice 90–26, 1990–1 C.B. 336, which suspended the portion of the 1988 temporary regulations that provided rules for accounting for foreign tax redeterminations that affect the calculation of the indirect foreign tax credit under sections 902 and 960.

On May 15, 2006, the Treasury Department and the IRS issued Notice 2006–47, 2006–1 C.B. 892, which provides interim rules allowing a taxpayer that otherwise would be required to use an average exchange rate translation convention to elect to translate foreign income taxes into U.S. dollars (dollars) using the exchange rates when the taxes were paid, either for all foreign income taxes or only for those foreign income taxes denominated in nonfunctional currency that are attributable to qualified business units within the meaning of section 989(a) (QBUs) with dollar functional currencies.

On November 7, 2007, the **Federal Register** published new temporary regulations (T.D. 9362) (the ''2007 temporary regulations'') at 72 FR 62771 and published a partial withdrawal of the notice of proposed rulemaking relating to the 1988 temporary regulations and a new notice of proposed rulemaking by cross-reference to the 2007 temporary regulations at 72 FR 62805. Corrections to the temporary and proposed regulations were published on December 19, 2007, in the **Federal Register** (72 FR 71787 and 72 FR 71842, respectively). Comments were received concerning the 2007 temporary regulations. A public hearing was not requested and none was held. The 2007 temporary regulations expired on November 5, 2010.

As part of the TCJA, section 905(c) was amended to reflect the repeal of section 902, by eliminating the provisions allowing for adjustments to pools of post-1986 undistributed earnings and foreign income taxes. The TCJA made no changes to section 986(a) or 6689.

This Treasury decision adopts certain portions of the proposed regulations under sections 905(c) and 986(a) that were published in connection with the 2007 temporary regulations. References in this preamble to the 2007 temporary regulations are understood to refer to the corresponding provisions of the accompanying proposed regulations. In particular, this Treasury decision finalizes (1) the currency translation rules (which are moved from § 1.905–3T(b) to § 1.986(a)–1)), (2) the definition of foreign tax redetermination in § 1.905–3T(c), (3) the rules under § 1.905–3T(d)(1) requiring a redetermination of U.S. tax liability with respect to foreign income taxes other than those that are deemed paid under section 960, and (4) the rules in § 1.905–3T(e) relating to foreign income taxes imposed on foreign tax refunds. Portions of the 2007 temporary regulations relating to prospective pooling adjustments are not included in the final regulations in light of the TCJA's repeal of section 902 and related amendments to section 905(c).

Section 1.905–3T(d)(2), which addresses redeterminations that affect foreign taxes deemed paid under section 960, § 1.905–4T, which in general provides the procedural rules for how to notify the IRS of a foreign tax redetermination, and § 301.6689–1T, which provides rules for the penalty for failure to notify the IRS of a foreign tax redetermination, are not included in this Treasury decision. Although the underlying substantive rule requiring redeterminations of U.S. tax liability has not changed, in light of the elimination of prospective pooling adjustments (which in many cases obviated the need for U.S. tax redeterminations), the Treasury Department and the IRS anticipate that there will be significantly more instances in which taxpayers must redetermine their U.S. tax liability with respect to a prior taxable year by reason of a foreign tax redetermination with respect to a controlled foreign corporation (''CFC''). As a result, the Treasury Department and the IRS have determined that the rules under §§ 1.905–3T(d)(2), 1.905–4T, and 301.6689–1T should be reissued as a notice of proposed rulemaking in order to allow taxpayers an additional opportunity to comment on those rules. These regulations are available in a notice of proposed rulemaking in the Proposed Rules section of this issue of the **Federal Register** (the ''2019 FTC proposed regulations'').

IV. Technical Amendment to Regulations Issued Under Section 905

This Treasury Decision also makes a technical amendment to § 1.905–2(a)(2). Regulations issued under § 1.905–2 address the forms, information, and evidence required to claim a foreign tax credit. On December 31, 1964, the **Federal Register** published changes (T.D. 6789) at 29 FR 19241 to the then existing regulations under § 1.905–2, including a sentence at § 1.905–2(a)(2) providing that if a foreign receipt or return is in a foreign language, a certified translation thereof must be furnished by the taxpayer. On January 27, 1998, the **Federal Register** published additional changes (T.D. 8759) at 63 FR 3812 to § 1.905–2. However, the **Federal Register** inadvertently deleted the sentence in § 1.905–2(a)(2) requiring certified translations of a foreign receipt or return in a foreign language. This Treasury Decision restores the inadvertently deleted sentence to § 1.905–2(a)(2).

Summary of Comments and Explanation of Revisions

I. Overview

The final regulations retain the basic approach and structure of the 2018 FTC proposed regulations, with certain revisions. Parts I through III and V of this Summary of Comments and Explanation of Revisions discuss those revisions as well as comments received in response to the solicitation of comments in the 2018 FTC proposed regulations. Part III.I of this Summary of Comments and Explanation of Revisions discusses the revisions and comments received with respect to the 2012 OFL proposed regulations. Part IV of this Summary of Comments and Explanation of Revisions discusses the revisions with respect to the 2007 temporary regulations relating to sections 905(c) and 986(a). Finally, Part VI of this Summary of Comments and Explanation of Revisions addresses the applicability dates for the final regulations.

II. Allocation and Apportionment of Deductions and the Calculation of Taxable Income for Purposes of Section 904(a)

A. Allocation of Expenses to Section 951A Category

A taxpayer determines its foreign tax credit limitation under section 904, in part, based on the taxpayer's taxable income from sources without the United States. The 2018 FTC proposed regulations provide that, in general, the regulations under sections 861 through 865 that provide rules for allocating and apportioning deductions to determine the taxpayer's taxable income from sources without the United States apply to income described in section 904(d)(1)(A) (the ''section 951A category'').

Some comments requested that regulations provide that no expenses should be allocated to the section 951A category in order to ensure that income of a United States shareholder (''U.S. shareholder'') derived through a CFC would be effectively exempt from additional U.S. tax if the foreign effective tax rate is greater than or equal to a particular rate. These comments generally cite language in H.R. Rep. 115–466 (2017) (the ''Conference Report'') illustrating that no U.S. ''residual tax'' applies to foreign earnings subject to a foreign effective tax rate of 13.125 percent or more. These comments suggest that not requiring expenses to be allocated to the section 951A category allows GILTI to function as a ''minimum tax.'' Alternatively, some comments suggested that expense allocation be eliminated if the taxpayer establishes that net CFC tested income is subject to a minimum foreign effective tax rate of 13.125 percent, or that expense allocation to the section 951A category be eliminated until section 864(f)(1) (providing an election to allocate interest expense on a worldwide basis) becomes effective. One comment suggested a fundamentally different approach to expense allocation that would allow taxpayers to prorate the allocation of expenses to certain foreign source income based on a ratio of the foreign tax rate with the U.S. tax rate, and recalculate U.S. income tax liability after disallowing the prorated expenses allocated to foreign source income. One comment suggested that after the TCJA the United States no longer relies on the general principle of a foreign tax credit to relieve double taxation, and that allocation of any expenses to section 951A category income is therefore inconsistent with U.S. treaty obligations to exempt the income from U.S. tax. One comment agreed with the approach of the proposed regulations requiring expense allocation to the section 951A category, noting that the application of the expense allocation rules is important to minimize the potential for base erosion.

As explained in Part I of the Explanation of Provisions section of the 2018 FTC proposed regulations, the TCJA did not provide for any changes to how the generally applicable rules for computing taxable income within each separate category should apply with respect to the new section 951A category, and other provisions added in the TCJA are inconsistent with the notion that Congress intended effectively to exempt section 951A category income that was subject to a certain foreign effective tax rate. Therefore, the Treasury Department and the IRS have determined that the statute requires that expenses be allocated and apportioned to the section 951A category. This approach is also consistent with U.S. treaty obligations, which preserve the right of the United States to limit allowable foreign tax credits ''in accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principles hereof) . . . '' See Article 23, Par. 2 of the 2016 U.S. Model Treaty.

This approach is confirmed by the Joint Committee on Taxation's Explanation of the TJCA, which states that Congress intended that the foreign tax credit limitation in the section 951A category, like any other separate category, is calculated by taking into account expenses allocable to income in that category. *See* Joint Comm. on Tax'n, General Explanation of Public Law 115–97, at 381 n. 1753 (''As under the law prior to enactment of the Act, U.S. shareholders are required to allocate expenses to foreign-source income for foreign tax credit limitation purposes based on principles applicable prior to the enactment of the Act.''). The Joint Committee's explanation also elaborates on the statement cited in the Conference Report that is cited by the comments, and clarifies that the ability to fully utilize foreign tax credits to eliminate U.S. tax liability at a foreign effective tax rate of 13.125 percent is possible only if it is assumed, ''among other things, . . . that the domestic corporation has no expenses.'' *Id.* at 381. The Explanation acknowledges that absent the assumption of there being no expenses, ''the results . . . may change.'' *Id.*

Accordingly, the final regulations do not alter the requirement under the Code for deductions to be allocated and apportioned to the section 951A category. However, the 2019 FTC proposed regulations provide certain additional rules under §§ 1.861–8 through 1.861–17, including rules that will have the effect of precluding the allocation and apportionment of certain research and experimentation expenses to the section 951A category. In addition, Part I.A.5 of the Explanation of Provisions of the 2019 FTC proposed regulations states that the Treasury Department and the IRS are studying whether further guidance with respect to the allocation and apportionment of interest expenses is necessary, and request comments on this topic.

B. General Rules Relating to the Allocation and Apportionment of Expenses

1. Definitions of Exempt Income and Exempt Asset

The 2018 FTC proposed regulations make certain clarifying changes to the definitions of exempt income and exempt asset in proposed § 1.861–8(d)(2)(ii). Additionally, those regulations address the treatment of the deduction under section 250(a)(1) (the ''section 250 deduction'') for purposes of the exempt income and assets rule. Under proposed § 1.861–8(d)(2)(ii)(C)(*1*), the portion of a domestic corporation's income that is foreign derived intangible income (''FDII'') or results from an inclusion under section 951A(a) (a ''GILTI inclusion''), and the corresponding amount treated as a dividend under section 78 (''section 78 dividend''), is treated as exempt income based on the amount of the section 250 deduction allowed to the U.S. shareholder. Proposed § 1.861–8(d)(2)(ii)(C)(*2*) treats an equivalent portion of the domestic corporation's assets that give rise to FDII, or the stock of the CFC that gives rise to the GILTI inclusion, as an exempt asset.

One comment argued that the full allocation of expenses to the section 951A is needed to prevent base erosion. The comment recommended that the rules in proposed § 1.861–8(d)(2)(ii)(C) that treat income offset by the section 250 deduction as exempt income and the assets that give rise to that income as exempt assets are inappropriate and should be withdrawn. Another comment agreed with the approach of the proposed regulations.

The Treasury Department and the IRS have determined that the treatment of the section 250 deduction as giving rise to exempt income is consistent with the legislative history, which states that Congress ''intends for the [section 250 deduction to] be treated as exempting the deducted income from tax.'' *See* Senate Committee on Finance, Explanation of the Bill, S. Prt. 115–20 at 376 n.1210 (November 22, 2017). The approach is also consistent with the treatment under section 864(e)(3) of certain deductions allowed under sections 243 and 245(a). Accordingly, the final regulations adopt the rules from the 2018 FTC proposed regulations regarding the treatment of the section 250 deduction for purposes of the exempt income and asset provisions. *See* § 1.861–8(d)(2)(ii)(C).

One comment requested that the final regulations clarify the requirement to identify assets that produce gross income included in FDII for purposes of determining the portion of a taxpayer's assets that are treated as exempt by reason of having FDII. In particular, the comment stated that it would be difficult to identify assets that produce FDII, and that tangible assets should be treated differently due to the exemption for qualified business asset investment (''QBAI'') under section 250(b)(2)(B). As a result, the comment recommended that FDII-related assets should not be treated as exempt assets. Alternatively, the comment recommended a formulary approach, which would take into account only basis of intangible assets that gave rise to either deduction eligible income (as defined in section 250(b)(3)) or foreign derived deduction eligible income (''FDDEI'') (as defined in section 250(b)(4)). Another comment suggested that the rule be modified to refer to assets that produce FDDEI rather than FDII.

Following the issuance of the 2018 FTC proposed regulations, the Treasury Department and the IRS issued rules under section 250 providing that the determination of FDDEI requires applying §§ 1.861–8 through 1.861–14T and 1.861–17 to allocate and apportion deductions between gross income derived from sales and services that are FDDEI (''gross FDDEI'') versus gross income that is not gross FDDEI. *See* proposed § 1.250(b)–1. In light of these changes, the Treasury Department and the IRS agree with the comment that proposed § 1.861–8(d)(2)(ii)(C)(*2*) should be revised to refer to assets that produce gross FDDEI. As a result of this change, the final regulations generally do not impose any additional requirements for identifying assets that produce gross FDDEI beyond what is necessary in order to determine the amount of the section 250 deduction. In addition, the final regulations do not limit application of the exempt asset rule to intangible assets because the effect of QBAI is already taken into account in determining the amount of the section 250 deduction and therefore reduces the fraction used in § 1.861–8(d)(2)(ii)(C)(*2*) to determine the portion of an asset that is exempt.

Under proposed § 1.861–8(d)(2)(ii)(C)(*1*), the amount of income treated as exempt as a result of the section 250 deduction is the amount of gross income offset by the section 250 deduction. In order to conform the exempt asset rule with respect to FDII to the exempt income rule, § 1.861–8(d)(2)(ii)(C)(*2*) provides that the portion of assets that produce gross FDDEI which is treated as exempt is determined by dividing the portion of the section 250 deduction relating to FDII by the taxpayer's gross FDDEI, instead of its FDII. This recognizes that gross FDDEI, and not FDII, reflects the gross income which the section 250 deduction is effectively exempting. The final regulations will have the effect of significantly reducing the portion of assets that are exempt by reason of FDII and, therefore, the revisions address the comments that the 2018 FTC proposed regulations' approach overstated the portion of assets that are exempt by reason of the section 250 deduction with respect to FDII.

The 2018 FTC proposed regulations also confirm that earnings and profits excluded from income under section 959 (''previously taxed earnings and profits'') do not result in any portion of the stock in a CFC being treated as an exempt asset. Proposed § 1.861–8(d)(2)(iv). One comment suggested adding the word ''solely'' to proposed § 1.861–8(d)(2)(iv) in order to clarify that stock that is not exempt by reason of earnings and profits described in section 959(c)(1) or (c)(2) can nonetheless be partially exempt under other rules. The adjustment to stock value in respect of earnings and profits under section 864(e)(4) and § 1.861–12(c)(2) precedes the application of the exempt asset rules of section 864(e)(3) and § 1.861–8(d)(2), and the determination of whether stock is exempt is unrelated to whether the value of the stock was adjusted by reference to previously taxed earnings and profits. Proposed § 1.861–8(d)(2)(iv) was merely intended to clarify existing law in order to preclude taxpayers from taking unreasonable positions inconsistent with section 864(e)(4), and the rule is clear that it is limited to precluding arguments that stock is exempt ''by reason of'' an adjustment under § 1.861–12(c)(2) for previously taxed earnings and profits. Therefore, the addition of the word ''solely'' is unnecessary, and the comment is not adopted.

2. Application to Insurance Companies in Connection With Certain Dividends and Tax-Exempt Interest

One comment to the 2018 FTC proposed regulations suggested that insurance companies reduce exempt income and assets to reflect prorated amounts of dividends and tax exempt interest. *See* sections 805(a)(4), 807, 812, and 832(b)(5)(B). This comment is addressed in Part I.A.4 of the Explanation of Provisions of the 2019 FTC proposed regulations.

3. Allocation and Apportionment of the Section 250 Deduction

Proposed § 1.861–8(e)(13) and (14) provide rules for allocating and apportioning (i) the portion of the section 250 deduction for FDII and (ii) the portion of the section 250 deduction for the GILTI inclusion and the amount of the section 78 dividend attributable to foreign taxes deemed paid with respect to the GILTI inclusion. In particular, proposed § 1.861–8(e)(13) provides that the portion of the section 250 deduction for FDII is treated as definitely related and allocable to the specific class of gross income that is included in the taxpayer's FDDEI, and that the deduction is apportioned between the statutory and residual grouping based on the FDDEI in each grouping.

A comment expressed concern that, to the extent that the portion of the section 250 deduction for FDII is allocated to foreign source income, it would reduce the ability to claim foreign tax credits. The comment recommended not apportioning this portion of the deduction to FDDEI. Under sections 861 and 862, a taxpayer must determine its taxable income by deducting from gross income the deductions properly apportioned or allocated thereto. Under § 1.861–8, deductions are generally allocated and apportioned based on a factual relationship between the deductions and gross income. Because a portion of the section 250 deduction for FDII is factually related to the taxpayer's FDDEI, under the principles of § 1.861–8 that portion of the section 250 deduction is allocated to that income, regardless of whether the FDDEI is U.S. or foreign source. Accordingly, this comment is not adopted.

4. Allocation and Apportionment of State Income Taxes

The 2018 FTC proposed regulations did not make any changes to the rules in § 1.861–8(e)(6) for allocating and apportioning state income taxes, which were finalized in 1991 (T.D. 8337). The final regulations also make no changes to these rules but remove *Examples 28* through *33* in § 1.861–8(g), which apply the rules in § 1.861–8(e)(6) to fact patterns involving foreign subsidiaries, pending further study by the Treasury Department and the IRS as to whether the rules in § 1.861–8(e)(6) should be revised. See Part II.B of the Explanation of Provisions to the 2019 FTC proposed regulations (requesting comments on § 1.861–8(e)(6)).

C. Allocation and Apportionment of Interest Expense

1. Special Rule for Specified Partnership Loans

The 2018 FTC proposed regulations included rules addressing the source and separate category of interest income and expense related to loans to a partnership by a U.S. person (or a member of its affiliated group) that owns an interest (directly or indirectly) in the partnership. These loans are referred to as specified partnership loans. Proposed § 1.861–9(e)(8)(vi)(C). Under proposed § 1.861–9(e)(8)(ii), the lender in these transactions is generally required to match the source and separate category of the interest income and expense by assigning the interest income to the same statutory and residual groupings from which the interest expense is deducted. The portion of the loan that corresponds to the matched income and expense is not taken into account for purposes of allocating and apportioning the lender's remaining interest expense. Proposed § 1.861–9(e)(8)(i). The 2018 FTC proposed regulations also include anti-avoidance rules to extend the application of these provisions to certain back-to-back loans or loans made through CFCs. *See* proposed § 1.861–9(e)(8)(iii) and (iv).

One comment suggested modifying the language in proposed § 1.861–9(e)(8)(ii) to clarify that the rules for specified partnership loans apply solely to match existing income and expense related to the loan, and therefore the rules do not create additional gross income. The final regulations clarify the language of the 2018 FTC proposed regulations consistent with the comment. *See* § 1.861–9(e)(8)(ii).

The same comment requested clarification with respect to the anti-avoidance rule in proposed § 1.861–9(e)(8)(iii). Proposed § 1.861–9(e)(8)(iii) provides that if instead of loaning directly to a partnership, a partner instead enters into a back-to-back loan structure through an unrelated person, then the series of loans will be recharacterized as a direct loan to the partnership if there was a principal purpose of avoiding the rules in proposed § 1.861–9(e)(8). A per se rule provides that a series of loans will be subject to the recharacterization rule without regard to the principal purpose test if the loan to the unrelated person would not have been made or maintained on substantially the same terms irrespective of the loan of funds by the unrelated person to the partnership. The comment requested that the per se rule be converted to an adverse factor in determining whether a principal purpose of avoidance exists.

The Treasury Department and the IRS have determined that a loan to an unrelated person that would not have been made or maintained on substantially the same terms if the unrelated person did not loan the funds to the partnership in which the original lender (or an affiliate of the original lender) has a direct or indirect interest is necessarily made with a principal purpose of avoiding the rules in § 1.861–9(e)(8). In addition, this rule is parallel to a similar anti-avoidance rule in § 1.861–11T(e)(3) that applies to loans between members of an affiliated group. The Treasury Department and the IRS have determined that a similar standard should apply in both cases. Therefore, the comment is not adopted.

The comment also requested clarification with respect to the anti-avoidance rule in proposed § 1.861–9(e)(8)(iv), which provides that certain loans to a partnership held by a CFC will be treated as held directly by the U.S. shareholder of the CFC if the loan was made or transferred with a principal purpose of avoiding the rules of proposed § 1.861–9(e)(8). The comment requested further guidance as to when a CFC loan to a partnership is considered to have a principal purpose of avoidance. The final regulations do not provide further guidance on the determination of principal purpose, which is a highly factual and case specific inquiry. The comment further requested clarification as to the tax consequences that arise when the loan is deemed to be held by the U.S. shareholder under the rule, and requested an example that would illustrate the operation of these rules. The final regulations clarify the operation of § 1.861–9(e)(8)(i), which generally requires that the U.S. person that owns a direct or indirect interest in the partnership disregard a portion of the loan receivable for purposes of allocating any other interest expense of the U.S. person. Where this anti-avoidance rule applies, the loan receivable is held by the CFC rather than its U.S. shareholder (which has the direct or indirect interest in the partnership), and thus merely disregarding the loan receivable would not affect the interest expense allocated by the U.S. shareholder because the relevant asset to the U.S. shareholder is the stock of the CFC that holds the loan receivable. Accordingly, the final regulations provide that appropriate adjustments are made to the value and characterization of the U.S. shareholder's stock in the CFC to reflect the amount of the loan that is disregarded under § 1.861–9(e)(8)(i). The final regulations also provide examples that illustrate the application of § 1.861–9(e)(8) in general. *See* § 1.861–9(e)(8)(vii).

Several comments requested that the rules for specified partnership loans be expanded to cover loans made by a partnership to a partner (''upstream partnership loans'') so that the treatment of loans by partners to partnerships and vice versa would be parallel for purposes of determining the source and separate category of the associated interest income and expense. The Treasury Department and the IRS agree that providing similar rules for upstream partnership loans is appropriate. Therefore, the 2019 FTC proposed regulations provide similar rules for determining the source and separate category of interest income and expense with respect to upstream partnership loans. These rules are being proposed in order to provide taxpayers an additional opportunity to comment on the rule. To better coordinate the terminology between § 1.861–9(e)(8) and the rules addressing upstream partnership loans in the 2019 FTC proposed regulations, all references in the final regulations to a specified partnership loan, or SPL, are changed to downstream partnership loan, or DPL, respectively.

2. Treatment of Limited Partners Under § 1.861–9(e)(4)

Proposed § 1.861–9(e)(4)(i) requires that limited partners and corporate general partners with less than 10 percent ownership in a partnership directly allocate their distributive share of partnership interest expense to their share of partnership gross income, which is generally treated as passive category income under proposed § 1.904–4(n)(1)(ii). One comment requested that the direct allocation rule be revised such that individuals that are partners with less than 10 percent ownership in a limited liability company or limited liability partnership be treated per se as limited partners.

Whether a partner is a general partner or limited partner is determined under general partnership law principles and therefore further guidance on this issue is outside the scope of the regulations. Accordingly, the comment is not adopted. *See also* Part III.E of this Summary of Comments and Explanation of Revisions for changes conforming the treatment of corporate and individual general partners.

3. Direct Allocation of Interest Expense for Certain Financing Companies

The general method to allocate and apportion interest expense, as provided in § 1.861–9T(a), is based on the principle that money is fungible and interest expense is attributable to all activities and property regardless of any specific purpose for incurring an obligation on which interest is paid. *See* H.R. Rep. No. 99–426, at 374 (1986) (''With limited exceptions, the committee believes that it is appropriate for taxpayers to allocate and apportion interest expense on the basis that money is fungible.''). The 2018 FTC proposed regulations do not alter this approach. However, one comment requested that a finance company that borrowed money to fund loans to customers should be permitted to directly allocate the expense to the extent of interest income from the financing activity. The comment does not identify any reasons why debt of a financing company cannot be used to fund income of the entire group (either directly through the proceeds or by freeing up capital elsewhere in the group). To the extent the financing entity is a ''financial corporation,'' the rules in § 1.861–11T(d)(4) allow for separate treatment of income of financial corporations versus nonfinancial corporations. Therefore, the Treasury Department and the IRS have determined that an exception to the general rule of fungibility for finance companies is unwarranted.

4. Election To Use the Alternative Tax Book Value Method

One comment requested that the final regulations suspend restrictions on changing any elections under either the foreign tax credit or expense allocation rules, including any elections included in these final regulations, whether from year-to-year or a retroactive basis, for a three-year period beginning in 2018. The only election identified by the comment letter is the election to use the alternative tax book value method for apportioning interest expense.

Allowing annual or retroactive changes to the decision to use the alternative tax book value method would create significant compliance concerns for taxpayers and administrability concerns for the IRS because each change in method will require adjusting asset bases and depreciation schedules to reflect the new method. Therefore, the comment is not adopted. However, the final regulations provide additional time for taxpayers to change between the sales and gross income methods for purposes of allocating and apportioning research and experimental (''R&E'') expenditures. *See* Part II.D. of this Summary of Comments and Explanation of Revisions.

5. Valuation of Assets for Purposes of Apportioning Interest Expense

In general, under the tax book value method or alternative tax book value method of interest apportionment, a taxpayer must determine the value of its assets based on an average of the tax book value of the asset at the beginning and end of the year. *See* proposed § 1.861–9(g)(2)(i)(A). Before the TCJA, taxpayers could elect to use the fair market value method, which required a determination of the fair market value of the asset as of the last day of the year. However, the fair market value method was repealed as part of the TJCA. *See* section 864(e)(2). In order to provide transitional relief with respect to the TJCA's repeal of the fair market value method, proposed § 1.861–9(g)(2)(i)(A) provides that for the first taxable year beginning after December 31, 2017, a taxpayer that had been using the fair market value method may choose to determine asset values using an average of the end of the first quarter and the year-end values of its assets, provided that all the members of an affiliated group (as defined in § 1.861–11T(d)) make the same choice and no substantial distortion would result.

One comment requested that for a given asset, taxpayers be permitted to average the prior taxable year's end of year fair market value with the current year-end value, which would be based on tax book value. This approach, however, would be inconsistent with the repeal of the fair market value method for interest apportionment as part of the TCJA. Furthermore, because the fair market value and tax book value methods rely on different methodologies, this approach could lead to a substantial distortion. Therefore, the comment is not adopted.

Another comment requested either that taxpayers be permitted to rely solely on the year-end tax book value of assets (and thus not requiring averaging) or that taxpayers electing to use first quarter values be permitted to do so without the earnings adjustment under § 1.861–12(c)(2)(i)(A) when the asset being valued is stock in a 10 percent owned corporation. The comment argues that this is necessary because otherwise taxpayers would have to determine the amount of the earnings adjustment at the end of the taxpayer's first quarter, which would be burdensome to comply with. However, the regulations already provide that taxpayers do not need to determine the earnings adjustment described in § 1.861–12(c)(2)(i)(A) as of the end of the first quarter. Under proposed § 1.861–9(g)(2)(ii)(B), with respect to stock in a 10 percent owned corporation, the tax book value of the stock at the end of the first quarter is determined before the adjustment required by § 1.861–12(c)(2)(i)(A), and a single earnings and profits adjustment is made based on the earnings and profits determined as of the end of the taxable year. This rule is maintained in the final regulations.

6. Clarification of Application of the Asset Method Under § 1.861–9T(g)

Section 1.861–9T(g) provides rules for purposes of allocating and apportioning interest expense of a CFC under the asset method, which also apply to characterize the stock of a first-tier CFC under § 1.861–12 for purposes of allocating and apportioning expenses of the CFC's U.S. shareholders. Under the rules in § 1.861–12, the adjusted basis of the stock of the first-tier CFC is adjusted by the earnings and profits of the CFC and other lower-tier foreign corporations owned by the CFC.

One comment requested that the asset method under § 1.861–9T(g) be clarified to confirm that when applying § 1.861–9 at the level of a CFC, the rules in § 1.861–12 apply for purposes of characterizing stock owned directly and indirectly by the CFC, and that such rules apply for all operative sections, not just section 904. The Treasury Department and the IRS agree that in applying the asset method at the level of a CFC (including for purposes of characterizing CFC stock in applying section 904 as the operative section), the CFC must apply the rules in § 1.861–12(c) with respect to any lower-tier CFCs. For example, a CFC applying the asset method must make basis adjustments to reflect earnings and profits of lower-tier corporations when valuing and characterizing the assets of the CFC. Otherwise, the value of the lower-tier corporations would be under- or over-represented in characterizing the assets of the CFC. Furthermore, any lower-tier CFCs must also apply the same rules, starting with the lowest-tier CFC and moving up.

Therefore, the final regulations provide in § 1.861–9(g)(4) that § 1.861–12 applies to characterize lower-tier stock in the hands of a CFC. Consistent with the 2018 FTC proposed regulations, § 1.861–12(a) clarifies that the rules of that section apply for all operative sections and are not limited to section 904.

7. Treatment of Tested Income in Allocating and Apportioning Interest Expense of a CFC Under the Modified Gross Income Method

Section 1.861–9T(j)(2) provides rules for purposes of allocating and apportioning interest expense of a CFC under the modified gross income method, which also apply to characterize the stock of a first-tier CFC under § 1.861–12 for purposes of allocating and apportioning expenses of the CFC's U.S. shareholders. In general, § 1.861–9T(j)(2) requires each CFC in a chain of ownership, beginning with the lowest-tier CFC, to allocate and apportion its interest expense and then tier up its income (net of interest expense) to the next-highest CFC in the chain, which then allocates and apportions its interest expense. Under proposed § 1.861–9(j)(2)(ii), gross tested income (net of interest expense) of a lower-tier corporation does not tier up to a higher-tier corporation, which is consistent with how the rules applied to subpart F income before the TCJA. One comment recommended that the regulations be revised to allow upper-tier CFCs to take into account gross tested income (net of interest expense) of lower-tier CFCs, noting that this would be consistent with the group-based approach of section 951A, would minimize differences between the modified gross income method and the asset method in § 1.861–9T(g), and would eliminate distortions that could arise in the case of an upper-tier holding company. The Treasury Department and the IRS agree with the comment, and therefore § 1.861–9(j)(2)(ii) eliminates the rule that excludes gross tested income from tiering up to higher-tier corporations for purposes of allocating and apportioning interest expense of the CFC. Additionally, modifications were made to § 1.861–13(c)(3) (Example 3) to reflect this change.

8. Characterization of Stock of Certain Foreign Corporations Under Proposed §§ 1.861–12(c)(3) and 1.861–13

Proposed § 1.861–12(c)(3) provides rules for characterizing the stock of a CFC for purposes of allocating and apportioning expenses under an asset method. If the operative section is not section 904, the stock of a CFC is characterized under either the asset method or the modified gross income method. Proposed § 1.861–12(c)(3)(i)(A). Where section 904 is the operative section, proposed § 1.861–13 applies to characterize the stock of the CFC as producing foreign source income in the separate categories or as producing U.S. source income. Proposed § 1.861–

12(c)(3)(i)(B). Under proposed § 1.861–13(a)(1), the stock of the CFC is first characterized according to the described statutory groupings under the asset method or the modified gross income method. If the CFC owns stock in a noncontrolled 10-percent owned foreign corporation, the assets or income of the foreign corporation is assigned to a gross subpart F income grouping to the extent the income of the foreign corporation, when distributed to the CFC, would be gross subpart F income of the CFC. The stock of the CFC is then assigned to the section 951A category, a treaty category, or other separate category under subsequent steps. The stock of the CFC may be assigned, in whole or in part, to the section 951A category if the CFC has gross tested income, even if the CFC has a tested loss. *See* proposed § 1.861–13(a)(2).

One comment requested that proposed § 1.861–13 provide that stock of a noncontrolled 10-percent owned foreign corporation owned by a CFC is instead assigned to the groupings for specified foreign source general category income or specified foreign source passive category income (as described in proposed § 1.861–13(a)(1)(i)(A)(*9*)). The comment notes this would be appropriate because proposed § 1.861–13 characterizes stock based on the income to which the stock gives rise, and a distribution by a noncontrolled 10-percent owned foreign corporation to a CFC should be eligible for the dividends received deduction in section 245A (the ''section 245A deduction'') under § 1.952–2.

As noted in Part III.B of the Explanation of Provisions to the temporary regulations under section 245A, the Treasury Department and the IRS intend to address issues related to the application of § 1.952–2, taking into account various comments received in connection with the TCJA (including in connection with regulations issued under section 951A), in a future guidance project. *See* T.D. 9865; 84 FR 28405. This guidance will clarify that, in general, any provision that is expressly limited in its application to domestic corporations does not apply to CFCs by reason of § 1.952–2. The Treasury Department and the IRS continue to study whether, and to what extent, proposed regulations should be issued that provide that dividends received by a CFC are eligible for a section 245A deduction notwithstanding the fact that the deduction is only available to domestic corporations. Given that no proposed regulations have been issued, the Treasury Department and the IRS have determined that it is appropriate to continue to characterize the stock of a noncontrolled 10-percent owned foreign corporation as giving rise to subpart F income, and accordingly, the comment is not adopted. Any changes that may be necessary to § 1.861–13 if proposed regulations under section 245A are issued providing that dividends received by a CFC are eligible for a section 245A deduction will be considered as part of that guidance.

Another comment suggested that the gross income and assets of tested loss CFCs should be exempt from the expense apportionment rules due to the existence of special rules for tested loss CFCs in the context of calculating GILTI, including the disallowance of any foreign tax credits related to the tested loss under section 960(d)(3). Section 864(e)(2) requires that interest expense be apportioned on the basis of the adjusted bases of assets. Whether or not a CFC is profitable does not change the fact that a taxpayer's borrowings can fund the operations of the CFC. In addition, a CFC may be highly valuable (and have a large and positive amount of accumulated earnings and profits) even if it happens to be in a loss position for a particular year. Exempting the assets of tested loss CFCs would also result in distortive incentives whereby a CFC with a small amount of tested income would have an incentive to shift into a tested loss in order to have the entire value of the CFC be excluded for purposes of interest expense apportionment. Finally, the special treatment of tested losses in the determination of the GILTI inclusion is already accounted for by reducing the value of the stock of any CFC that is assigned to the section 951A category based on the inclusion percentage. *See* § 1.861–13(a)(2). Accordingly, this comment is not adopted.

Finally, the final regulations clarify in § 1.861–13(a)(1)(i) and (ii) that for purposes of characterizing the stock of a CFC in the various statutory groupings, the U.S. shareholder of the CFC must use the same method (either the asset method or modified gross income method) that the CFC uses to apportion its interest expense. This is consistent with the rule in existence before the 2018 FTC proposed regulations, which is still reflected in § 1.861–12(c)(3)(i)(A).

9. Assets Funded by Disallowed Interest

Under § 1.861–12T(f)(1), to the extent that interest expense is capitalized, deferred, or disallowed, the adjusted basis of an asset connected to the interest expense is reduced to account for the interest that was capitalized, deferred, or disallowed. One comment suggested a revision to clarify, and narrow, the scope of this rule. The Treasury Department and the IRS agree that this rule should be clarified and have proposed changes in the 2019 FTC proposed regulations.

D. Allocation and Apportionment of Research and Experimental Expenditures

Proposed § 1.861–17 provides a one-time exception to the five-year binding election period by allowing taxpayers to switch between the sales method and gross income method in the first taxable year beginning after December 31, 2017. This exception is finalized without change.

Comments requested revisions to the approach for allocating and apportioning R&D expenditures under § 1.861–17, which the 2018 FTC proposed regulations do not otherwise modify. These comments are discussed in the 2019 FTC proposed regulations, which propose changes to the application of the sales method and allow taxpayers that are on the sales method to rely on those changes for taxable years before the proposed rulemaking is in effect. In order to give taxpayers an additional opportunity after the 2019 FTC proposed regulations have been issued to switch to the sales method, the final regulations provide that taxpayers may change to the sales method up to their last taxable year that begins before January 1, 2020, without the prior consent of the Commissioner.

E. Section 904(b)(4)

Section 904(b)(4) makes certain adjustments to both the taxpayer's foreign source taxable income and the taxpayer's entire taxable income for purposes of computing the applicable foreign tax credit limitation, based on the foreign-source portion (as defined in section 245A(c)) of any dividend from a specified 10-percent owned foreign corporation (as defined in section 245A(b)) and the deductions allocated and apportioned to, in general, income with respect to stock of the foreign corporation that will generally be eligible for a section 245A deduction or the stock of the foreign corporation that gives rise to that income. Proposed § 1.904(b)–3(c)(1) and (2) provide rules for determining what amount of the stock of the foreign corporation gives rise to income that, if distributed, is generally eligible for a section 245A deduction. The rules subdivide a portion of the value of the stock into a section 245A subgroup and a non-section 245A subgroup within each separate category.

One comment requested that the regulations clarify the treatment of stock basis of a CFC that is associated with a hybrid instrument when the stock would give rise to dividends for which a deduction is disallowed under section 245A(e), and suggested that the amount of the basis of that stock should be assigned to the non-section 245A subgroup.

Under proposed § 1.861–13(a)(5), stock is assigned to a section 245A subgroup without regard to whether a dividend paid (either in the current or future year) with respect to the stock may actually qualify for a section 245A deduction (for example, the deduction could be disallowed due to section 245A(e) or section 246(c)). The Treasury Department and the IRS considered a rule that would assign a portion of stock to a section 245A subgroup only if the earnings and profits reflected in the stock's value were allowed (or would be allowed in the future) a section 245A deduction. However, taxpayers generally could not know in a current year whether a distribution of the current earnings and profits would be allowed a section 245A deduction in a future year, and a rule requiring taxpayers to recalculate their section 245A subgroups through amended returns would create compliance burdens for taxpayers and administrative burdens for the IRS. Therefore, the final regulations retain the rules in the 2018 FTC proposed regulations, which determine the amount of stock in a section 245A subgroup without regard to whether a section 245A deduction is or would be allowed with respect to dividends paid with respect to the stock.

The comment also suggested that stock associated with hybrid instruments owned directly by a U.S. shareholder should be assigned to the non-section 245A subgroup due to a concern that the value of stock assigned to a section 245A subgroup would be excluded for purposes of valuing the stock under the beginning- and end-of-year averaging rule in § 1.861–9(g)(2). However, neither § 1.861–13(a)(5) nor § 1.904(b)–3 provides that stock assigned to the section 245A subgroup is excluded. Instead, deductions allocated and apportioned to stock assigned to the section 245A subgroup are added back to the numerator and denominator determined under section 904(a). Therefore, contrary to the comment, the assignment of stock to the section 245A subgroup (as opposed to the non-section 245A subgroup) does not impact the calculation of the total value of stock under the beginning- and end-of-year averaging rule in § 1.861–9(g)(2). Thus, the comment is not adopted.

Another comment recommended that proposed § 1.904(b)–3 be amended to provide that the treatment of deductions allocated and apportioned to the section 245A subgroup not be added back to entire taxable income for purposes of applying section 904(a) to section 951A category income. The comment is not adopted. Section 904(b)(4) is clear that deductions described in that provision are disregarded for purposes of "entire taxable income," which means that the computation under section 904(a) (which describes a fraction, the denominator of which is "entire taxable income") with respect to all separate categories, including the section 951A category, are affected by deductions allocated and apportioned to the section 245A subgroup. However, the amount of income in the section 951A category (the numerator of the section 904(a) fraction when section 904(a) applies to that category) is not affected by deductions allocated and apportioned to the section 245A subgroups of other separate categories.

III. Foreign Tax Credit Limitation Under Section 904

A. Transition Rules Accounting for New Separate Categories

1. Carryovers and Carrybacks of Unused Foreign Taxes Under Section 904(c)

The 2018 FTC proposed regulations provide transition rules for assigning carryforwards of unused foreign taxes paid or accrued, or deemed paid or accrued, in pre-2018 taxable years to post-2017 separate categories, which include new categories for section 951A category income and foreign branch category income. Proposed § 1.904–2(j)(1)(ii) provides that if unused foreign taxes paid or accrued or deemed paid with respect to a separate category of income are carried forward to a taxable year beginning after December 31, 2017, those taxes are allocated to the same post-2017 separate category as the pre-2018 separate category from which the unused foreign taxes are carried. Proposed § 1.904–2(j)(1)(iii) provides an exception that permits taxpayers to assign unused foreign taxes in the pre-2018 separate category for general category income to the post-2017 separate category for foreign branch category income to the extent they would have been assigned to that separate category if the taxes had been paid or accrued in a post-2017 taxable year. Any remaining unused taxes are assigned to the post-2017 separate category for general category income.

Several comments requested a simplified rule for assigning a portion of the pre-2018 unused foreign taxes to the post-2017 separate category for foreign branch category income. One comment recommended a simplified rule under which unused foreign taxes are assigned to the foreign branch category in the same proportions as foreign taxes paid or accrued by the taxpayer's foreign branches in the relevant pre-2018 year bear to all foreign taxes paid or accrued by the taxpayer in that year. Another comment recommended a simplified rule that assigns the pre-2018 unused foreign taxes to the post-2017 separate categories by reference to a single year. Another comment recommended either allowing taxpayers to allocate pre-2018 unused foreign taxes freely between the post-2017 separate categories for general category income and foreign branch category income, or in the alternative, using any reasonable method. Finally, one comment recommended that if the reconstruction option is maintained in the final regulations that it be simplified by not requiring taxpayers to reconstruct disregarded payments between a branch and its owner.

After considering the comments, the Treasury Department and the IRS agree that a simplified safe harbor option with respect to the reconstruction option should be provided. Section 1.904–2(j)(1)(iii)(B) provides a safe harbor that allocates unused foreign taxes from a particular pre-2017 taxable year to the post-2018 separate category for foreign branch category income based on a ratio equal to the amount of foreign income taxes that were paid or accrued by the taxpayer's foreign branches divided by the amount of all foreign income taxes assigned to the general category that were paid or accrued, or deemed paid by the taxpayer with respect to the taxable year. The Treasury Department and the IRS adopt this recommendation because it combines administrative convenience, a low potential for manipulation, and a reasonable approximation of a full reconstruction. Furthermore, in light of the addition of a safe harbor option, no changes are made to the requirements for reconstruction if the safe harbor option is not chosen. Taxpayers that do not choose the safe harbor must determine the unused foreign taxes with respect to foreign branch category income as if that separate category (and thus, all the rules in § 1.904–4(f)) had applied in the year the taxes were paid or accrued.

Another comment requested that when applying the reconstruction option, the final regulations provide that for purposes of determining whether excess credits relate to direct or indirect foreign taxes, taxpayers may treat indirect credits as having been used first. However, under the reconstruction option, taxpayers must allocate unused foreign taxes by applying the rules for foreign branch category income to the origin year and determining the amount of taxes that would have been unused foreign taxes and would have been allocated to foreign branch category income had the foreign branch category applied for that year. Because deemed paid taxes can never relate to the foreign branch category, no deemed paid taxes will be treated as giving rise to unused foreign taxes that would have been allocated to foreign branch category income. Therefore, the Treasury Department and the IRS have determined that no special rules are needed. *See* § 1.904–2(j)(1)(iii).

Another comment requested that taxpayers be allowed to apply the general category exception in proposed § 1.904–2(j)(1)(iii) to post-2017 tax years on a year-by-year basis, rather than to all post-2017 tax years. The Treasury Department and the IRS have determined that the use of different methods in different years could result in inconsistent allocations of the same foreign tax credit carryovers and create significant complexity for taxpayers and the IRS. Accordingly the comment is not adopted.

2. Separate Limitation Losses, Overall Foreign Losses, Overall Domestic Losses, and Net Operating Loss Carryforwards

Proposed § 1.904(f)–12(j) generally provides that any separate limitation loss (''SLL'') or overall foreign loss (''OFL'') accounts in a pre-2018 separate category remain in the same post-2017 separate category. However, to the extent there are any unused foreign taxes with respect to the pre-2018 separate category for general category income that are allocated between the post-2017 separate categories for general category income and foreign branch category income, then any SLL or OFL account in the pre-2018 separate category for general category income is allocated to those post-2017 separate categories in the same proportion that the unused foreign taxes were allocated. Similar rules were provided in the 2018 FTC proposed regulations with respect to the recapture of SLLs or overall domestic losses (each an ''ODL'') that reduced income in a separate category in a pre-2018 taxable year, as well as for foreign losses that are part of a net operating loss that is incurred in a pre-2018 taxable year and carried forward to post-2017 taxable years.

One comment suggested that it was not clear that the allocation of losses should follow the allocation of unused foreign taxes, and that it was inflexible not to allow an allocation of losses with respect to the pre-2018 separate category for general category income between the post-2017 separate categories for general category income and branch category income when there were no unused foreign taxes with respect to that category to be allocated. The comment suggested that a true reconstruction of the losses would be too complex, but requested that the Treasury Department and the IRS consider some other unspecified approach that was independent from the allocation of unused foreign taxes.

Another comment on the same issue requested that the Treasury Department and the IRS allow taxpayers to elect to reconstruct the losses. In other words, this approach would allow taxpayers to allocate a portion of loss accounts with respect to the pre-2018 separate category for general category income to the post-2017 separate category for foreign branch category income to the extent they were attributable to losses that either related to, or offset, pre-2018 general category income that would have been foreign branch category income if recognized in a post-2017 taxable year, regardless of the taxpayer's treatment of unused foreign taxes.

The Treasury Department and the IRS agree that additional options should be added under the transition rules for loss accounts that relate to the pre-2018 separate category for general category income. Accordingly, § 1.904(f)–12(j)(2) provides that a SLL or OFL account incurred in the pre-2018 separate category for general category income by default remains in the general category, but that the taxpayer may choose to reconstruct how much of the loss account would have been in the foreign branch category had that category been in effect before 2018. As an alternative to reconstruction, a safe harbor provides that the taxpayer may instead recapture the pre-2018 loss account by recharacterizing the first available income in the post-2017 separate category for either general category income or foreign branch category income. To the extent the income in both separate categories available for recapture exceeds the balance in the loss account, the loss account is recaptured proportionately from each separate category. An ordering rule provides that the balance in a pre-2018 loss account is recaptured before any post-2017 additions to the account. This safe harbor follows similar transition rules provided in § 1.904(f)–12(a) for pre-1987 loss accounts.

Similarly, § 1.904(f)–12(j)(3) provides that an SLL or OFL that reduced pre-2018 general category income is by default recaptured in post-2018 years as general category income, but that a taxpayer may choose to reconstruct how much of the balance in the loss account would have offset foreign branch category income had that separate category applied in the year the loss was incurred, and recapture that amount in post-2017 taxable years as income in the foreign branch category. As an alternative to reconstruction, the final regulations retain the rule in proposed § 1.904(f)–12(j)(3)(ii) as a safe harbor, which provides that the taxpayer may instead recapture the balance in the loss account in subsequent taxable years ratably as income in the taxpayer's post-2017 separate categories for general category and foreign branch category income based on the proportion in which any unused foreign taxes in the pre-2018 separate category for general category income are allocated under the transition rules in § 1.904–2(j)(1)(iii)(A) or (B).

Section 1.904(f)–12(j)(4) provides that foreign losses that are part of general category net operating losses incurred in pre-2018 taxable years which are carried forward to post-2017 taxable years are by default treated as general category net operating losses, but that the taxpayer may choose to reconstruct how much of that loss would have been attributable to the foreign branch category had that separate category applied in the year the net operating loss arose. As an alternative to reconstruction, a safe harbor provides that the taxpayer may instead choose to treat the net operating loss carryforward as attributable to the general category and foreign branch category to the extent of any general category income and foreign branch category income, respectively, that is available in the year to be offset by the net operating loss carryforward (the carryforward year). To the extent the net operating loss carryforward offsets any other income in the carryforward year, it is treated as attributable to the general category. If the sum of taxpayer's general category income and foreign branch category income in the carryforward year exceeds the amount of the net operating loss carryforward, then the amount of each type of separate category income that is offset by the net operating loss carryforward, and therefore the separate category treatment of the net operating loss carryforward, is determined on a proportionate basis. An ordering rule provides that a pre-2018 general category net operating loss is applied before any post-2017 general category net operating loss.

Finally, § 1.904(f)–12(j)(5) sets forth a coordination rule that provides that for purposes of applying the transition rules for unused foreign taxes or any of the rules for loss accounts, the choice whether to default to the general category or to reconstruct must be made consistently in all cases. However, if the taxpayer chooses to reconstruct, the choice to apply a safe harbor may be made independently under each set of transition rules.

B. Foreign Branch Category Income

1. Policy Considerations

Comments recommended that the final regulations, or preamble to the final regulations, include a discussion of the tax policy considerations relevant to proposed § 1.904–4(f). In general, proposed § 1.904–4(f) defines the term foreign branch category income, which affects both the limitation on foreign tax credits under section 904 and the deduction for FDII under section 250(a)(1)(A). Under section 904(d)(2)(J), foreign branch income is defined as the business profits attributable to one or more QBUs in one or more foreign countries, with the amount of business profits attributable to a QBU determined under rules established by the Secretary. Accordingly, the 2018 FTC proposed regulations provide guidance regarding the attribution of profits to a foreign branch.

The legislative history to the TCJA does not discuss the attribution of business profits to a QBU. In drafting the 2018 FTC proposed regulations, the Treasury Department and the IRS balanced various policy objectives, including: Attributing gross income to a foreign branch in a manner that is commensurate with its business activities; administrability for taxpayers and the IRS; conformity with local country tax law; and giving effect to the policies of sections 250(b)(3)(A)(i)(VI) and 904(d)(1)(B), which limit, respectively, the deduction under section 250 and the allowance of a credit under section 901 by reference to the amount of business profits attributable to a QBU.

The Treasury Department and the IRS have determined that the 2018 FTC proposed regulations' approach to attributing gross income to a foreign branch strikes the appropriate balance among those goals. In general, the 2018 FTC proposed regulations attribute gross income by reference to the books and records maintained with respect to a foreign branch, subject to certain adjustments (including adjustments to reflect Federal income tax principles). Proposed § 1.904–4(f)(2)(i). Reliance on a foreign branch's books and records promotes administrability for both taxpayers and the IRS. In addition, gross income reflected on the books and records of a foreign branch generally reflects payments for economic activity of that foreign branch, such that the proposed regulations' approach is broadly consistent with the policy of attributing gross income based on the relative economic activity of a foreign branch. Furthermore, the rule will promote conformity between the income attributed to a foreign branch under § 1.904–4(f) and the income subject to tax in the foreign jurisdiction.

To further those policies, the 2018 FTC proposed regulations also give effect to payments made in connection with certain transactions that are disregarded for Federal income tax purposes (such payments, ''disregarded payments''). Proposed § 1.904–4(f)(2)(vi). These payments are generally reflected on the books and records of a foreign branch, represent compensation for economic activity performed by or for a foreign branch, and are frequently given effect for foreign income tax purposes. Accordingly, giving effect to those transactions generally aligns with the policies furthered by the general rule for attributing gross income to a foreign branch. For additional discussion regarding the policies and rules relating to disregarded payments, see Part III.B.2 of this Summary of Comments and Explanation of Revisions.

2. Disregarded Payments

i. In General

Several comments were received regarding proposed § 1.904–4(f)(2)(vi), under which gross income attributable to a foreign branch that is not passive category income must be adjusted to reflect disregarded payments between a foreign branch and its foreign branch owner, and between foreign branches (the ''disregarded payment rule''). Some comments expressed support for the rule, while others indicated that they believed that proposed § 1.904–4(f) would be more administrable without the disregarded payment rule. As described in Part III.B.1 of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS have determined that the disregarded payment rule furthers the various policies related to the attribution of gross income to a foreign branch. The disregarded payment rules are designed to utilize information that is already available to taxpayers, making the rule more administrable. Taking disregarded payments into account will also give effect to the economic activity of a foreign branch (or a foreign branch owner) while reducing mismatches between the amount of gross income attributable to a foreign branch and the foreign tax base. Accordingly, the final regulations retain the disregarded payment rule, subject to the modifications described in this Part III.B.2 of the Summary of Comments and Explanation of Revisions.

ii. Source and Character of Income Allocated in Connection With Disregarded Payments

Comments recommended that the character and source of gross income that is reattributed under the disregarded payment rule be determined by reference to the disregarded transaction giving rise to the reattribution. For example, if a foreign branch owner earned $50 of U.S. source royalty income, and made a $50 disregarded payment to its foreign branch for services performed that if regarded would be allocable to the royalty income under the 2018 FTC proposed regulations, the proposed regulations would attribute $50 of U.S. source royalty income to the foreign branch. Because attributing U.S. source royalty income to the foreign branch would not increase the taxpayer's limitation under section 904(d)(2)(B) (the foreign branch category), the comments recommended that the source and character of the reattributed gross income be determined by reference to the disregarded payment, such that the $50 of U.S. source royalty income would be converted to foreign source services income, potentially increasing the creditability of taxes attributable to the foreign branch (including taxes imposed by reason of the disregarded transaction).

The Treasury Department and the IRS have determined that it would be inappropriate to issue rules under section 904 converting the source and character, as opposed to the separate category, of a taxpayer's gross income. Generally, section 904(d) and the regulations under § 1.904–4(f) provide rules regarding the separate application of section 904 with respect to certain categories of regarded gross income of a taxpayer. The Treasury Department and the IRS have determined that section 904 does not provide for the redetermination of the character or source of a taxpayer's gross income. Converting U.S. source income to foreign source income would also be inconsistent with the purpose of section

904, which is to ensure that the foreign taxes may not be used as a credit against U.S. tax on U.S. source income. Finally, rules allowing taxpayers to increase foreign source income through transactions with foreign branches would be prone to significant manipulation. Accordingly, the final regulations do not include special rules for determining the source and character of gross income that is reattributed under the disregarded payment rule. Similarly, the final regulations clarify that § 1.904–4(f) does not affect the analysis of whether an amount of gross income can be resourced under an applicable bilateral tax treaty. Such analysis is based solely on the treaty text and related authorities.

iii. Netting of Disregarded Payments

Comments recommended that disregarded payments be netted before determining the amount of gross income attributable to a foreign branch and its owner. For example, under a netting rule, if a foreign branch made a $100 disregarded payment to its foreign branch owner, and the foreign branch owner made an $85 disregarded payment to the foreign branch during the same year, no more than $15 of the gross income reflected on the books and records of the foreign branch would be attributed to the foreign branch owner, regardless of the factual relationship between the two payments. Similarly, if a foreign branch owner made a $50 disregarded payment to one branch, and received a $50 disregarded payment from a second branch, none of the gross income reflected on the books and records of the second foreign branch would be attributed to its owner and none of the gross income earned by the foreign branch owner would be attributed to the first foreign branch.

The Treasury Department and the IRS have determined that disregarded payments should not be netted before making adjustments under the disregarded payment rule. As described in Part III.B.2.ii of this Summary of Comments and Explanation of Revisions, the disregarded payment rule affects only the separate category of gross income, and not the source or character of a taxpayer's gross income. Accordingly, when a disregarded payment is made between a foreign branch owner and a foreign branch, the payment must be allocated to gross income of the payor to determine the source and character of the amount that is reattributed. When there is an increase to the amount of gross income attributable to a foreign branch, for example, there must be a corresponding decrease to income of the foreign branch owner with the same source and character. Moreover, the disregarded payment rule only affects the assignment of gross income in the foreign branch category and the general category, or a specified separate category that is associated with the foreign branch or general categories. Passive income, for example, is always excluded from the foreign branch category. Thus, to the extent that a disregarded payment from a foreign branch owner to a foreign branch would be allocable to passive income of the foreign branch owner, there can be no adjustment as a result of that payment to the taxpayer's gross income in the passive category, even though the amount of passive category income that is attributable to the foreign branch (and the foreign branch owner) may change.

Netting disregarded payments would distort these rules by preventing the disregarded payment rule from accurately identifying the source and character of gross income that is attributable to the foreign branch and its owner, respectively. For example, if a foreign branch earned $100 of foreign source royalty income that was initially attributable to the foreign branch, and made a $90 disregarded payment to its foreign branch owner that if regarded would be allocable to that foreign source royalty income, only $10 of that foreign source royalty income should be treated as foreign branch category income. Under a netting rule, however, a $90 disregarded payment by the foreign branch owner to that foreign branch (or another foreign branch of the foreign branch owner) that would be allocable to U.S. source passive category income of the foreign branch owner would offset the payment, such that U.S. source passive category income that could not increase foreign branch category income itself would effectively increase foreign branch category income, by increasing the non-passive foreign source royalty income attributable to a foreign branch. Accordingly, to prevent this and similarly arbitrary outcomes under the disregarded payment rule, the final regulations do not include a rule netting disregarded payments between a foreign branch owner and its foreign branches.

A comment further recommended that disregarded payments between foreign branches should be disregarded, and stated that taking those transactions into account added administrative complexity to the 2018 FTC proposed regulations without changing the categorization of any item of gross income as foreign branch category income. The Treasury Department and the IRS have determined that this comment is incorrect, and the final regulations retain the 2018 FTC proposed regulations' rules regarding transactions between foreign branches. The items of gross income attributable to a particular foreign branch vary based on the nature of the disregarded transaction, which could include multiple back-to-back disregarded payments between foreign branches and the foreign branch owner; further, the amount, character, and source of gross income allocable to a particular foreign branch may vary, and knowing which gross income items are attributable to a particular foreign branch is necessary to determine the amount, character, and source of gross income that is attributed to a foreign branch or the foreign branch owner as the result of a particular disregarded payment. The final regulations clarify this point, including through clarifications to the ordering rule in § 1.904–4(f)(2)(vi)(F), and a new example illustrating the effects of transactions between foreign branches. *See* § 1.904–4(f)(4)(xi) (Example 11). However, the final regulations also clarify that in the case where there is no disregarded payment between the foreign branch and foreign branch owner, disregarded payments between foreign branches have no effect. *See* § 1.904–4(f)(2)(vi)(A).

iv. Interest and Other Financial Transactions

Under the proposed regulations, the disregarded payment rules do not apply to disregarded payments of interest or interest equivalents (''disregarded interest payments''). *See* proposed § 1.904–4(f)(2)(vi)(C)(*1*). The preamble to the 2018 FTC proposed regulations stated that, like remittances from a foreign branch or contributions to a foreign branch, disregarded interest payments reflect a shift of, or return on, capital. Several comments disagreed with that statement, arguing that disregarded interest payments reflect business profits with respect to the payee, particularly with respect to the financial services industry. Comments also indicated that distinguishing among different types of disregarded payments based on their character presented administrative challenges. Finally, a comment noted that failing to reattribute gross income on the basis of disregarded interest payments resulted in incongruities between the gross income attributed to a foreign branch for section 904 purposes and the gross income subject to tax under foreign law.

The final regulations adopt the 2018 FTC proposed regulations' approach to disregarded interest payments. The Treasury Department and the IRS have determined that a general rule reattributing gross income by reference to disregarded interest payments would be inappropriate. As one comment noted, reattributing gross income by reference to disregarded interest payments, but not by reference to remittances and contributions, would allow taxpayers to ''strip'' the foreign branch category, potentially resulting in manipulation of the limitations in sections 250(b)(3)(A)(i)(VI) and 904(d)(1)(B). Similarly, a taxpayer seeking to increase foreign branch category income could instead borrow money from the foreign branch and shift income from the general category through disregarded interest payments made to the foreign branch. However, as described in Part III.B.4.iii of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS are considering future guidance providing special rules for certain financial institutions, including rules that would provide for adjustments to the attribution of gross income by reference to disregarded interest payments.

v. Disregarded Transfers of Intangible Property

Proposed § 1.904–4(f)(2)(vi)(D) (the ''intangible property rule'') requires the use of section 367(d) principles to impute payments, over time, for certain transfers of intangible property in a disregarded transaction. Comments requested that the intangible property rule be withdrawn, either in whole or in part (for example, by limiting the application of the rule to transfers from a foreign branch owner to a foreign branch). The comments argued that (i) there is no compelling policy rationale for the intangible property rule; (ii) the intangible property rule undermines a legislative objective of the TCJA, which was to achieve neutrality as to whether to locate intellectual property in a domestic corporation or its foreign subsidiary; (iii) the anti-abuse rule in § 1.904–4(f)(2)(v) is sufficient to prevent abusive tax-avoidance through disregarded remittances or contributions; (iv) the absence of a similar rule for tangible property or money evidences the lack of a need for a special rule for certain intangible property; (v) the intangible property rule would result in mismatches between the gross income attributable to a foreign branch and the gross income of the foreign branch for foreign tax purposes; and (vi) the rule would present administrative and compliance challenges. Certain comments acknowledged that the intangible property rule may be theoretically accurate, but argued that the compliance burdens that the rule posed outweighed its benefits.

The Treasury Department and the IRS have determined that retaining the intangible property rule is appropriate, and that it should apply to any disregarded transfer between a foreign branch owner and a foreign branch, as well as to transfers between foreign branches. While the intangible property rule may increase compliance burdens and increase the disparity between the gross income attributable to a foreign branch and the gross income taxable by a foreign country, the Treasury Department and the IRS have determined that those concerns are outweighed by the benefits derived from the rule. In general, § 1.904–4(f)(2)(vi)(A) adjusts the attribution of gross income when disregarded payments are made between a foreign branch and a foreign branch owner, or between foreign branches. Disregarded remittances or contributions, however, do not result in the reattribution of gross income. Section 1.904–4(f)(2)(vi)(C)(*2*) and (*3*). Accordingly, when a disregarded transaction with a foreign branch may be structured as either a remittance or contribution, on the one hand, or as a sale, exchange, or license, on the other hand, the amount of gross income attributed to a foreign branch could be manipulated. This concern is heightened when the property in question is highly mobile and highly valuable, as is generally true of intangible property (and less frequently true of tangible property). In light of the higher risk of manipulation for transfers of intangible property, the Treasury Department and the IRS have determined that the anti-abuse rule in § 1.904–4(f)(2)(v) does not sufficiently protect against manipulation, necessitating the more specific and mechanical intangible property rule.

The Treasury Department and the IRS have, however, modified the intangible property rule in response to comments. First, comments recommended that the intangible property rule be limited to disregarded transfers occurring after the enactment of the TCJA, after the date on which the proposed regulations were issued, or after the date on which the final regulations become effective. In response to these comments, the final regulations provide that the intangible property rule does not apply to transfers that occurred before December 7, 2018 (the date on which the proposed regulations were published). Section 1.904–4(f)(2)(vi)(D)(*2*). The Treasury Department and the IRS have determined that limiting the application of the intangible property rule to transfers occurring on or after the date on which the rule was proposed strikes the appropriate balance between providing taxpayers with sufficient notice regarding the intangible property rule, on the one hand, and preventing manipulation of the amount of gross income attributable to a foreign branch, on the other hand.

Second, several comments indicated that the intangible property rule inappropriately captures transient ownership of intangible property that was neither developed nor exploited by the foreign branch (or foreign branch owner) before a transfer. For example, several comments suggested that the intangible property rule would apply to certain repatriations of intangible property from a foreign subsidiary that elected to be treated as a disregarded entity (within the meaning of § 1.904–4(f)(3)(iv)), and immediately thereafter distributed intangible property to its U.S. owner. The Treasury Department and the IRS have determined that the potential distortions that the intangible property rule addresses generally are not implicated in the situation described in the comments. Accordingly, the final regulations adopt the recommendation. Specifically, the final regulations provide that the intangible property rule does not apply to transfers by a foreign branch or foreign branch owner that owns the intangible property transitorily, subject to certain limitations. *See* § 1.904–4(f)(2)(vi)(D)(*3*)(*i*) through (*iii*). For this purpose, whether or not a foreign branch owner that is a transferor of intangible property is treated as satisfying the transitory ownership requirements is determined by reference to both the foreign branch owner transferor and any predecessor to the foreign branch owner. *See* § 1.904–4(f)(2)(vi)(D)(*3*)(*iv*).

Finally, comments requested additional guidance and examples illustrating the application of section 367(d) principles in the context of a remittance of intangible property from a foreign branch to the foreign branch owner. In response to the comments, the final regulations specify that if a foreign branch remits property described in section 367(d)(4) to its foreign branch owner, the foreign branch is treated as having sold the transferred property to the foreign branch owner in exchange for annual payments contingent on the productivity or use of the property, the amount of which are determined under the principles of section 367(d) and the regulations under that section. The final regulations also include an example illustrating the application of the intangible property rule to a remittance of intangible property from a foreign branch to a foreign branch owner. *See* § 1.904–4(f)(4)(xii) (Example 12). The final regulations do not address comments regarding the operation of section 367(d), which are outside of the scope of the final regulations.

vi. Special Rule for Certain Disregarded Payments

A comment recommended that the final regulations clarify that disregarded payments that would be capitalized into amortizable or depreciable basis may produce adjustments under § 1.904–4(f)(2)(vi) in the year or years that the amortization or depreciation deductions would be allowed if those payments had been regarded. The final regulations adopt this recommendation. *See* §§ 1.904–4(f)(2)(vi)(B)(*1*) (specifically including disregarded cost recovery deductions, such as depreciation and amortization, in the disregarded payment allocation rules) and 1.904–4(f)(2)(vi)(B)(*3*) (clarifying the timing of those reattributions).

The final regulations also provide additional guidance regarding certain disregarded payments that would, if regarded, not be deductible, including guidance regarding disregarded sales of property that reattribute gross income when basis would be recovered other than through depreciation, amortization, or other disregarded cost recovery deductions. Under these rules, for example, a foreign branch owner's sale of property with a zero basis to its foreign branch for $100, followed by a sale by the foreign branch of that property to a third party for $110, would generally result in $110 of income that is reflected on the books and records of a foreign branch. The final regulations clarify that, in this example, $100 of gross income must be attributed to the foreign branch owner. Specifically, the foreign branch would be treated as having an adjusted disregarded basis in the property of $100, resulting in $10 of gain from the sale of the property being attributed to the foreign branch, and $100 of adjusted disregarded gain being attributed to its foreign branch owner. *See* § 1.904–4(f)(2)(vi)(B)(*2*) (concerning disregarded sales of property). Attributions of income under this rule are adjusted to the extent that the basis would otherwise have been recovered by the transferee (for example, through a disregarded cost recovery deduction). *See* § 1.904–4(f)(3)(i) (defining adjusted disregarded basis).

vii. Certain Disregarded Transactions

The 2018 FTC proposed regulations provide for certain adjustments to the amount of gross income that would otherwise be attributed to a foreign branch under proposed § 1.904–4(f)(2)(i). For example, gross income attributable to a foreign branch generally does not include gain attributable to a sale of stock by the foreign branch. *See* proposed § 1.904–4(f)(2)(iii). The final regulations clarify that consistent adjustments must be made when attributing income under the disregarded payment rule. *See* § 1.904–4(f)(2)(vi)(C)(*4*). Thus, for example, a disregarded payment from a foreign branch owner to its foreign branch with respect to a disregarded sale of stock from the foreign branch to the foreign branch owner would not result in adjustments to the attribution of gross income between the foreign branch owner and the foreign branch.

3. Foreign Branch Definition

i. Trade or Business Requirement

The proposed regulations define a foreign branch by reference to the definition of a QBU in § 1.989(a)–1(b)(2)(ii) and (b)(3), which require that the branch maintain a separate set of books and records with respect to its activities and conduct of a trade or business outside of the United States (among other things). For this purpose, the trade or business standard described in § 1.989(a)–1(c) applies, subject to certain modifications. *See* proposed § 1.904–4(f)(3)(iii). The proposed regulations provide that activities conducted outside the United States that constitute a permanent establishment under the terms of an income tax treaty between the United States and the country in which the activities are carried out are presumed to constitute a trade or business conducted outside the United States for purposes of determining whether the activities meet the trade or business standard of the foreign branch definition.

A comment indicated that it is not clear when activities that constitute a permanent establishment should ever be treated as failing to satisfy this requirement. The Treasury Department and the IRS have determined that, consistent with the policy of promoting conformity between the gross income attributable to a foreign branch and the gross income subject to tax in a foreign jurisdiction, no exception to this rule is warranted. Accordingly, the final regulations provide that activities conducted outside the United States that constitute a permanent establishment under the terms of an income tax treaty between the United States and the country in which the activities are carried out constitute a trade or business conducted outside the United States for purposes of determining whether the activities meet the trade or business standard of the foreign branch definition, and do not adopt the presumption rule in the proposed regulations. § 1.904–4(f)(3)(vii)(B).

ii. Separate Set of Books and Records

The proposed regulations include a special rule treating a partnership as maintaining a separate set of books and records with respect to the activities of a foreign trade or business, whether or not a separate set of books and records was actually maintained. *See* proposed § 1.904–4(f)(3)(iii)(C)(*2*). Thus, for example, a foreign branch exists when a partnership records on a single set of books income from a trade or business conducted outside the United States and also income earned from unrelated investment activity. The proposed regulations deem the partnership to maintain a separate set of books and records with respect to the trade or business conducted outside the United States, and the taxpayer must determine, as the context requires, the items that would be reflected on such books and records. *Id.*

A comment recommended that the final regulations provide additional guidance regarding the attribution of income items to any deemed set of books and records. In particular, the comment recommended that the principles of sections 864(c)(2), (c)(4), and (c)(5) should apply in constructing any deemed books and records in a manner analogous to the approach taken under the dual consolidated loss regulations with respect to genuine branches (although the comment recommended that the rule apply whether the QBU was a genuine branch or was held in a disregarded entity). *See* § 1.1503(d)–5(c)(2)(i). The Treasury Department and the IRS agree that, when a foreign branch does not have a separate set of books and records, the regulations should include a standard to construct hypothetical books and records. Accordingly, the final regulations adopt the recommendation. *See* § 1.904–4(f)(3)(vii)(C)(*2*).

4. Other Comments and Revisions

i. Attribution of Gain or Loss on Disposition of a Foreign Branch

To the extent that gross income (as adjusted to conform to Federal income tax principles) is reflected on the books and records of a foreign branch, the 2018 FTC proposed regulations generally treat the income as attributable to a foreign branch. Thus, for example, gain from the sale of an asset held by a foreign branch that is reflected on the books and records of the foreign branch is generally attributable to the foreign branch under proposed § 1.904–4(f)(2)(i). Similarly, gain from the sale of all of the assets of a foreign branch would, to the extent reflected on the books and records of the foreign branch, generally be attributable to the foreign branch. By contrast, when a foreign branch owner sells its interests in a disregarded entity through which it operates a foreign branch, and the gain or loss is not reflected on the books and records of a foreign branch, the income would not generally be attributable to the foreign branch under proposed § 1.904–4(f)(2)(i). Furthermore, the regulations provide a special rule providing that gross income from the disposition of an interest in a partnership or other pass-through entity, or an interest in a disregarded entity, generally is not included in the foreign branch category. *See* proposed § 1.904–4(f)(2)(iv)(A).

Comments recommended that gain or loss from the disposition of a foreign branch be treated as attributable to a foreign branch whether or not the gain or loss is reflected on the books and records of a foreign branch, including the disposition of a foreign branch held through a disregarded entity. The Treasury Department and the IRS have determined that the rules for attributing gain from the sale of an interest in a foreign branch in the proposed regulations are appropriate. In general, the proposed regulations' treatment of the disposition of a foreign branch promotes conformity with local country taxation. Gain on the sale of assets properly reflected on the books of a foreign branch will generally be included in the taxable income of the foreign branch in its local country, and will generally reflect income associated with the trade or business activities of the foreign branch. In contrast, a foreign branch owner's sale of an entity that includes a foreign branch will not be reflected on the books of the foreign branch being sold, and will generally not give rise to local country tax on the transferred entity. Furthermore, proposed § 1.904–4(f)(2)(i), which relies on the books and records of a foreign branch, sets forth a rule that is administrable for taxpayers and the IRS.

In the case of a sale by a foreign branch of another entity that includes a foreign branch, the sale generally reflects gain that is not associated with the selling branch's trade or business activities, except when there is a sufficiently close business connection between the selling branch and the entity being sold. As described in Part III.B.4.ii of this Summary of Comments and Explanation of Revisions, the proposed and final regulations include an exception that allows gain or loss on the sale of another entity to be included in foreign branch category income when that connection exists.

The exception to this rule in proposed § 1.904–4(f)(2)(iv)(A) (excluding the disposition of certain interests reflected on the books and records of a foreign branch), appropriately prevents gain from the sale of interests unrelated to the trade or business conducted by a foreign branch from being treated as the ''business profits'' of the foreign branch. Accordingly, the final regulations adopt the rules set forth in the proposed regulations, subject to the modifications described in Part III.B.4.ii of this Summary of Comments and Explanation of Revisions.

ii. Ordinary Course of Business Exception

The proposed regulations provide that the disposition of an interest in a partnership or other pass-through entity is treated as occurring in the ordinary course of the foreign branch's active trade or business to the extent that the foreign branch ''engages in the same or a related trade or business as the partnership or other pass-through entity (other than through a less than 10 percent interest)'' (the ''same or related trade or business rule''). Proposed § 1.904–4(f)(2)(iv)(B). A comment suggested that the reference to a ''10 percent interest'' in the same or related trade or business rule is unclear. To address the comment, the final regulations clarify that the same or related trade or business rule applies only when the foreign branch owns 10 percent or more of the interests in the partnership or other pass-through entity, and the foreign branch directly engages in the same, or a related, trade or business as that partnership or other pass-through entity.

iii. Comments Outside the Scope of the Final Regulation; Future Guidance

Several comments to proposed § 1.904–4(f) were received that are outside the scope of this rulemaking, including: Comments related to the allocation of expenses to foreign branch category income; comments relating to the trade or business and books and records standards of § 1.989(a)–1(c) and (d); comments relating to the interaction of § 1.1502–13 with § 1.904–4(f); comments relating to the operation of section 367(d); and comments relating to the application of the step transaction doctrine. These comments are not addressed in this Summary of Comments and Explanation of Revisions, but may be considered in future guidance projects addressing the issues discussed in the comments.

In particular, the Treasury Department and the IRS intend to issue future guidance coordinating the allocation and apportionment of expenses with the determination of foreign branch category income. In particular, the Treasury Department and the IRS are considering proposing rules applicable to regulated financial institutions regarding the allocation of interest expense to foreign branch category income. Under one approach, interest expense on demand deposits of a foreign banking branch would be directly allocated to foreign branch category income that is denominated in the same currency. Interest expense with respect to U.S. dollar-denominated demand deposits could similarly be directly allocated to interest income earned on U.S. dollar-denominated assets. Assets and liabilities would then be adjusted and residual interest expense would be allocated fungibly under the generally-applicable rules. This approach would take account of the fact that regulated financial institutions typically invest foreign currency-denominated deposits in interest-bearing assets denominated in the same currency, in part because interest rates vary across different currencies and this practice is more likely to yield a predictable return.

Under another approach, interest expense would be allocated to the foreign branch category using an approach similar to the rules applicable to foreign corporations that are engaged in the conduct of a trade or business within the United States. Generally, those rules provide for the allocation of interest expense by reference to the liabilities reflected on the books and records of a branch, and make adjustments to the amount of interest expense allocable to a branch by reference to the leverage ratio of the taxpayer as a whole. *See generally* § 1.882–5. Under this approach to allocating interest expense to foreign branch category income, it is anticipated that the amount of interest expense allocated to the foreign branch category would take into account both regarded and disregarded transactions reflected on the books and records of the foreign branch. Furthermore, in connection with this approach, disregarded interest payments would be subject to the general disregarded payment rule, resulting in adjustments to the attribution of gross income by reason of disregarded interest payments.

The Treasury Department and the IRS also recognize that the existing expense allocation rules, including with respect to R&E expenditures, depreciation, or losses, when applied to allocate and apportion expenses to gross income that has been reattributed under the disregarded payment rule in § 1.904–4(f)(2)(vi), may lead to results that are inconsistent with the policy goal of identifying income attributable to the foreign branch that is commensurate with its business activities. The Treasury Department and the IRS are studying whether additional rules for allocating and apportioning expenses to foreign branch category income or limiting the amount of the adjustments to the attribution of gross income as a result of certain disregarded payments are appropriate.

The Treasury Department and the IRS welcome comments on issues relating to allocation and apportionment of expenses to the foreign branch category. Comments on this topic should be submitted as part of the notice and comment process for the 2019 FTC proposed regulations. See Part I.A.5 of the Explanation of Provisions to the 2019 FTC proposed regulations.

C. Section 951A and Passive Category Income

Proposed § 1.904–4(g) generally provides that section 951A category income means amounts included in the gross income of a United States person (''U.S. person'') under section 951A(a), but does not include passive category income. *See also* section 904(d)(1)(A). Additionally, proposed § 1.904–4(c)(1) provides that passive income that is considered to be high-taxed income under section 904(d)(2)(B)(iii)(II) (''the section 904 high-tax kickout'') is treated as general category income, foreign branch category income, section 951A category income, or income in a specified separate category, depending on the application of the general rules in § 1.904–4. One comment suggested that the regulations should provide that income included under section 951A is never assigned to the passive category. The comment also suggested that passive category income that qualifies for the section 904 high-tax kickout should never be assigned to the section 951A category. The comment assumed that all passive category income earned by a CFC was necessarily foreign personal holding company income and therefore could never be included under section 951A.

The Treasury Department and the IRS note that although it is generally unlikely that passive category income would be included under section 951A, nothing in section 904 eliminates this possibility. To the contrary, the parenthetical in section 904(d)(1)(A) contemplates that all or part of a GILTI inclusion could be passive category income by expressly excluding passive category income from the section 951A category. Further, to the extent that income included under section 951A is excluded from passive category income under the section 904 high-tax kickout, it is appropriate under the rules of section 904(d) and § 1.904–4 that the income be reclassified as section 951A category income rather than income in another separate category. The section 904 high-tax kickout does not specify the category to which high-taxed income is assigned; it merely specifies that the high-taxed income is not passive category income. Therefore, the comment is not adopted.

Additionally, under section 904(c) as amended by the TCJA, unused foreign taxes with respect to section 951A category income may not be carried back or carried forward. Proposed § 1.904–2(a) incorporated this statutory change into the regulations. One comment recommended that unused foreign taxes with respect to section 951A category income should be eligible to be carried back or carried forward. However, because the statutory language of section 904(c) is clear, the comment is not adopted.

D. Items Resourced Under Treaties

The 2018 FTC proposed regulations include rules regarding section 904(d)(6), which applies when a taxpayer elects the benefits of a treaty obligation to resource an item of income. Proposed § 1.904–4(k)(2) adopts a grouping methodology for purposes of section 904(d)(6) whereby the relevant portions of sections 904, 907, and 960 apply separately to the aggregate amount of items of income that are in a single separate category and resourced under a particular treaty rather than separately to each item resourced under the treaty. The proposed regulations also provide that § 1.904–6 applies to allocate foreign income taxes to a separate category determined under section 904(d)(6). The preamble to the 2018 FTC proposed regulations requested comments on whether special rules should apply to limit the taxes allocated to a separate category determined under section 904(d)(6) to taxes imposed by the foreign jurisdiction that was a party to the relevant treaty, or whether taxes imposed by a third-party jurisdiction should continue to be allocated to the separate category determined under section 904(d)(6).

One comment addressed the issue of foreign taxes imposed by third-party jurisdictions, noting that any rule that allocated such taxes away from the income on which it was imposed under § 1.904–6 would be a departure from the framework of the foreign tax credit regime, which generally aims to attribute foreign taxes to the income to which they relate. The Treasury Department and the IRS agree with the comment, and therefore the final regulations reaffirm that taxes imposed by a third-party jurisdiction should continue to be allocated to the separate category determined under section 904(d)(6) or 865(h). *See* § 1.904–4(k)(1)(iii) and (k)(2).

Another comment recommended that the final regulations apply the approach under section 904(d)(6) to income resourced under section 865(h). The comment indicated that there was no compelling reason why similar grouping rules should not also be extended to income subject to section 865(h). The Treasury Department and the IRS agree that consistent application of the similar rules in sections 865(h) and 904(d)(6) that assign items of income resourced under a treaty to a separate category is appropriate. Accordingly, the final regulations provide that, with respect to gains described in section 865(h)(2)(A), the provisions of section 904(a), (b), (c), (d), (f), and (g), and sections 907 and 960 are applied separately with respect to each treaty under which the taxpayer has claimed benefits and, within each treaty, to each separate category of income. *See* § 1.904–4(k)(2). Therefore, if a taxpayer recognizes gain described in section 865(h)(2)(A) from multiple sales and other U.S. source income that is resourced and subject to section 904(d)(6), the gains and other income are all passive category income, and the gains and other income are resourced under the same treaty, then the aggregate amount of the resourced gains are included in a single section 865(h) separate category for passive category income resourced under a tax treaty, and the other passive income is included in a single section 904(d)(6) separate category for passive category income resourced under a tax treaty. In addition, the high-taxed income rules of section 904(d) (including the grouping rules in § 1.904–4(c)) apply separately to the items of income included in each separate category for passive category income resourced under a particular tax treaty.

E. Distributive Shares of Partnership Income

Under former § 1.904–5(h) (as in effect before the final regulations) and proposed § 1.904–4(n), a partner's distributive share of partnership income is characterized as passive income to the extent that the distributive share is a share of income earned or accrued by the partnership in the passive category. However, this rule does not apply to any limited partner or corporate general partner that owns less than 10 percent of the value in a partnership. Instead, that partner's entire distributive share of partnership income is assigned to the passive category. The preamble to the proposed regulations requested comments on whether this rule should be modified. One comment stated that, if a general partner is a CFC, its distributive share should be characterized on a look-through basis by referencing the income earned or accrued by the partnership, regardless of whether the CFC owns 10 percent of the value in a partnership, and that consideration should be given to making this rule elective. The comment also suggested considering a look-through approach for all corporate general partners that own less than 10 percent of the partnership.

The Treasury Department and the IRS agree that in the case of corporate general partners in a partnership, the corporation's distributive share of income of the partnership should be characterized based on the income of the partnership regardless of the corporate partner's ownership threshold. The rule in former § 1.904–5(h) assigning income of a less than 10-percent partner to the passive category reflected the concern that partners would have difficulty obtaining information from the partnership in order to determine the partnership's income. However, the comment states that corporate general partners are generally able to obtain information to determine their distributive shares of the partnership's income. In addition, with respect to CFCs, section 951A requires the CFC to determine whether each item of partnership income is tested income, subpart F income, or excluded from tested income under section 951A(c)(2)(A)(i)(I) through (V) regardless of the CFC's ownership percentage in the partnership. Furthermore, with respect to individuals, the prior final regulations at § 1.904–5(h)(1) already provided that general partners with less than 10 percent ownership in the partnership apply a look-through approach. Therefore, there is minimal administrative benefit to assigning all of a less-than-10-percent corporate general partner's income to the passive category rather than following the general rule that assigns the distributive share based on the income of the partnership. Therefore, § 1.904–4(n)(1)(ii) provides that all general partners apply the general rule even if the partner owns less than 10 percent of the partnership. The same change is made to the expense allocation rules under § 1.861–9(e)(4), which provides rules for assigning partnership interest expense in the case of a less-than-10-percent limited partner or corporate general partner.

F. Look-Through Rules

1. Section 951A Category

The proposed regulations generally provide that the look-through rules under section 904(d)(3) provide look-through treatment solely with respect to payments allocable to the passive category. *See* proposed § 1.904–5. Other payments described in section 904(d)(3) are assigned to a separate category other than the passive category based on the general rules in § 1.904–4. Proposed § 1.904–5(b)(1). Accordingly, dividends, interest, rents, or royalties paid from a CFC to a U.S. shareholder are not assigned to the section 951A category, because only amounts included in the gross income of a U.S. shareholder under section 951A (and the related gross-up amount for foreign taxes deemed paid) are assigned to the section 951A category.

Comments requested that § 1.904–4 be revised to provide that the look-through rules under section 904(d)(3) apply to characterize interest, rents, and royalties paid by a CFC to a U.S. shareholder as income in the section 951A category. However, section 904(d)(3) provides that look-through payments not allocable to passive category income are not treated as passive category income, but does not assign the income to a particular category. Section 904(d)(1) generally defines the separate categories, and section 904(d)(1)(A) is clear that only amounts includible in gross income under section 951A are assigned to the section 951A category. Accordingly, under the clear terms of the statute, look-through payments cannot give rise to section 951A category income and must be assigned to other separate categories, such as the foreign branch category (if described in section 904(d)(1)(B)), a separate category for income described in section 901(j) or income resourced under a tax treaty, or the general category. Therefore, the comment is not adopted.

2. Treatment of Interest Deductions That Are Disallowed

Proposed § 1.861–9(c)(5) provides that if a taxpayer's deduction for business interest expense is disallowed under section 163(j) in a given year but permitted in a future taxable year, that the deduction for the business interest expense is apportioned under the rules of § 1.861–9 as though it were incurred in the year in which the expense is deductible. This is consistent with the existing general rule in § 1.861–9T(c) that in order for interest expense to be allocated and apportioned, the expense must be currently deductible. *See also* § 1.861–9T(c)(3) (applying the same rule to interest deductions deferred under section 163(d)).

One comment requested guidance on how to apply the look-through rules, which require allocating and apportioning interest expense under § 1.861–9 in order to match the interest with gross income of the payor, when the interest expense is not allowed as a deduction at the CFC level. The comment noted that the disallowance at the CFC level does not defer a recipient income inclusion that must be assigned to a separate category.

In response to the comment, the final regulations provide in § 1.904–5(c)(2)(i) that the allocation and apportionment rule described in § 1.904–5(c)(2)(ii) is applied in the year the interest income is taken into account even if the interest expense is not actually deductible by the CFC in that year.

G. Allocation and Apportionment of Foreign Taxes

Proposed § 1.904–6(a) provides rules for the allocation and apportionment of taxes to the separate categories of income. Consistent with section 904(d)(2)(H)(i), proposed § 1.904–6(a)(1)(iv) provides that foreign taxes imposed with respect to base differences are assigned to the separate category in section 904(d)(1)(B), which is the foreign branch category. Comments stated that Congress had inadvertently failed to revise the cross-reference in section 904(d)(2)(H)(i) and that the regulations should assign taxes associated with base differences to the general category, or should provide a rule assigning the taxes to the general category or the foreign branch category depending on the types of income that the taxpayer earns. Because the statute is clear that taxes associated with base differences are assigned solely to the foreign branch category, the final regulations confirm that such taxes are assigned to the category specified in section 904(d)(2)(H)(i).

Several comments to the 2018 FTC proposed regulations requested additional guidance clarifying the allocation and apportionment of foreign income taxes under § 1.904–6. These rules apply not only for purposes of assigning taxes to separate categories, but also apply under § 1.960–1(d) for purposes of associating foreign income taxes with income groups and PTEP groups in determining the amount of deemed paid credits under section 960. In particular, the comments requested additional rules clarifying the meaning of base and timing differences as well as new examples, and rules on assigning taxes incurred with respect to disregarded payments, and clarification on how those rules interact with the foreign branch category rules.

The Treasury Department and the IRS have determined that proposed § 1.904–6(a)(1)(iv) generally reflects the appropriate principles regarding what constitutes a base or timing difference, but agree that additional guidance regarding how those principles apply in specific fact patterns is warranted. In order to provide final rules for taxpayers to apply, while also providing an additional opportunity for taxpayers to comment on the new additional guidance, the final regulations finalize the rules in the 2018 FTC proposed regulations in § 1.904–6(a)(1)(iv). New rules relating to the allocation and apportionment of foreign income taxes are contained in the 2019 FTC proposed regulations.

H. Separate Limitation Loss and Overall Foreign Loss Rules Under Section 904(f)

Other than a provision coordinating the application of the adjustments in proposed § 1.904(b)–3 with the ordering rules for allocation and recapture of losses, including SLLs and OFLs, *see* proposed § 1.904(b)–3(d), the 2018 FTC proposed regulations did not make any changes to the rules governing SLLs and OFLs. However, a number of comments requested changes to the application of those rules with respect to the section 951A category.

One comment recommended that income in the section 951A category be excluded for purposes of the OFL recapture rule in § 1.904(f)–2(c)(1), which generally provides that the OFL recapture amount in a separate category is the lesser of the maximum recapture amount in that category (the lesser of the OFL account balance or income in that category) or 50 percent of total foreign source income. The comment suggested that for most taxpayers, GILTI inclusions will significantly exceed foreign source income in other separate categories and as a result the foreign source income in those other separate categories will always be fully subject to the recapture rule, up to the amount of the OFL account balance in that category. Comments also recommended that the final regulations provide that the separate limitation loss rules under section 904(f)(5) do not apply with respect to the section 951A category, that the ODL rules in section 904(g) do not apply to reduce income in the section 951A category, and that foreign tax credits assigned to the section 951A category that are not allowed by reason of a separate limitation loss or ODL ''hover'' until the loss is recaptured, at which time the ''hovering'' foreign tax credits would be allowed.

The current OFL recapture rule reflects the intended application of section 904(f)(1) as expressed in legislative history from 1986. In addition, section 904(f)(5) and (g) are clear that foreign source losses must be allocated to foreign source income in other separate categories before reducing U.S. source income and that ODLs reduce foreign source income in each separate category and must be recaptured out of income in those categories. The TCJA did not modify the operation of section 904(f) or (g) with respect to the section 951A category, nor is there any indication in the TCJA or legislative history that Congress intended the rules under section 904(f) and (g) to apply differently to section 951A category income as compared to other separate categories. In addition, no authority is provided in section 904 to allow taxes assigned to the section 951A category that accrue in one year to be deferred and claimed as a credit in a future year. Such a rule would be inconsistent with sections 901 and 905(a), which allow a foreign tax credit only when the foreign tax is paid or accrued (or deemed paid), and section 904(c) which, as amended by the TCJA, explicitly provides that foreign income taxes assigned to the section 951A category that are not credited in the current year cannot be carried to different taxable years. Accordingly, the comments are not adopted.

I. Overall Foreign Loss Recapture on Property Dispositions

The 2012 OFL proposed regulations revise the ordering rules under § 1.904(g)–3 that generally provide for the coordination of section 904(f) and (g) to include specific references for taking into account OFL recapture on property dispositions under section 904(f)(3). In the case of dispositions in which gain is recognized irrespective of section 904(f)(3), the proposed regulations provide that the OFL recapture is included in Step Five along with other general OFL recapture. In the case of dispositions in which gain would not otherwise be recognized on a disposition, the 2012 OFL proposed regulations add a new Step Eight to those ordering rules to address the recognition of the additional income under section 904(f)(3) and the corresponding recapture of the applicable OFL account. New Step Eight also provides that if the additional recognition of gain increases the allowable amount of the net operating loss deduction, then the recapture of the OFL account occurs first before the additional net operating loss carryover is taken into account to offset all or a portion of that gain.

Step Eight did not address the case where additional recognition of gain reduces the amount of a current year net operating loss. The final regulations revise the new Step Eight to provide that the allocation rules for additional net operating loss carryovers apply similarly to reductions in current year net operating losses, because both cases involve loss offsetting the additional recognized gain.

One comment was received with respect to the 2012 OFL proposed regulations, which recommended addressing dispositions that result in additional income recognition under branch loss recapture and dual consolidated loss recapture rules. The 2019 FTC proposed regulations provide a new Step Nine addressing branch loss recapture and dual consolidated loss recapture amounts. The new Step Nine is being proposed in order to provide taxpayers an additional opportunity to comment on the rule.

IV. Translation of Foreign Income Taxes and Foreign Tax Redeterminations

A. Currency Translation Rules

1. Relevant Taxable Year and Definition of the Term ''Two Years''

The 2007 temporary regulations provide currency translation rules to reflect the statutory changes made to sections 905(c) and 986(a) by the Taxpayer Relief Act of 1997 (Pub. L. 105–34, 111 Stat. 788 (1997)) and to section 986(a) by the American Jobs Creation Act of 2004 (Pub. L. 108–357, 118 Stat. 1418 (2004)). Consistent with section 986(a)(1)(A), § 1.905–3T(b)(1)(i) of the 2007 temporary regulations generally provides that accrued foreign income taxes are translated into dollars at the average exchange rate for the taxable year to which such taxes relate. The 2007 temporary regulations also provide, consistent with section 986(a), several exceptions to this rule, including that, under section 986(a)(1)(B), the exchange rate on the date the taxes are paid is used to translate accrued foreign income taxes that are paid before, or more than two years after the close of, the taxable year to which the taxes relate. Section 905(c)(1)(B) also provides that, if accrued taxes are not paid before the date two years after the close of the taxable year to which such taxes relate, the taxpayer must notify the IRS and redetermine its U.S. tax liability for the year or years in which it claimed a credit for such taxes.

Consistent with sections 905(c)(1)(B) and 986(a)(1)(A), § 1.905–3T(b)(1)(ii) and (c) of the 2007 temporary regulations use the term ''two years,'' raising the issue of whether the term refers to two taxable years or two calendar years (that is, 24 months). The Treasury Department and the IRS have determined that a short taxable year, such as could result from a restructuring or other event, should not reduce the period within which a taxpayer can pay an accrued tax without triggering a foreign tax redetermination and thereby requiring the tax to be translated into dollars at the exchange rate on the date of payment. Accordingly, the final regulations at §§ 1.986(a)–1(a)(2)(i) and (c) and 1.905–3(a) use the term ''24 months'' instead of the term ''two years.'' *See also* § 1.905–3(b)(1)(ii)(E) (Example 5).

The relevant taxable year of a partner or beneficiary that is legally liable for foreign income tax on a distributive share of income is the partner's or beneficiary's taxable year. On the other hand, in the case of a partnership that has legal liability under foreign law for foreign income tax and that uses a different U.S. taxable year than its partners who take their distributive shares of the partnership's tax into account under section 901(b)(5) and § 1.702–1(a)(6), the rules under § 1.905–3T(b)(1)(i) of the 2007 temporary regulations does not specify whether the taxable year of the partnership or of the partner is the relevant ''taxable year to which such taxes relate'' for purposes of determining the applicable exchange rate, including whether the tax is denominated in inflationary currency, as well as whether the tax is paid within two years. A similar issue may arise with respect to a beneficiary of a trust who takes into account a distributive share of foreign income taxes paid by the trust.

The Treasury Department and the IRS have determined that the relevant taxable year is that of the person, including a partnership or trust, that has legal liability for the tax within the meaning of § 1.901–2(f) (the ''section 901 taxpayer''). Measuring the period with reference to the taxable year of a partnership or trust that is the section 901 taxpayer is simpler and more administrable than a rule that would vary the applicable translation convention and determine whether a foreign tax has been redetermined by reference to the taxable year of each partner or beneficiary. It will also generally conform the average exchange rate translation convention used to translate the taxes with the translation rate used to translate the income out of which the tax is paid by using the same taxable year to determine the average rate for both purposes. See section 989(b)(4). Accordingly, the final regulations at § 1.986(a)–1(a)(1) and (2) clarify that the relevant taxable year to which the tax relates is that of the person that is considered to pay the tax under § 1.901–2(f).

2. Definition of Inflationary Currency

Under section 986(a)(1)(C) and section 986(a)(2), a foreign tax liability denominated in an inflationary currency (as determined under regulations) is translated into dollars at the exchange rate on the date of payment of the foreign tax. Section 1.905–3T(b)(1)(ii)(C) of the 2007 temporary regulations defines an inflationary currency as the currency of a country in which there is cumulative inflation of at least 30 percent during the 36-month base period immediately preceding the last day of the taxable year. The 2007 temporary regulations do not address which year or years are relevant to determining whether a currency in which a foreign tax liability is denominated is inflationary.

The purpose of the payment date translation rule for tax denominated in inflationary currency is to more accurately reflect the dollar cost of satisfying a foreign tax liability when the currency experiences significant inflation between the time the tax accrues and the date the tax is paid, including when the average exchange rate would otherwise apply because the tax is paid within 24 months of the close of the taxable year to which the tax relates. To avoid overstating the dollar cost of the foreign tax liability, the Treasury Department and the IRS have determined that it is appropriate to translate a foreign tax liability into dollars at the spot rate (as defined in § 1.988–1(d)) on the date of payment of the foreign taxes if the taxes are denominated in a currency that is inflationary in the accrual year or in any subsequent taxable year up to and including the taxable year of the section 901 taxpayer in which the tax is paid. *See* § 1.986(a)–1(a)(2)(iii).

The final regulations also reflect editorial changes to the definition of an inflationary currency that adopt the principles of § 1.985–1(b)(2)(ii)(D) as modified by cross-reference instead of restating the method described in that paragraph. No substantive change to the computation was intended as a result of this rephrasing of the rule.

3. Year-End Translation Rate

Section 1.905–3T(b)(1)(ii)(C) and (D) of the 2007 temporary regulations and § 1.986(a)–1(a)(2)(iii) and (a)(2)(iv)(A) of the final regulations provide that, in the case of accrued taxes, the liability for which is denominated in an inflationary currency, or in the case of a taxpayer that elects to translate accrued taxes into dollars using the spot rate as of the date of payment, any accrued but unpaid taxes are translated into dollars at the spot rate on the last day of the U.S. taxable year to which such taxes relate. If the currency is not inflationary in the accrual year, but is inflationary when paid, under the general rule of § 1.986(a)–1(a)(1) of the final regulations, the tax will be provisionally translated into dollars at the average rate for the year of accrual. In each of these cases, when the taxes are subsequently paid they are translated into dollars at the spot rate on the date of payment. If this amount differs from the provisional year-end rate or average rate initially used to assign a dollar value to the credit, the later payment of the tax will constitute a foreign tax redetermination requiring an adjustment to reflect the difference between the accrued amount and the actual dollar cost of paying the tax. See § 1.905–3T(c) of the 2007 temporary regulations and § 1.905–3(a) of the final regulations for the definition of a foreign tax redetermination. The final regulations at § 1.986(a)–1(a)(2)(iii) and (iv) include a cross reference to § 1.905–3 to clarify that there generally will be a foreign tax redetermination when the accrued tax is subsequently paid, which may result in a U.S. tax redetermination.

The 2007 temporary regulations effectively require that two returns be filed in the case of accrued taxes subject to § 1.905–3T(b)(1)(ii)(C) (inflationary currency) or (D) (spot rate election) that accrue in one taxable year and are paid in the next taxable year before the return for the accrual year has been filed: First, the original return on which the accrued but unpaid taxes are translated at the provisional year-end rate, and, second, an amended return, filed after such taxes are paid, on which such taxes are translated at the rate on the date of payment. To minimize compliance burdens for taxpayers, the final regulations at § 1.986(a)–1(a)(2)(iii) and (iv) provide that taxpayers may translate accrued but unpaid taxes (including foreign taxes deemed paid under section 960) into dollars using the spot rate on the date of payment, in lieu of the provisional year-end rate, on the original return for the year for which the credit is claimed if such taxes are paid before the due date (with extensions) of such original return and such return is timely filed.

4. Election To Translate Accrued Taxes Using the Rate on the Date of Payment

Section 1.905–3T(b)(1)(ii)(D) of the 2007 temporary regulations provides that, pursuant to section 986(a)(1)(D), a taxpayer that otherwise would be required to translate foreign taxes using the average exchange rate may elect to translate all foreign income taxes denominated in nonfunctional currency using the exchange rate as of the date of payment (spot rate election). Although using the spot rate on the date of payment most accurately reflects the dollar cost of paying the foreign income tax, the 2007 temporary regulations reflect the view that taxpayers should not be permitted to use hindsight to select the more favorable of the spot rate or average exchange rate conventions to translate nonfunctional currency taxes on a QBU-by-QBU basis. Rather, in addition to a spot rate election for all of a taxpayer's nonfunctional currency foreign income taxes, the 2007 temporary regulations also permit an election to use the spot rate to translate less than all of a taxpayer's nonfunctional currency foreign income taxes, but only in situations that would reduce compliance burdens or avoid a mismatch between the exchange rates used to translate creditable foreign taxes and the same nonfunctional currency amount of income used to pay the tax. As noted in the preamble to the 2007 temporary regulations, such a mismatch may occur in the case of a QBU that has a dollar functional currency (dollar QBU) if the average exchange rate is used to translate nonfunctional currency tax that is paid out of nonfunctional currency income earned by the dollar QBU, because in that case income from transactions involving foreign currency are accounted for using the spot rate on a transaction-by-transaction basis. Accordingly, § 1.905–3T(b)(1)(ii)(D) of the 2007 temporary regulations provides that a taxpayer may make a spot rate election for all foreign income taxes denominated in nonfunctional currency, or for only those foreign income taxes that are denominated in nonfunctional currency and are attributable to dollar QBUs.

Section 1.905–3T(b)(1)(ii)(D) of the 2007 temporary regulations refers only to a ''taxpayer'' and not also to a section 902 corporation (a qualified group member described in section 909(d)(5) before its repeal in the TCJA), raising a question whether a foreign corporation with a U.S. shareholder eligible to compute deemed paid taxes should be considered a separate ''taxpayer'' that is eligible to make the spot rate election. To address this issue, the final regulations at § 1.986(a)–1(a)(2)(iv)(A) and (B) provide that the taxpayer for purposes of making the spot rate election under section 986(a)(1)(D) is any individual or corporation, and revise the references to section 902 corporations to reflect the repeal of sections 902 and 909(d)(5). Accordingly, a foreign corporation that is a specified 10-percent owned foreign corporation may elect separately from any of its U.S. shareholders to translate either all of the foreign corporation's foreign income taxes denominated in nonfunctional currency, or only those nonfunctional currency taxes of the foreign corporation's dollar QBUs, using the spot rate on the date of payment. Section 1.986(a)–1(a)(2)(iv)(B) of the final regulations also clarifies that a spot rate election by a U.S. shareholder does not further require that the shareholder's foreign subsidiaries make a spot rate election.

Section 986(a)(1)(D)(i) provides that a spot rate election is available only for foreign taxes denominated in a taxpayer's nonfunctional currency. The final regulations clarify at § 1.986(a)–1(a)(2)(iv)(A) that whether a tax that is attributable to a QBU of a taxpayer is denominated in nonfunctional currency is determined by reference to the functional currency of the taxpayer (which includes a specified 10-percent owned foreign corporation), and not that of the QBU. Accordingly, taxes denominated in a QBU's functional currency that is a nonfunctional currency of the taxpayer are considered nonfunctional currency taxes for purposes of these rules.

The final regulations at § 1.986(a)–1(a)(2)(iv)(B) also confirm that, in the case of a taxpayer (including a specified 10-percent owned foreign corporation) that makes the spot rate election only with respect to nonfunctional currency taxes that are attributable to dollar QBUs, the election must be made for all of the taxpayer's dollar QBUs and cannot be made separately for each dollar QBU. Finally, the final regulations clarify that foreign tax is attributable to a dollar QBU for purposes of these rules if it is properly recorded on the books and records of the QBU in accordance with the regulations under sections 985 through 989. This rule will help ensure matching of the exchange rate used to determine the dollar amount of the credit with the exchange rate used to determine the dollar amount of income that is used to pay the tax.

The 2007 temporary regulations do not permit the spot rate election to be used to translate taxes that are denominated in a nonfunctional currency of the taxpayer and attributable to QBUs with non-dollar functional currencies (non-dollar QBUs), other than as part of an election to translate all foreign taxes at the spot rate on the date of payment. As noted, one of the rationales for providing an election for taxpayers to translate less than all of their nonfunctional currency taxes using the rate on the date of payment is to allow taxpayers to avoid a mismatch due to the use of different translation conventions in determining the translated dollar amount of foreign tax credit and the translated dollar amount of the foreign income used to pay the tax.

However, there is generally no mismatch between the translation rate for taxes on income earned through non-dollar QBUs and the income used to pay the taxes. Under sections 986(a)(1)(A), 987(2), and 989(b)(4), such taxes and income generally are translated into dollars at the average exchange rate, minimizing administrative and compliance burdens. Although § 1.987–3T(c)(2)(v), issued in 2016, requires section 987 income or loss equal to the creditable tax amount to be translated at the same exchange rate that is used to translate the creditable taxes for purposes of section 901, the Treasury Department and the IRS intend to amend the regulations under section 987, deferring the applicability date of § 1.987–3T(c)(2)(v) (along with other portions of the regulations under section 987). *See* Notice 2018–57. Because in the absence of applicable final regulations the spot rate election to translate taxes paid by non-dollar QBUs would generally create a mismatch between the translated dollar amount of the foreign tax credit and the translated dollar amount of the foreign income used to pay the tax, and would increase, rather than reduce, administrative burdens for the IRS and compliance burdens for taxpayers, the Treasury Department and the IRS have determined that it is inappropriate to allow selective use of the spot rate election for nonfunctional currency taxes attributable to non-dollar QBUs. Accordingly, the final regulations provide that the spot rate election may not be made for foreign income taxes attributable to non-dollar QBUs, except as part of an election to translate all taxes denominated in nonfunctional currency at the spot rate on the date of payment.

5. Section 988 Gain or Loss When There Is a Change in Functional Currency

The 2007 temporary regulations do not address how to determine section 988 gain or loss when there has been a change in functional currency between the time a tax is paid or accrued and when it is refunded. If a QBU receives a refund of nonfunctional currency tax that is denominated in a currency that was the functional currency of the QBU when the tax was claimed as a credit or added to PTEP group taxes, § 1.986(a)–1(e)(2) of the final regulations provides that the QBU uses the exchange rate used under § 1.985–5(c) when the QBU's functional currency changed to determine its basis in the refunded nonfunctional currency. If a QBU receives a refund of functional currency tax that was denominated in a nonfunctional currency when the tax was claimed as a credit or added to PTEP group taxes, § 1.986(a)–1(e)(3) of the final regulations provides that the QBU recognizes the section 988 gain or loss that would have been recognized under § 1.985–5(b) if the refund had been received immediately before the QBU's functional currency changed. The final regulations also add a cross-reference to these rules at § 1.988–2(a)(2)(iii)(C).

B. Accounting for Foreign Tax Redeterminations

1. Definition of a Foreign Tax Redetermination

Section 1.905–3T(c) of the 2007 temporary regulations defines a ''foreign tax redetermination'' as a change in the foreign tax liability that may affect a taxpayer's foreign tax credit, including accrued taxes that when paid differ from the amounts added to post-1986 foreign income taxes or claimed as credits by the taxpayer (such as corrections to overaccruals and additional payments); accrued taxes that are not paid before the date two years after the close of the taxable year to which such taxes relate; refunds of tax paid; and for accrued taxes translated into dollars when paid, a difference between the dollar value of the accrued tax and the dollar value of the tax paid attributable to fluctuations in the foreign currency's value.

Section 1.905–3(a) of the final regulations reflects several clarifying changes to what constitutes a foreign tax redetermination. First, a foreign tax redetermination includes certain situations covered by section 905(c) that do not involve a change in the foreign tax liability, such as the failure to pay accrued taxes within two years and the subsequent payment of any such accrued but unpaid taxes. Second, a foreign tax redetermination includes adjustments such as a correction to an accrual that determined the tax due with reasonable accuracy, but is revised after additional consideration to reflect the correct final tax liability. Third, the regulations clarify that a foreign tax redetermination occurs if any tax that is claimed as a credit or added to PTEP group taxes is subsequently refunded, regardless of whether the tax was properly treated as paid within the meaning of § 1.901–2(e) (which includes, among other requirements, that the tax was owed and not refundable) when claimed as a credit or added to PTEP group taxes. New examples at § 1.905–3(b)(1)(ii) of the final regulations illustrate these rules, including an example demonstrating that a foreign tax redetermination includes the accrual and payment of contested taxes following the resolution of a dispute with a foreign government.

Section 1.905–3T(c) of the 2007 temporary regulations, implementing section 905(c)(1)(B), states that a foreign tax redetermination includes ''accrued taxes that are not paid *before* the date two years after the close of the taxable year to which such taxes relate.'' (Emphasis added.) In contrast, the currency translation rule at § 1.905–3T(b)(1)(ii)(A) of the 2007 temporary regulations, implementing sections 986(a)(1)(B)(i) and 986(a)(2)(A), provides that, ''[a]ny foreign income taxes denominated in foreign currency that are paid *more than two years after* the close of the U.S. taxable year to which they relate shall be translated into dollars using the exchange rate as of the date of payment of the foreign taxes.'' (Emphasis added.)

If a calendar year taxpayer accrues foreign taxes at the close of calendar Year 1, ''the date two years after the close of the taxable year to which such taxes relate'' literally refers to December 31 of Year 3, rather than January 1 of Year 4. Thus, if the taxpayer has not paid the taxes before December 31 of Year 3, that is, on or before December 30, a foreign tax redetermination would occur on December 31 of Year 3 even if the tax was paid on December 31 of Year 3, and such payment would constitute a second foreign tax redetermination. Both foreign tax redeterminations generally would require translating the foreign taxes at the same average exchange rate, resulting in offsetting foreign tax redeterminations.

To better coordinate the application of the foreign tax redetermination and currency translation rules and to ease compliance burdens, the definition of a foreign tax redetermination has been revised to include ''accrued taxes that are not paid *on or* before the date 24 months after the close of the taxable year to which such taxes relate.'' (Emphasis added.)

The Treasury Department and the IRS also have determined that the foreign tax redetermination resulting from accrued taxes that remain unpaid after two years should be considered to occur on the date that is 24 months after the close of the taxable year to which the taxes relate. Accordingly, § 1.905–3(a) of the final regulations provides that if accrued taxes are not paid on or before the date that is 24 months after the close of the taxable year to which they relate, the resulting foreign tax redetermination will be accounted for as if the unpaid portion of the taxes were refunded on such date.

Finally, the final regulations clarify that taxes that first accrue after the date 24 months after the close of the taxable year to which such taxes relate may not be claimed as a credit or added to PTEP group taxes until they are paid. The final regulations also include a cross-reference to the rules of section 905(b) and the all-events test under § 1.461–4(g)(6)(iii)(B), which require the taxpayer to establish the amount of tax that was properly accrued.

2. Adjustments to Foreign Taxes Claimed as a Direct Credit

Section 1.905–3T(d)(1) of the 2007 temporary regulations provides that, in the case of a foreign tax redetermination with respect to taxes paid or accrued by a U.S. taxpayer, a redetermination of U.S. tax liability is required ''for the taxable year for which the foreign tax was claimed as a credit.'' The final regulations clarify how the rules apply when a U.S. taxpayer's foreign taxes exceed the applicable limitation under section 904(d) and the taxpayer carries its unused foreign taxes back or forward to another year under section 904(c). Section 1.905–3(b)(1)(i) of the final regulations provides that, if a foreign tax redetermination occurs with respect to foreign tax claimed as a direct credit, then a redetermination of U.S. tax liability is required for the taxable year in which the credit was claimed and any year to which unused foreign taxes from such year were carried under section 904(c).

Section 1.905–3T(d)(1) of the 2007 temporary regulations provides that a redetermination of U.S. tax liability is not required if the difference between the dollar value of the accrued tax and the tax paid is attributable to fluctuations in the value of the foreign currency and the amount of the foreign tax redetermination with respect to each foreign country is less than the lesser of $10,000 or two percent of the dollar amount of the foreign tax initially accrued with respect to that foreign country. The application of this rule was unclear in the case of foreign tax redeterminations occurring with respect to multiple foreign countries. The final regulations at § 1.905–3(b)(1)(i) clarify that the exception to a redetermination of U.S. tax liability applies only if the $10,000 or two percent threshold is satisfied with respect to each and every foreign country with respect to which a foreign tax redetermination occurs.

3. Foreign Tax Imposed on Refund

Section 1.905–3T(e) of the 1988 temporary regulations provided that tax imposed on a refund of foreign tax is considered to reduce the amount of the refund, and no other credit or deduction is allowed with respect to such tax imposed on such refund. This provision was carried over at § 1.905–3T(e) of the 2007 temporary regulations without change. Section 1.905–3(c) of the final regulations modifies this rule to clarify that it applies in the case of any section 901 taxpayer, which includes a specified 10-percent owned foreign corporation.

V. Deemed Paid Taxes Under Section 960

A. Scope of Current Year Taxes

Proposed § 1.960–2 deems a corporate U.S. shareholder of a CFC to pay certain of the CFC's current year foreign income taxes that are attributable to the CFC's income that the domestic corporation includes under sections 951(a)(1)(A) and 951A(a). Current year taxes are the foreign income taxes that a CFC pays or accrues in its current taxable year, which the rule defines as the U.S. taxable year of a CFC that either is an inclusion year or during which the CFC receives or makes a distribution that is described in sections 959(a) or (b). Proposed § 1.960–1(b)(3), (4). Proposed § 1.960–1(b)(4) preserves current law with respect to the timing of the accrual of foreign income taxes. Under current law, taxes accrue when all the events have occurred that establish the fact of the liability and the amount of the liability can be determined with reasonable accuracy. Therefore, in the case of taxes that are withheld from a payment, the withholding taxes accrue when the payment from which the tax is withheld is made. In the case of taxes that are imposed on net income that a taxpayer recognizes under foreign law with respect to a taxable period, the net income taxes accrue on the last day of the foreign taxable period. *See* § 1.446–1(c)(1)(ii) (a liability is incurred and taken into account for Federal income tax purposes in the taxable year in which all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability); § 1.461–4(g)(6)(iii)(B) (economic performance with respect to foreign income tax liability occurs when the requirements of the all events test other than economic performance are met). Therefore, under the 2018 FTC proposed regulations, if there is a difference between the U.S. and foreign taxable years, the foreign tax may accrue, for U.S. tax purposes, in a U.S. taxable year that does not include all the income to which the tax relates. The proposed regulations further provide that if current year taxes are imposed on an item of income that U.S. law recognizes in a different taxable year—in other words, if a difference in the foreign and U.S. taxable bases results from a timing difference—the taxes relate to the income group in a section 904 category of the CFC to which they would be assigned if the income item was recognized under U.S. law in the current year. Proposed §§ 1.960–1(c)(3)(ii)(B) and 1.904–6(a)(1)(iv).

Comments requested changes to the definition of ''current year taxes'' that address timing differences that arise when a CFC has different U.S. and foreign taxable years. Specifically, the comments suggested a number of approaches to match the foreign income taxes that the CFC pays or accrues with respect to a foreign taxable year with the income that it recognizes in a U.S. taxable year. For example, comments requested that the definition take into account foreign income taxes that relate to income recognized during the current taxable year but that are paid or accrued by a CFC with respect to a foreign taxable year that closes after the current taxable year. Comments suggested that a portion of the foreign income taxes could be allocated between U.S. taxable years on the basis of a ratable allocation of the foreign taxable income on which the taxes are imposed to the portion of a foreign taxable year of the CFC that corresponds to the two U.S. taxable years. The foreign income taxes that are allocated to the current taxable year under the proration would then be treated as current year taxes for purposes of computing deemed paid taxes under section 960(a) and section 960(d), even though a portion of the taxes do not accrue under section 461 and the all events test until after the close of the current taxable year. Comments also suggested modifying the current accrual rule for foreign income taxes to treat any foreign income taxes paid or accrued by a CFC that are allocated to a current taxable year under the proration as accruing in that year. In addition, comments suggested a ''closing of the books'' method for determining the foreign tax that is treated as either a current year tax or as accruing during the next U.S. taxable year, or other approaches such as a ''with-and-without'' calculation to determine taxes attributable to extraordinary transactions.

Differences in the timing of the accrual of foreign income taxes and the inclusion of income by a U.S. shareholder on which the taxes are imposed due to a CFC's differing U.S. and foreign taxable years will generally resolve over time because although the U.S. and foreign taxable years start and close on different dates, both taxable periods encompass profits earned over the same length of time. A comment noted that this mismatch might not resolve if there are differences in the type or amount of income that a CFC earns from year to year. Unless the CFC earns all of its income ratably every year for both U.S. and foreign tax purposes, however, any method for allocating foreign tax to a different U.S. taxable year may not mitigate or may even exacerbate an ongoing mismatch of the income recognized in the current U.S. taxable year with the foreign income tax that accrues after the close of that year. Moreover, as one comment acknowledged, a rule that relies on estimates of foreign income taxes that have not accrued because they are attributable to a foreign taxable year that closes after the U.S. taxable year would require the ongoing correction of inaccurate estimates through redeterminations under section 905(c) and the filing of amended returns.

A comment noted that § 1.901–2(f)(4) requires the allocation of certain foreign taxes to a U.S. taxable year and treats those taxes as accruing in that year. This rule, however, only applies to mismatches that occur with respect to a single foreign taxable year due to the transfer of a disregarded entity or a partnership interest. Section 1.901–2(f)(4) addresses these narrow fact patterns by treating the foreign taxes that accrue in one U.S. taxable year but that are imposed on foreign taxable income that is likely to be recognized for Federal income tax purposes in a different, short U.S. taxable year of a partnership due to a partnership termination, or in a different U.S. taxable year of an owner of a disregarded entity due to a transfer of a disregarded entity, as having accrued in that short U.S. taxable year or ownership period. In certain cases, the rule may require the filing of an amended return to reflect the allocation of a portion of foreign taxes that accrue under the all events test in one U.S. taxable year to a different U.S. taxable year. This rule is appropriate to resolve a one-time mismatch in the foreign and U.S. taxable years in connection with an ownership change and is not an appropriate mechanism to address ongoing mismatches in U.S. and foreign taxable years that will generally resolve over time. In light of the fact that providing an election to choose among a variety of allocation and accrual methods in respect of foreign income tax would create compliance burdens for taxpayers and administrative burdens for the IRS and may produce results that are no more and possibly less accurate than the current accrual rule, the final regulations do not adopt the comments requesting that taxpayers be allowed to treat foreign taxes as accruing in a taxable year other than the year in which the taxes actually accrue under current law.

One comment requested that the fourth sentence in § 1.960–1(b)(4), which provides that net basis foreign income taxes accrue on the last day of the foreign taxable year, be removed or qualified, because the comment asserted that the statement did not reflect current law regarding the accrual of these taxes. However, the comment did not identify any fact patterns in which net basis foreign income taxes could accrue before the last day of the foreign taxable year. By definition, net basis foreign income taxes can only be determined with reasonable accuracy after the foreign taxable year has closed and all income and deductions have been accrued for foreign tax purposes. Therefore, the fourth sentence in § 1.960–1(b)(4) reflects current law regarding when these taxes accrue and the comment is not adopted.

B. Other Changes Relating to Current Year Taxes Imposed on Timing Difference Items

1. Assignment of Current Year Taxes to Income Groups

One comment suggested that mismatches between the U.S. and foreign taxable years could be addressed by characterizing current year tax, and therefore allocating and apportioning it to an income group, based upon the earnings recognized under Federal income tax law for the current taxable year, regardless of whether that income was included in the foreign tax base upon which the current year tax was imposed. However, this change would nullify the § 1.904–6(a) rules as a mechanism for attributing a current year tax to a statutory grouping of income, namely, income items included under section 951A or 951(a) and distributions of previously taxed earnings and profits, and potentially associate current year taxes with income for section 960 purposes other than the income to which the tax would relate for purposes of section 904. Congress intended, however, that similar principles would apply to treat current year taxes as properly attributable to a statutory grouping of income for purposes of determining deemed paid taxes under section 960 as those that apply for purposes of assigning foreign income tax to a section 904 category. *See* Conference Report, at 628 (''It is anticipated that the Secretary would provide regulations with rules for allocating taxes similar to rules in place for purposes of determining the allocation of taxes to specific foreign tax credit baskets.''). In addition, this rule would be inconsistent with the statutory requirement that taxes be ''properly attributable'' to the income that was included, because no factual connection would exist between the taxes and the income to which the taxes would be assigned. Therefore, the comment is not adopted.

2. Current Year Taxes Assigned to Groups With No Current Year Income

Comments also requested changes that would address a broader range of timing differences, such as a difference in the timing of income recognition with respect to a particular transaction or difference in the timing of cost recovery, in addition to taxable year mismatches. Consistent with section 960(a) and (d), the 2018 FTC proposed regulations deem a corporate U.S. shareholder of a CFC to pay foreign income taxes of the CFC, which are allocated and apportioned to an income group under the principles of § 1.904–6, only if there is an inclusion under either section 951(a)(1)(A) or section 951A that is attributable to net income in the income group. *See* proposed § 1.960–2(b) and (c). A current year tax that is allocated and apportioned to an income group cannot therefore be deemed paid if there is no net income in a particular group due to a timing difference or a reduction of the net income under section 952(c) to reflect the earnings and profits limitation or a chain deficit. The comments requested various changes that would have the effect of preserving a current year tax that, applying the principles of § 1.904–6, would otherwise be allocated to an income group with no net income and not deemed paid under section 960.

Several comments addressed the ineligibility of a current year tax to be deemed paid because it is associated under the principles of § 1.904–6 with an income group that has no current year income or to which no inclusion is otherwise attributable. Comments requested that, in that circumstance, the current year tax be treated as properly attributable to previously taxed earnings and profits and deemed paid under section 960(b) upon a subsequent distribution of the previously taxed earnings and profits. A similar comment suggested that a current year tax that is assigned to an income group to which no inclusion is attributable nonetheless be treated as deemed paid under section 960 for the current taxable year as long as the income that was included in the foreign tax base either was previously recognized or will be recognized in the future under Federal income tax rules.

Section 960 requires an inclusion of subpart F income under section 951(a)(1) or of tested income under section 951A in order for foreign income taxes that are associated with that income to be deemed paid. *See* Conference Report at 628 (''Tax imposed on income that is not included in subpart F income, is not considered attributable to subpart F income.''). In the absence of an inclusion, only a distribution of previously taxed earnings and profits may cause a current year tax to be associated with previously taxed earnings and profits instead of current year earnings, and treated as deemed paid by the distribution recipient.

Congress intended for § 1.904–6 principles to apply to associate current year tax with those inclusions or distributions so that the taxes that are deemed paid with respect to an inclusion or distribution are also associated, for purposes of applying the limitation under section 904(d), with the separate category to which the inclusion or previously taxed earnings and profits is assigned. Congress also repealed section 902, which tracked multi-year amounts of a CFC's foreign income taxes and associated those amounts with multi-year amounts of its earnings and profits, in favor of a system that associates, within a single, current taxable year, the foreign income taxes that a CFC pays or accrues with the income it recognizes in that year. *See* H.R. Rep. No. 115–409, at 383 (''[O]ffering deemed paid foreign tax credits on a current year basis solely under section 960 reflects what the Committee believes to be a simpler and more appropriate application of the foreign tax credit regime in a 100 percent participation exemption system); Conference Report at 628 (''The provision eliminates the need for computing and tracking cumulative tax pools.''). In a current year system that relies on § 1.904–6 principles to associate taxes paid or accrued by a CFC with respect to a taxable year with its income for that taxable year, taxes that accrue in a taxable year but relate to income other than the income that is included by a U.S. shareholder in that year are not deemed paid. Section 1.960–1(d)(3)(ii)(B) carries out the legislative intent by assigning taxes under the timing difference rule to current items of income of the same type as the items included in the foreign tax base, even if the tax was factually associated with specific items of income that were recognized for U.S. tax purposes in a different taxable year.

Associating the tax with previously taxed earnings and profits rather than current year items of income would be inconsistent with Congress's intent to eliminate pooling and calculate deemed paid foreign tax credits on a current year basis rather than on a multi-year basis; the change requested by the comments, in other words, would circumvent Congress's intent that, in the absence of a distribution of previously taxed earnings and profits, the only event that causes a foreign income tax to be deemed paid by a domestic corporation is an inclusion of the income to which the foreign income tax that is paid or accrued by a CFC relates. Conference report at 628. Therefore, the comments are not adopted.

Comments also requested the allowance of carryovers or carrybacks at the CFC level if a current year tax is not deemed paid because it is imposed on a timing difference item to which no inclusion is attributable or if the inclusion amount is reduced to reflect the shareholder's qualified deficit. The requested changes to allow carryovers of foreign income taxes at the CFC level are inappropriate in light of the transition, discussed in this Part V.B, from a system based on multi-year pools of foreign income taxes to a current-year system. Moreover, Congress also expressly disallowed carryovers of section 951A category foreign income taxes paid, accrued, or deemed paid by a domestic corporation. *See* section 904(c). The allowance of carryovers by a CFC of current year taxes that are not deemed paid by a U.S. shareholder with respect to an inclusion would undermine Congress's intent to deem a U.S. shareholder to pay foreign income taxes with respect to inclusions only on a current year basis and to allow carryovers only of certain foreign income taxes. Therefore, the comments are not adopted.

One comment specifically referenced the rule in proposed § 1.960–2(c)(5) that provides for no deemed paid taxes under section 960(d) and proposed § 1.960–2(c)(1) when the taxpayer has no inclusion under section 951A(a) in arguing for a proportionate carryover of taxes not deemed paid in the current year. The comment noted that if there was no inclusion under section 951A(a) because the taxpayer had no net CFC tested income (as defined in § 1.951A–1(c)(2)) or had deemed tangible income return (as defined in § 1.951A–1(c)(3)) in excess of its net CFC tested income, the earnings associated with that income may not be eligible for the deduction under section 245A and therefore could be subject to double taxation.

In general, earnings and profits related to income that is not included under section 951(a) or section 951A(a) (including income that is not included because of the taxpayer's deemed tangible income return or a lack of net CFC tested income) are eligible for the dividends received deduction under section 245A when those earnings are distributed to a domestic corporation, if the holding period and other requirements under section 245A are met. Thus, excluding the taxes associated with those earnings from being deemed paid under proposed § 1.960–2(c)(5) does not result in double taxation as asserted by the comment. *See also* section 245A(d). Accordingly, no changes were made to proposed § 1.960–2(c)(5).

3. Current Year Taxes Attributable to Inclusion Reduced by Qualified Deficit

A comment requested an adjustment to the computation of deemed paid taxes if a domestic corporation's subpart F inclusion that is attributable to net income in a subpart F income group is reduced by the amount of the domestic corporation's share of a qualified deficit. The requested adjustment would cause all taxes in the subpart F income group to be deemed paid in the year the qualified deficit is used. Under the requested adjustment, the amount of the current year taxes allocated and apportioned to the group that would be deemed paid by the domestic corporation would be disproportionate to the portion of the subpart F income in the group that is included in income by the domestic corporation. Under section 952(c)(1)(B), a qualified deficit reduces the amount of subpart F income of a CFC that a U.S. shareholder includes in its gross income under section 951(a)(1)(A) but does not reduce the subpart F income of the CFC. In contrast, section 952(c)(1)(A) reduces the subpart F income of the CFC at the CFC level. In addition, whereas the current year E&P limitation in section 952(c)(1)(A) can give rise to recapture in a future taxable year of the reduced subpart F income amount, no such recapture occurs with respect to qualified deficits. Therefore, the final regulations retain the rule in § 1.960–2(b)(3)(ii) that reduces the amount of foreign income taxes deemed paid to the extent the U.S. shareholder reduces its subpart F inclusion by reason of a qualified deficit. Otherwise, taxpayers could be allowed a deemed paid credit in excess of the amount of foreign income taxes the CFC paid with respect to the income that was included.

4. Assignment of Current Year Taxes to Section 904 Categories and Income Groups Determined Under Federal Income Tax Law

Comments requested clarification on the application of the timing difference rule in the case of foreign income taxes incurred by a CFC after the enactment of section 951A but imposed on income included in the foreign tax base that may correspond to income recognized under Federal income tax law in a pre-enactment taxable year (including, for example, income of a CFC that was included in a U.S. shareholder's income under section 965). In particular, comments noted that the description in proposed § 1.960–1(d)(3)(ii)(B)(*2*) of the timing difference rule as applied to certain taxes with respect to previously taxed earnings and profits suggested that the taxes would relate to the category that existed in the inclusion year, rather than (if different) the category to which the previously taxed earnings and profits would have been assigned in the year in which the taxes are paid or accrued. The comments recommended the rules confirm that taxes incurred by a CFC after the enactment of section 951A can be assigned to a tested income group even if such taxes were imposed on income that accrued for U.S. tax purposes before section 951A was enacted.

Under § 1.904–6(a)(1)(iv), a tax imposed on an amount that is not included in U.S. taxable income in the current year is allocated and apportioned to the appropriate separate category or categories to which the tax would be allocated and apportioned if the income were recognized under Federal income tax principles in the year in which the tax was imposed. Therefore, in the context of proposed § 1.960–1(d)(3)(ii), which applies the principles of § 1.904–6, a tax imposed in a post-TCJA year with respect to pre-TCJA income is assigned to a tested income group if the pre-TCJA income, if recognized in the year the tax was imposed, would be tested income. Therefore, no further change to the regulations is necessary to achieve the result requested by the comments. However, the sentence in proposed § 1.960–1(d)(3)(ii)(B)(*2*) is revised to eliminate any inference that the timing difference rule assigns the tax on the basis of the separate categories that existed in the inclusion year.

One comment asked for clarifications regarding how current year taxes are allocated and apportioned under proposed § 1.960–1(d)(3)(ii) when the foreign corporation's U.S. and foreign taxable years do not match. In addition to the change to proposed § 1.960–1(d)(3)(ii)(B)(*2*) described in the previous paragraph, as requested by the comment certain changes were also made to proposed § 1.960–1(d)(3)(ii) to clarify the allocation and apportionment process that applies to associate a current year tax with a particular income group or PTEP group that is treated as an income group. These changes clarify that in order to allocate and apportion a current year tax to the section 904 categories and income groups within those categories, all of the foreign taxable income for the period with respect to which the tax is imposed under foreign law is characterized under Federal income tax law and assigned to the categories or groups as though that foreign taxable income were recognized under Federal income tax law in the year in which the tax is paid or accrued. *See* § 1.960(d)(3)(ii)(A) and (C). Additionally, as discussed in Part III.G of this Summary of Comments and Explanation of Revisions, further guidance relating to the allocation and apportionment of foreign income taxes is contained in the 2019 FTC proposed regulations.

C. Application of Section 960 to Inclusions Under Section 1293

Proposed § 1.960–1(a)(1) sets out the general scope of the rules providing for the determination of the foreign income taxes deemed paid by a domestic corporation under section 960. Comments requested that proposed § 1.960–1(a)(1) be modified to clarify that the regulations under section 960 do not preclude a credit under section 1293(f). The final regulations in § 1.960–1(a)(1) clarify that the regulations apply for purposes of any provision that treats a taxpayer as a domestic corporation that is deemed to pay foreign income taxes or treats a foreign corporation as a CFC for purposes of section 960, including for example, section 962(a)(2) or 1293(f).

D. Assigning Gross Income to Section 904 Categories and Income Groups

1. Separate Categories to Which Income May Be Assigned

With respect to a CFC, proposed § 1.960–1(d) provides rules for assigning gross income, and allocating and apportioning deductions and current year taxes, to section 904 categories and income groups for purposes of determining what taxes are properly attributable to, and therefore deemed paid with respect to, a subpart F inclusion, GILTI inclusion, or a distribution of previously taxed earnings and profits. Under proposed § 1.960–1(d)(2)(i), gross income is first assigned to a section 904 category. The rule also specifies that, other than gross income relating to a section 959(b) distribution, gross income of a CFC cannot be assigned to the section 951A category or foreign branch category.

One comment recommended changes to this language, in general, to specify that gross income relating to a section 959(b) distribution can be assigned to the section 951A category, but that gross income of a CFC can never be assigned to the foreign branch category. The Treasury Department and the IRS agree that the language could be clarified, and accordingly, the final regulations modify § 1.960–1(d)(2)(i) to omit any references to the foreign branch category. However, the Treasury Department and the IRS are studying whether in certain cases a CFC may have gross income that is assigned to the foreign branch category and therefore the final regulations do not preclude that possibility.

2. Scope of Subpart F Income Groups

After assignment of income to section 904 categories, proposed § 1.960–1(d)(2)(ii)(A) provides that the income is further assigned to income groups within the section 904 categories. Under proposed § 1.960–1(d)(2)(ii)(B), gross subpart F income is assigned to income groups based on the items of income determined under § 1.954–1(c)(1)(iii).

Comments requested that all subpart F income in a separate category be treated as a single item for purposes of determining what taxes are properly attributable to a subpart F inclusion. However, because the grouping rules in the 2018 FTC proposed regulations are necessary to properly coordinate the calculation of foreign taxes deemed paid under section 960(a) with the application of the subpart F high-tax exception and the section 904 high-tax kickout, the final regulations do not adopt these comments.

Section 960(a) requires a determination of the foreign income taxes that are attributable to ''any item of income . . . with respect to [a] controlled foreign corporation'' that is included in gross income of a domestic corporation under section 951(a)(1). However, under the subpart F high-tax exception, a taxpayer may exclude from a CFC's foreign base company income an ''item of income'' that is high-taxed. High-taxed income is excluded from foreign base company income, and therefore is not included in the U.S. shareholder's income under section 951(a)(1). The regulations under section 954(b)(4) identify items of gross foreign base company income within each section 904 category and allocate and apportion expenses (including foreign tax expense) among these items in order to compute the net items of foreign base company income and determine the foreign effective tax rate with respect to each item. The grouping rules in the section 954(b)(4) regulations further coordinate the application of the subpart F high-tax exception with the section 904 high-tax kickout by adopting the passive category grouping rules used in the section 904 regulations. See § 1.954–1(c)(1)(iii) and sections 904(d)(2)(B)(ii)(II) and 904(d)(2)(F), excluding from passive income any income with respect to which the foreign income taxes paid, accrued, and deemed paid exceed the highest U.S. tax rate.

By adopting the same grouping rules used to determine eligibility for the subpart F high-tax exception and the application of the section 904 high-tax kickout, the subpart F income groups of proposed § 1.960–1(d)(2)(ii)(B) ensure that the same amount of foreign tax is treated as attributable to a particular item of a CFC's foreign base company income for purposes of all three Code sections. This helps minimize the circumstances in which passive subpart F income could fail to qualify for the subpart F high-tax exception, but when included under section 951(a) by the U.S. shareholder with foreign taxes deemed paid trigger the similar (but not identical) section 904 high-tax kickout. Additionally, given that section 960(a) specifically refers to the foreign income taxes properly attributable to the ''item of income,'' which has historically been determined in this manner in applying the subpart F high-tax exception and the section 904 high-tax kickout, the Treasury Department and the IRS have determined that retaining the separate subpart F income groups as provided in the 2018 FTC proposed regulations is appropriate. Accordingly, the comments are not adopted.

E. Deemed Paid Credits for Inclusions Under Section 951(a)(1)(B)

Proposed § 1.960–2(b)(1) provides that no foreign income taxes are deemed paid under section 960(a) with respect to an inclusion under section 951(a)(1)(B), which is based on the amount determined under section 956 (a ''section 956 inclusion''). The preamble to the proposed regulations explains that a section 956 inclusion is not an inclusion of an ''item of income'' of the CFC but instead is an inclusion equal to an amount that is determined under the formula in section 956(a) and therefore section 960(a), which as amended by the TCJA computes deemed paid taxes by reference to foreign taxes attributable to an ''item of income,'' does not allow for a deemed paid credit. Comments noted that section 960(a) references section 951(a)(1), not merely subpart F inclusions under section 951(a)(1)(A), and argued that a section 956 inclusion is an item of income in respect of the U.S. shareholder and requested that the regulation be modified to allow for a deemed paid credit in connection with a section 956 inclusion. Additionally, comments argued that not allowing credits in respect of section 956 inclusions was inconsistent with the legislative history of the TCJA. However, one comment stated that the rule in proposed § 1.960–2(b)(1) represented sensible policy because, under a pre-TCJA regime that deferred U.S. taxation of a CFC's earnings until those earnings were repatriated through a dividend distribution, section 956 served the purpose of treating effective repatriations of CFC earnings in the form of investments in certain U.S. property in a manner similar to repatriations in the form of dividends. The TCJA allowed a dividend received deduction for dividends from subsidiary foreign corporations, and no foreign taxes are deemed paid under the TCJA with respect to dividends (including dividends that are not eligible for a deduction under section 245A).

The Treasury Department and the IRS disagree that the ''item of income'' reference in section 960(a) refers to the U.S. shareholder's inclusion under section 951(a)(1), rather than the item of income of the CFC that is included in the U.S. shareholder's income. If that were the case, then no foreign taxes of the CFC would be properly attributable to such item of income, since the foreign taxes are imposed on the items of income earned by the CFC and not on the U.S. shareholder's subpart F inclusion. Therefore, the items to which foreign tax can be properly attributed must refer to the CFC's income items in order for section 960(a) to allow for a deemed paid credit for foreign taxes paid or accrued by the CFC. Because a section 956 inclusion is not traceable to an item of income of the CFC, section 960(a) does not permit a deemed paid credit for section 956 inclusions. *See also Whitlock* v. *Comm'r,* 494 F.2d 1297 (10th Cir. 1974) (earnings that give rise to a section 956 inclusion are ''not an 'income' type item of the corporation'').

In addition, section 960(a) does not define what it means for taxes to be ''properly attributable'' to items of income. The legislative history provides that rules similar to § 1.904–6(a) should apply in attributing foreign income taxes to ''item[s] of subpart F income.'' H.R. Rep. No. 115–409, at 383. Section 1.960–1(d)(3)(ii) accordingly applies the principles of § 1.904–6(a) to allocate a CFC's current year taxes to the CFC's income items that comprise its subpart F income and other income earned in the current taxable year. Those principles require attributing foreign income taxes, which are paid or accrued by the CFC, to items of income of the CFC, not to an item of income of the U.S. shareholder, since an inclusion under section 951(a) with respect to the U.S. shareholder is not ''included in the [foreign] base upon which the [CFC's foreign income] tax is imposed.'' Section 1.904–6(a)(1). Furthermore, an inclusion under section 951(a) with respect to the U.S. shareholder is not an ''item of subpart F income,'' and subpart F income excludes earnings relating to section 956. *See* section 952(a) (defining ''subpart F income'').

The Treasury Department and the IRS have also determined that attributing any foreign income taxes to a section 956 inclusion would be inconsistent with the intent of Congress to eliminate the need for multi-year tracking of income and taxes and move to a foreign tax credit system based solely on current year taxes and income. H.R. Rep. No. 115–409, at 383 (''[O]ffering deemed paid foreign tax credits on a current year basis solely under section 960 reflects what the Committee believes to be a simpler and more appropriate application of the foreign tax credit regime in a 100 percent participation exemption system.''). Congress intended for the repeal of section 902 and the amendment of section 960 to ''eliminate[ ] the need for computing and tracking cumulative tax pools.'' *Id.* Allowing a deemed paid credit for inclusions under section 956, as requested by comments, would require the promulgation of complex rules for tracking annual layers of taxes that were associated with earnings that were not included under section 951(a)(1) or 951A, special ordering rules for determining which layer of taxes were deemed paid with respect to a section 956 inclusion relating to earnings from a prior year, and would also potentially require multifaceted rules to trace movements in layers as a result of distributions of earnings and profits or reorganizations of entities.

Therefore, consistent with the proposed regulations, the final regulations provide that no foreign income taxes are deemed paid under section 960(a) with respect to a section 956 inclusion.

F. PTEP Groups in Annual PTEP Accounts

Under proposed § 1.960–3(c)(1), a CFC must establish a separate, annual account (''annual PTEP account'') for its earnings and profits for its current taxable year to which subpart F or GILTI inclusions of U.S. shareholders are attributable. The previously taxed earnings and profits in each annual account are then assigned to one of ten possible groups of previously taxed earnings described in proposed § 1.960–3(c)(2) (each, a ''PTEP group''). After the proposed regulations were issued, the Treasury Department and the IRS released Notice 2019–01, 2019–2 I.R.B. 275, which announced the intention to issue regulations relating to foreign corporations with previously taxed earnings and profits. Notice 2019–01 affirmed the requirement to maintain annual PTEP accounts, but expanded the number of PTEP groups to 16, which included the original ten PTEP groups in the 2018 FTC proposed regulations as well as six additional groups. Notice 2019–01 provided that these rules would be coordinated with proposed §§ 1.960–1 and 1.960–3. Both the preamble to the 2018 FTC proposed regulations and Notice 2019–01 requested comments on possible ways to simplify the PTEP groups. While no comments made specific suggestions on how to combine or consolidate PTEP groups, one comment noted that the rules were complex and questioned whether tracking all the PTEP groups was necessary.

After evaluating the various limitations on the creditability of certain foreign income taxes and the application of the foreign currency rules under section 986(c) with respect to PTEP groups, the Treasury Department and the IRS have determined that it is possible to consolidate certain of the PTEP groups that were listed in Notice 2019–01. Accordingly, the final regulations update the list of the PTEP groups in § 1.960–3 to include ten PTEP groups. This list consolidates the PTEP groups that were included in the 2018 FTC proposed regulations with the PTEP groups that were included in Notice 2019–01. The updated list permits taxpayers to track fewer PTEP groups than those provided for in Notice 2019–01, while still permitting the application of the relevant foreign tax credit and foreign currency provisions. However, the Treasury Department and the IRS intend to issue more comprehensive regulations addressing the maintenance of annual PTEP accounts and the PTEP groups in a separate notice of proposed rulemaking under section 959. It is anticipated that, as part of that guidance, further changes may be made to § 1.960–3 in order to coordinate both sets of regulations.

G. Transition Rule for Foreign Income Taxes Deemed Paid With Respect to PTEP Groups

Proposed § 1.960–3(d)(3) provides rules for how to determine whether foreign income taxes that were paid or accrued by a CFC in a taxable year that began before January 1, 2018, with respect to PTEP groups that were established for an inclusion year beginning before January 1, 2018, are treated as PTEP group taxes for purposes of applying § 1.960–3. The rule requires that the foreign income taxes meet three conditions, including a condition that the taxes were paid or accrued in a taxable year of the CFC that began before January 1, 2018.

One comment noted that this condition could be read to provide that taxes imposed after 2017 on a distribution from a PTEP group from an inclusion year before 2018 are not treated as PTEP group taxes. The comment recommended eliminating this condition. The Treasury Department and the IRS agree with the comment that the condition inappropriately limited the foreign income taxes that could qualify as PTEP group taxes under the rule. Accordingly, the final regulations eliminate the requirement in proposed § 1.960–3(d)(3)(i). *See* § 1.960–3(d)(3).

H. Application of Section 960(c) to Inclusions Under Section 951A

If certain conditions are met, section 960(c)(1) and § 1.960–4 allow a taxpayer to increase its section 904 limitation in the year of receipt of previously taxed earnings and profits. Because a distribution of previously taxed earnings and profits is excluded from gross income under section 959(a), the distribution will not increase the taxpayer's section 904 limitation except to the extent of any foreign currency gain recognized under section 986(c). The lack of sufficient section 904 limitation could prevent the taxpayer from claiming a credit for foreign income tax, such as a withholding tax, imposed by reason of the distribution. Section 960(c)(1) and § 1.960–4 permit foreign tax on the distribution to be credited to the extent the taxpayer had excess limitation in the year of inclusion of the income under section 951A or section 951(a).

However, in order to limit the increase to the limitation attributable to the inclusion, the increase in the section 904 limitation is reduced by the amount which would have been the section 904 limitation in the inclusion year if the amounts had not been included in gross income under section 951(a) or 951A(a). *See* § 1.960–4(c) and proposed § 1.960–4(a)(1). The increase in the section 904 limitation also excludes any excess limitation in the year of the inclusion that was used to claim a credit for foreign taxes in addition to those paid, accrued, or deemed paid with respect to the inclusions under section 951(a) or section 951A. *See* § 1.960–4(d) and proposed § 1.960–4(a)(1).

A comment recommended that § 1.960–4(c) and (d) not apply to GILTI inclusions because GILTI inclusions are segregated in a separate category that cannot include any other income. However, the parenthetical in section 904(d)(1)(A) contemplates that all or part of a GILTI inclusion could be passive category income by expressly excluding passive category income from the section 951A category. Therefore, the comment is not adopted.

I. Application of Section 965(g) to Section 960(b)

Section 965(g) provides that no credit is allowed under section 901 for the applicable percentage of any taxes paid or accrued (or treated as paid or accrued) with respect to any amount for which a deduction is allowed under section 965(c). On August 9, 2018, the Treasury Department and the IRS published proposed regulations (REG–104226–18) in the **Federal Register** (83 FR 39514) (the ''section 965 proposed regulations''), which included a provision to disallow credits under section 901 for the applicable percentage of any foreign income taxes attributable to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits. The section 965 proposed regulations included a rule for foreign taxes deemed paid under section 960(a)(3) and reserved a rule for foreign taxes deemed paid under section 960(b) in proposed § 1.965–5(c)(1)(iii). Subsequently, in December 2018, the 2018 FTC proposed regulations provided the rule in § 1.965–5(c)(1)(iii) to disallow credits for the applicable percentage of foreign income taxes deemed paid under section 960(b) with respect to distributions to the domestic corporation of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits, and provided a coordination rule with proposed § 1.960–3, which provides rules for section 960(b). On February 5, 2019, the **Federal Register** published final regulations under section 965 (T.D. 9846) at 84 FR 1838, and these regulations confirmed, under § 1.965–5(c)(1)(i), that no credit was allowed for the applicable percentage of foreign income taxes deemed paid under section 960(b) with respect to distributions of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits. The final regulations in this Treasury decision finalize the rule in § 1.965–5(c)(1)(iii) limiting the application of section 965(g) to distributions to domestic corporations in order to avoid multiple disallowances, and coordinating the application of § 1.965–5(c)(1)(i) with § 1.960–3.

In addition, the 2018 FTC proposed regulations provide a rule similar to the rule that applies to taxes deemed paid under section 960(a)(3) (as in effect on December 21, 2017) that is in § 1.965–5(c)(1)(ii) in the section 965 proposed regulations. In particular, foreign income taxes that would have been deemed paid under section 960(a)(1) (as in effect on December 21, 2017) with respect to the portion of a section 965(a) earnings amount that was reduced under § 1.965–1(b)(2) or § 1.965–8(b) are not eligible to be deemed paid under section 960(b) and § 1.960–3(b)(1) or any other section of the Code. *See* proposed § 1.965–5(c)(1)(iii).

A comment asserted that these taxes should be considered to meet the requirements of section 960(b) as they are income taxes ''properly attributable'' to section 965(b) previously taxed earnings and profits. The comment states that although such earnings are not included in income under section 951(a), they are effectively taxed upon distribution through the reduction of basis under section 961(b).

The Treasury Department and the IRS disagree with the comment for several reasons. First, any distribution of PTEP that reduces basis does not necessarily result in U.S. tax; rather, such distribution is excluded from income under section 959(a) to the extent there is sufficient basis. The reasoning suggested by the comment would require that when a U.S. shareholder has a section 951(a) inclusion that is not reduced under section 965(b)(4), a deemed paid credit would be allowed twice, once at the time of the section 951(a) inclusion and then again when a distribution of PTEP is made that results in a reduction of basis under section 961(b), which is plainly contrary to the text of section 960 and the purpose of the foreign tax credit.

Second, the comment argues that section 965(b)(4)(A) provides that section 965(a) earnings amounts offset by an aggregate foreign E&P deficit are treated as income previously included under section 951(a) ''solely'' for purposes of applying section 959, so that such earnings are not treated as previously included under section 951(a) for purposes of applying section 960. However, the application of section 959 is a precondition to the application of section 960(b); section 960(b) cannot result in deemed paid taxes other than with respect to a distribution that is excluded from income under section 959, and in order to be so treated the section 965(b) previously taxed earnings and profits are necessarily treated as previously included under section 951(a) for purposes of section 959. See also Part VI.B of the Summary of Comments and Explanation of Revisions to the final regulations under section 965 (T.D. 9846, published in the **Federal Register** (84 FR 1838) on February 5, 2019) (rejecting similar argument in the context of prior law under section 960(a)(3)).

Third, section 960(b) allows a credit for foreign income taxes paid by CFCs upon a subsequent distribution of the section 965(b) previously taxed earnings and profits through a chain of CFCs to the domestic corporate shareholder, but does not allow a credit for foreign income taxes that were previously deemed paid (or treated as deemed paid) under section 960(a) when the amounts were included (or treated as included) in income under section 951(a). As explained in Part VI.B of the Summary of Comments and Explanation of Revisions to the final regulations under section 965 (T.D. 9846, published in the **Federal Register** (84 FR 1838) on February 5, 2019), foreign income taxes attributable to a section 965(a) earnings amount that were offset by an aggregate foreign E&P deficit were treated as deemed paid under section 960(a) when those earnings were treated as included in income under section 951(a) for purposes of section 959. Therefore, such taxes are not available to be deemed paid again under section 960(b) upon a distribution of the section 965(b) previously taxed earnings and profits.

Finally, section 960(b) provides that only taxes that are ''properly attributable to'' a distribution of PTEP are treated as deemed paid. The comment does not explain why foreign income taxes that were paid or accrued in taxable years before the TCJA would be ''properly attributable'' to a distribution of PTEP in a later taxable year. The legislative history to the TCJA indicates that rules similar to § 1.904–6(a) should apply to determine the meaning of ''properly attributable.'' H.R. Rep. No. 115–409, at 383. Under § 1.904–6(a) as in effect at the time of the TCJA, foreign income taxes paid or accrued in a current year are allocated and apportioned to current year income in a separate category (taking into account timing differences under former § 1.904–6(a)(1)(iv)), and not to income in a different taxable year. Section 1.960–1(d)(3)(ii) implements this legislative intent by providing that only current year taxes imposed solely by reason of a distribution of PTEP are allocated and apportioned to PTEP groups. Because section 960(b) applies only to distributions of PTEP arising in taxable years covered by the TCJA, foreign income taxes paid or accrued in taxable years before the TCJA can never be ''properly attributable'' to a distribution of PTEP that is described in section 960(b).

Therefore, the final regulations provide that no credit is allowed under section 960(b) or any other provision of the Code for taxes attributable to section 965(a) earnings amounts offset by an aggregate foreign E&P deficit that would have been deemed paid under former section 960(a)(1) had the amounts actually been included in income under section 951(a).

J. Treatment of Section 78 Dividend

1. Taxes Deemed Paid Under Section 960(b)

Under section 78, as amended by the TCJA, an amount equal to the taxes deemed paid by a domestic corporation under section 960(a), (b), and (d) are treated as a dividend received from the foreign corporation. Section 960(b) addresses taxes deemed paid on distributions of previously taxed earnings and profits. Before the TCJA, section 78 did not reference former section 960(a)(3), which at the time addressed taxes deemed paid on distributions of previously taxed earnings and profits. This is consistent with the purpose of the section 78 dividend, which is to ensure that a U.S. shareholder cannot effectively both deduct and credit the foreign taxes paid by a foreign subsidiary that are deemed paid by the U.S. shareholder. *See* Elizabeth A. Owens & Gerald T. Ball, The Indirect Credit § 2.2B1a n.54 (1975); Stanley Surrey, ''Current Issues in the Taxation of Corporate Foreign Investment,'' 56 Columbia Law Rev. 815, 828 (June 1956) (describing the ''mathematical quirk'' that necessitated enactment of section 78). However, there is no deduction taken into account by the U.S. shareholder for U.S. tax purposes with respect to taxes deemed paid under either former section 960(a)(3) or section 960(b) that would need to be reversed by section 78.

One comment requested that the final regulations make clear that, notwithstanding the amendment of section 78, deemed paid taxes are not treated as a section 78 dividend to the extent that the taxes are related to previously taxed earnings and profits. The comment states that providing a section 78 dividend on these taxes is inappropriate given the purpose of section 78, and that no changes to the statutory language of section 78 should be needed to achieve this result based on the final regulations in effect before the enactment of the TCJA. Finally, the comment also requested changes to the example in proposed § 1.960–1(f) to show the computation of deemed paid taxes of a U.S. shareholder under section 960(b)(1) and the application of section 78 to the deemed paid taxes.

Because section 78 clearly states that taxes deemed paid under section 960(b) give rise to a section 78 dividend, the final regulations do not adopt the comment. Additionally, because an example of the application of section 960(b)(1) is already provided in § 1.960–3(e)(2), no changes were made to the example in proposed § 1.960–1(f) in the final regulations.

2. Inclusion in Foreign Oil Related Income

One comment requested clarification that a section 78 dividend associated with an inclusion under section 951A can be included in foreign oil related income under section 907(c)(3)(B). The

TCJA amended section 907(c)(3)(B) to delete references to section 902 and to refer to taxes deemed paid under section 960, instead of section 960(a). The comment requested amendments to § 1.907(c)–2(d)(5).

The Treasury Department and the IRS agree that section 78 dividends with respect to inclusions under section 951A can be included in foreign oil related income, and that section 907(c)(3)(B), as amended by the TCJA, clearly provides for this result notwithstanding the existence of outdated regulations. However, the final regulations do not contain revisions to the regulations under section 907, which is beyond the scope of the final regulations. The regulations under section 907 have not been revised since 1991 and substantial revisions are required to conform to statutory changes made since 1991. The Treasury Department and the IRS expect to revise the regulations under section 907 in a future guidance project. Comments are requested on what additional issues should be addressed as part of revising those regulations.

VI. Applicability Dates

In general, the 2018 FTC proposed regulations provide that the portions of the regulations that relate to statutory amendments made by the TCJA apply to taxable years beginning after December 31, 2017. *See* section 7805(b)(2). In the case of §§ 1.78–1, 1.861–12(c)(2), and 1.965–7(e), these regulations were finalized as part of TD 9866, published in the **Federal Register** (84 FR 29288) on June 21, 2019.

Other portions of the proposed regulations that do not relate to the TCJA apply to taxable years ending on or after December 4, 2018. *See* section 7805(b)(1)(B). Certain portions of the proposed regulations contain rules that relate to the TCJA as well as rules that do not relate to the TCJA. Those regulations generally apply to taxable years that satisfy both of the following two conditions: (1) The taxable year begins after December 31, 2017, and (2) the taxable year ends on or after December 4, 2018. *See* section 7805(b)(1)(B).

In general, no changes were made to the proposed applicability dates in the 2018 FTC proposed regulations in the final regulations. For §§ 1.904(b)–3 and 1.960–1 through 1.960–6, the applicability dates were revised to apply the regulations to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, consistent with section 7805(b)(1)(B).

Section 1.904(g)–3, which finalizes the 2012 OFL proposed regulations, is applicable to taxable years ending on or after December 16, 2019.

Section 1.905–3, which finalizes proposed § 1.905–3 (other than proposed § 1.905–3(a)) is applicable to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019. See proposed § 1.905–3(b)(2) and § 1.905–5, contained in the 2019 FTC proposed regulations, for rules that apply to foreign tax redeterminations of foreign corporations.

Section 1.986(a)–1, which finalizes proposed § 1.905–3(a), applies to taxable years ending on or after December 16, 2019, and to taxable years of foreign corporations which end with or within a taxable year of a U.S. shareholder ending on or after December 16, 2019.

Special Analyses

I. Regulatory Planning and Review

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, reducing costs, harmonizing rules, and promoting flexibility. For purposes of Executive Order 13771, this rule is regulatory.

The final regulations have been designated by the Office of Information and Regulatory Affairs (OIRA) as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (MOA, April 11, 2018) between the Treasury Department and the Office of Management and Budget 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 and Need for the Final Regulations

Before the Tax Cuts and Jobs Act (TCJA), the United States taxed its citizens, residents, and domestic corporations on their worldwide income. However, to the extent that a foreign jurisdiction and the United States taxed the same income, this framework could have resulted in double taxation. The U.S. foreign tax credit (FTC) regime alleviated potential double taxation by allowing a non-refundable credit for foreign income taxes paid or accrued that could be applied to reduce the U.S. tax on foreign source income. Although the TCJA eliminated the U.S. tax on some foreign source income, the United States continues to provide foreign tax credits for foreign source income subject to U.S. tax. The changes made by TCJA to international taxation necessitate certain changes in this FTC regime.

In plain language, the FTC calculation is applied separately to different categories of income (a ''separate category''), a long-standing framework that is unchanged by TCJA.[1] This framework entails the taxpayer allocating income, expenses, and foreign income taxes paid or accrued to each separate category. Taxpayers who pay foreign taxes on income in one separate category cannot claim a credit against U.S. tax owed on income (more precisely, gross income minus deductions) in a different category. For example, suppose a domestic corporate taxpayer has $100 of active foreign source income in the ''general category'' and $100 of passive foreign source income, such as interest income, in the ''passive category.'' It also has $50 of foreign taxes associated with the ''general category'' income and $0 of foreign taxes associated with the ''passive category'' income. The allowable FTC is determined separately for the two categories. Therefore, none of the $50 of ''general category'' FTCs can be used to offset U.S. tax on the ''passive category'' income. This taxpayer has a pre-FTC U.S. tax liability of $42 (21 percent of $200) but can claim a FTC for only $21 (21 percent of $100) of this liability, which is with respect to active foreign source income in the general category. The $21 represents what is referred to as the taxpayer's foreign tax credit limitation with respect to the general category. The taxpayer may carry the remaining $29 of foreign taxes ($50 minus $21) back to the prior taxable year and then forward for up to 10 years (until used), and is allowed a credit against U.S. tax on general category foreign source income in the carryover year, subject to certain restrictions.

Expenses borne by U.S. parents and domestic affiliates that support foreign operations also generally follow this long-standing framework. Deductions that reduce foreign source taxable income in a particular category thereby reduce the allowable FTCs for that

[1] Prior to the enactment of the TCJA, these categories were primarily the passive and general categories. The TCJA added new separate categories for global intangible low-taxed income (the section 951A category) and foreign branch category income.

category. The rules for expense allocation need updating in light of the changes made by TCJA.

The TCJA added new separate categories for global intangible low-taxed income (the section 951A category) and foreign branch income. The addition of these new categories and other changes [2] necessitate practical guidance for implementation. The final regulations also update outdated portions of the existing regulations to help conform the existing regulations to the post-TCJA world. Finally, the final regulations address comments received on the 2018 FTC proposed regulations.

B. Overview of the Final Regulations

The final regulations specify the methodologies and approaches necessary to conform the existing regulations to the changes specified in the TCJA. The final regulations provide guidance for taxpayers to determine the amount of their foreign tax credits and how to compute their foreign tax credit limitation.

Most notably, the final regulations help interpret the statute by providing details regarding how income is assigned and expenses are apportioned to the new separate categories created by the TCJA. In particular, the final regulations specify that, for purposes of applying the expense allocation and apportionment rules, the portion of gross income related to FDII or a GILTI inclusion which is offset by the section 250 deduction is treated as exempt income, and the stock giving rise to GILTI that is offset by the section 250 deduction is treated as a partially exempt asset. Such treatment implies that fewer expenses will be allocated to the section 951A category as a result of this rule, leading to higher computed foreign source taxable income, a larger foreign tax credit limitation, and a larger foreign tax credit offset with respect to GILTI income. Because in the absence of these regulations, these expenses would generally be allocated to the section 951A category (which makes it more difficult to utilize FTCs related to GILTI), this rule will in general reduce the tax burden of U.S. multinational corporations with GILTI income and allocable expenses.

The final regulations also address how FTC carryovers are allocated across the new separate categories. The formation of two new separate categories requires a determination regarding how the balance of FTC carryovers in existence upon enactment of TCJA are to be allocated across new and existing separate categories.

The final regulations also address certain potentially abusive borrowing arrangements, such as when a U.S. person lends money to a foreign partnership in order to artificially increase foreign source income (and therefore the FTC limitation) without affecting U.S. taxable income. In addition, they clarify the regulatory environment by updating inoperative language in §§ 1.904–1 through 1.904–3, parts of the regulations that have not previously been updated to reflect changes to section 904 made in 1978.

The final regulations also ease transitional administrative burdens associated with the implementation of the TCJA; for example, they allow an exception to the 5 year waiting period for the election of the gross income or sales method for R&E expense allocation, and provide added flexibility for when the average bases of assets is measured by taxpayers who are required to switch to the tax book method of valuation. The final regulations further clarify the § 1.904–6 rules concerning how allocation of taxes across separate categories should be calculated in the presence of base and timing differences and also fill technical gaps in how to implement the statute in practice, for example, by providing a clear rule for how to characterize the value of stock in each separate category in the context of the new separate categories.

C. Economic Analysis

1. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of the final regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these regulations.

2. Summary of Economic Effects

The final regulations provide certainty and clarity to taxpayers regarding the allocation of income, expenses, and FTC carryovers to the separate income categories. In the absence of the enhanced specificity provided by these regulations, similarly situated taxpayers might interpret the foreign tax credit provisions of the tax code differently, potentially resulting in inefficient patterns of economic activity. For example, because separate categories for GILTI and foreign branch income did not previously exist, one taxpayer might undertake a particular business activity, based on that taxpayer's interpretations of how that activity's income, expenses, and carryover foreign tax credits will be allocated across these categories, that another taxpayer, making a different interpretation of the tax treatment of these allocations, might forego. If this difference in interpretations confers a competitive advantage on the less profitable enterprise, U.S. economic performance may suffer. The guidance provided in these regulations helps to ensure that taxpayers face more uniform incentives when making economic decisions. In general, economic performance is enhanced when businesses face more uniform signals about tax treatment.

Because the TCJA is new, the Treasury Department and the IRS do not know with reasonable precision the tax interpretations that taxpayers might make in the absence of this guidance. To the extent that taxpayers would generally have interpreted the foreign tax credit rules as being less favorable to the taxpayer than the final regulations provide, these final regulations may result in additional international activity by these taxpayers relative to the no-action baseline. This additional activity may include both activities that are beneficial to the U.S. economy (perhaps because they represent enhanced international opportunities for businesses with U.S. owners) and activities that are not beneficial (perhaps because they are accompanied by reduced activity in the United States) The Treasury Department and the IRS recognize that additional U.S. economic activity abroad may be a complement or substitute to activity within the United States and that to the extent these regulations change this activity (relative to the no-action baseline or alternative regulatory approaches), a mix of results may occur.

The Treasury Department and the IRS have not undertaken quantitative estimates of the economic effects of the final regulations. The Treasury Department and the IRS do not have readily available data or models to estimate with reasonable precision (i) the tax stances that taxpayers would likely take in the absence of these final regulations or under alternative regulatory approaches; (ii) the difference in economic decisions that taxpayers might make between the final regulations and the no-action baseline or alternative regulatory approaches; or (iii) how this difference in business activities will affect U.S. economic

[2] TCJA repealed the fair market value method of asset valuation used to apportion interest expense to separate categories and amended Code sections that address deemed paid credits for subpart F income, global intangible low-taxed income (GILTI), and distributions of previously taxed earnings and profits. Further, because repatriated dividends are no longer taxable, the TCJA also repealed section 902 (which allowed a domestic corporation to claim FTCs with respect to dividends paid from a foreign corporation) and made other conforming changes.

activity. In the absence of such quantitative estimates, the Treasury Department and the IRS have undertaken a qualitative analysis of the economic effects of the final regulations relative to the no-action baseline and relative to alternative regulatory approaches. This analysis is presented in Parts I.C.3 and I.C.4. of this Special Analyses.

3. Economic Effects of Important Provisions Revised From the 2018 FTC Proposed Regulations

i. Transition Rules Relating to Foreign Tax Credit Carryovers

a. Background

Under the Code, to the extent a taxpayer pays or accrues creditable foreign taxes in excess of its foreign tax credit limitation in a given year, the taxpayer can carry those excess credits back one year or forward ten years (FTC carryover). Because a taxpayer's FTC limitation is determined on a separate category basis, FTC carryovers are maintained on a separate category basis as well. When there are changes in the number of separate categories, transition rules are generally needed to deal with how to classify the existing FTC carryovers so that they can be allocated to the new separate categories. The TCJA expanded the existing separate categories by subdividing the general category into three categories: General, foreign branch, and section 951A. The TCJA did not, however, provide transition rules for the existing stock of FTC carryovers.

To deal with the transition issue, the 2018 FTC proposed regulations provided a default rule that kept FTC carryovers in the general category going forward. However, taxpayers could elect to reconstruct their FTC carryover with respect to the foreign branch (but not the section 951A) category. To do so, a taxpayer would need to determine what portion of its FTC carryover would be in the foreign branch category if the foreign branch category had existed in the year the carryover arose. No amount of the carryover was required to be allocated to the section 951A category because of the difficulty associated with the reconstruction and because under the TCJA carryovers are not allowed for the foreign tax credits in the section 951A category. The provision in the 2018 FTC proposed regulations not to require taxpayers that elected reconstruction to allocate FTC carryovers to the section 951A category is generally favorable to the affected taxpayers because otherwise taxpayers would have had carryover credits allocated to the section 951A category and those taxpayers would not have been allowed to utilize those credits.

b. Options Considered for the Final Regulations

The Treasury Department and the IRS considered several options to deal with FTC carryovers in response to taxpayer comments.[3] The first option was to adopt the rule from the 2018 FTC proposed regulations without modification. A second set of options was to adopt simplified rules to assist taxpayers with allocating the FTC carryovers to the different separate categories. The Treasury Department and the IRS considered three variants of simplified rules: (a) Allow taxpayers to assign FTCs to the foreign branch category proportionately according to the ratio of foreign taxes paid or accrued by the taxpayer's branches to total foreign taxes paid or accrued by the taxpayer (in that year); (b) allow taxpayers to assign FTCs based on any reasonable method; or (c) allow taxpayers to assign FTCs by reconstructing FTC carryforwards but do not require taxpayers to apply the disregarded payment rule in § 1.904–4(f)(2)(vi).

The final regulations adopt the first simplified rule, (a). Thus, taxpayers may keep FTC carryovers in the general category, allocate them to the foreign branch category in the same manner as they would have been allocated had the foreign branch category always existed, or allocate them to the foreign branch category proportionately. This simplified rule reduces complexity for some taxpayers and is not expected to result in a substantially different allocation of FTCs to the branch basket than full reconstruction. The final rule therefore minimizes the potential for the manipulation of allocations of income, expenses, and foreign taxes to the categories while minimizing taxpayer compliance and IRS administrative costs.

c. Number of Affected Taxpayers

This provision potentially affects any taxpayer with a general category FTC arising in a taxable year beginning before January 1, 2018, that is carried to a taxable year beginning on or after January 1, 2018. The Treasury Department and the IRS estimate that there are between 2 and 2.25 million individual and business taxpayers that would be affected by the transition rules related to FTC carryovers. This estimate is based on currently available counts of taxpayers with FTC carryovers reported on Form 1118 schedule B line 5 and Form 1116 part III line 10 for tax years 2015–2017.

[3] The 2018 FTC proposed regulations requested comments on whether a simplified safe harbor approach was appropriate and several comments requested such a rule.

ii. Transfers of IP for Purposes of the Foreign Branch Category

a. Background

The TCJA added a new separate category related to foreign branch income. The statute did not, however, provide specific guidance on what constitutes foreign branch income other than that it is business profits attributable to one or more qualified business units of the taxpayer in one or more foreign countries. To provide greater specificity over the definition of foreign branch income, the 2018 FTC proposed regulations generally determined the foreign branch income based on the U.S.-tax adjusted books and records of the foreign branch. However, certain adjustments were made to those books and records based on certain disregarded transactions that may have occurred between the foreign branch owner and the foreign branch. These adjustments were intended to get to a more accurate representation of the gross income attributable to the branch.

The issue of disregarded payments is particularly salient in the context of disregarded transfers of intellectual property (IP). The 2018 FTC proposed regulations included a rule that disregarded transfers of IP between a foreign branch and its owner would result in a deemed payment that reallocates income between the foreign branch category and the general category. This rule has the effect of preventing artificial manipulation of the foreign branch category through changes in ownership of IP between a foreign branch and its owner. This rule applied regardless of when the transfer of IP occurred and regardless of how long the IP remained in the foreign branch. Comments requested that the rule be withdrawn and cited, among other concerns, its administrative and compliance burdens. Other comments requested that the Treasury Department limit the applicability of the rule to a later date and also limit its applicability where ownership of the IP by the foreign branch is transitory.

b. Options Considered for the Final Regulations

The Treasury Department and the IRS considered three options with respect to the treatment of disregarded transfers of IP for purposes of determining foreign branch income. The first option was to withdraw the rule in its entirety and to provide no specific guidance for disregarded transfers of IP. The second option was to adopt the rule unchanged from the 2018 FTC proposed regulations. The third option was to adopt the rule with certain modifications that would alleviate some of the compliance and administrative burdens. These modifications include applying the rule to transfers that occurred after the date of publication of the 2018 FTC proposed regulations and providing exceptions for transfers involving transitory ownership by the foreign branch.

The final regulations adopt the third option. They retain the structure of the 2018 FTC proposed regulations but limit its applicability to transactions that occurred after the date of publication of the 2018 FTC proposed regulations, and included an exception for transitory ownership. The Treasury Department and the IRS recognize that this rule may result in higher compliance costs relative to the no-action baseline but project that this negative consequence is outweighed by concerns that taxpayers could otherwise structure highly valuable and mobile IP transfers to avoid the purpose of the rules. This avoidance would be difficult for the IRS to address absent the rule. In order to minimize the increase in compliance costs relative to withdrawing the rule (and simultaneously to reduce compliance costs relative to retaining the proposed regulations without change), the rule is limited to IP transfers that occurred after the publication of the 2018 FTC proposed regulations, when taxpayers were aware of the rule and how foreign branch category income would be determined. Furthermore, the Treasury Department and the IRS determined that cases where the foreign branch only owned the IP for brief periods of time were unlikely to pose the risk identified and thus should be excepted.

c. Number of Affected Taxpayers

This provision affects any taxpayer that transfers IP to or from a foreign branch on or after December 7, 2018. Because transfers of IP are not specifically identified on any tax forms, the Treasury Department and the IRS estimated the number of taxpayers who report nonzero gross income and allocable deductions with respect to a foreign branch as an upper bound on the group of taxpayers potentially affected by this rule. The Treasury Department and the IRS have determined that there were 1,500 unique taxpayers that meet these conditions in currently available data from taxable years 2015–2017. The number of these taxpayers that transfer IP is likely much smaller than this count because most taxpayers do not transfer IP in any given tax year.

iii. Treatment of GILTI for Purposes of the Interest Allocation Rules

a. Background

The Code provides rules for how the interest expense of a CFC is to be allocated for purposes of claiming the foreign tax credit. Under the Code, a CFC must allocate and apportion its interest expense among groups of income for purposes of determining its tested income, subpart F income, or other types of net foreign source income. At the same time, a U.S. taxpayer must characterize (in terms of separate categories) the value of its CFCs for purposes of allocating and apportioning its own interest expense. Existing rules allow a CFC to allocate its interest using one of two methods (the asset method or the modified gross income (MGI) method) and the U.S. taxpayer characterizes the stock of its CFC (for purposes of allocating its own interest) using the same method that the CFC used to allocate its interest. The MGI method treats subpart F income differently than other types of gross income with respect to interest allocations for tiered CFC ownership structures; in particular, subpart F income of lower tier CFCs is not accounted for by upper tier CFCs (that is, it does not ''tier up'') for purposes of interest expense allocation, whereas all other types of a CFC's income do tier up.

The 2018 FTC proposed regulations do not take into account gross tested income from a lower-tier CFC with respect to an upper-tier CFC for purposes of allocating the upper tier CFC's interest expense. A comment requested that gross tested income tier up to the upper-tier CFC under the MGI method in order to minimize differences between the results obtained under the asset method and the MGI method.

b. Options Considered for the Final Regulations

The Treasury Department and the IRS considered two options with respect to the treatment of interest expense allocation. The first option was to adopt the rule from the 2018 FTC proposed regulations. The second option was to adopt a rule that requires gross tested income to tier up for purposes of applying the MGI method.

The final regulations require tested income to tier up to the upper-tier CFC for purposes of allocating interest expense when applying the MGI method. This is an appropriate solution for several reasons. First, the section 951A rules do not have special rules for passive income similar to those present in the subpart F regime; the Treasury Department and the IRS have further determined that the existing rule accounts for the special rules that apply to subpart F income. Hence, an exception to the general tiering up rule is not needed for tested income. Second, the solution minimizes differences in the results obtained by taxpayers that elect the asset method rather than the MGI method, thus minimizing arbitrary differences in the tax treatment of similarly situated taxpayers. Finally, the solution is consistent with how the rules in section 951A apply for purposes of determining the CFC's tested income.

c. Number of Affected Taxpayers

The Treasury Department and the IRS determined that the group of taxpayers affected by the regulation consists of any taxpayer with at least one second-tier CFC that earns gross tested income. The Treasury Department and the IRS estimate that there are between 11,000 and 14,000 taxpayers that fit that profile based on tax filings for tax years 2015–2017.

4. Economic Effects of Provisions Not Substantially Revised From the 2018 FTC Proposed Regulations

i. Matching Interest Income Allocation to Interest Expense Allocation for Partnerships

The existing rules for the foreign tax credit generally specify how taxpayer income, expenses, and FTC carryovers are to be allocated to the separate categories. There remain, however, many allocation rules that would benefit from additional clarity. Regarding interest income and expenses in the case of partnership loan structures, the 2018 FTC proposed regulations specified that the taxpayer's interest income allocation is to be matched to its interest expense allocation, rather than specifying that the interest expense allocation be matched to the taxpayer's interest income allocation.

This rule reduces opportunities for taxpayers to increase their gross foreign source income based solely on a related party loan to a partnership. Such potentially abusive borrowing arrangements occur, for example, when a U.S. person lends money to a foreign partnership in order to artificially increase foreign source income (and therefore the FTC limitation) without affecting U.S. taxable income. This increase in the FTC limitation is accomplished, for example, by lending to a controlled partnership, which has no effect on U.S. taxable income because the interest income received from the partnership is offset by the lender's share of the interest expense incurred by the partnership. However, the transaction can increase foreign source income and allowable foreign tax credits, because the existing interest expense allocation rules do not generally allocate interest income and interest expenses similarly.

To prevent such artificial inflation of foreign tax credits, the final regulations specify that interest income attributable to borrowing through a partnership will be allocated across separate foreign tax credit categories in the same manner as the associated interest expense. Accordingly, the proposed matching rule achieves a more neutral foreign tax credit limitation result and better minimizes the impact of related party loans on a taxpayer's foreign tax credit limitation.

The final regulations are the same as the 2018 FTC proposed regulations in this regard except for minor technical modifications.

ii. Treatment of Income Associated With the Section 250 Deduction as Exempt Income and Treatment of Expenses Allocated to Section 951A Category as Exempt Expenses

The statute does not specify how income associated with the section 250 deduction is to be treated for purposes of claiming the FTC. To address this issue, the proposed regulations specified that the income associated with the section 250 deduction is treated as income that is partially exempt from income tax (based on the amount of the section 250 deduction allowed) for purposes of the foreign tax credit. As a result, the taxpayer's expenses are to be allocated and apportioned without taking into account this income.

The partially exempt treatment provided for section 250 income means that fewer expenses are allocated to the section 951A category than would have been if that income were not partially exempt (since the total gross income in the section 951A category would have been higher). The regulations therefore potentially increase the competitiveness of U.S. corporations relative to the no-action baseline, as described in Part I.3.B of this Special Analyses.

The 2018 FTC proposed regulations requested comment on the estimated impact of the reduced expense allocation to the section 951A category relative to specifying that no expenses may be allocated against this income. Most comments did not address this issue. One comment expressed the view that the increased incentive to over-allocate expenses to the United States (relative to the no-action baseline) might not be small, because expense allocation responds to effective tax rates rather than statutory rates, and post-TCJA effective tax rates might not have fallen as much as statutory rates. Estimates of post-TCJA marginal effective tax rates suggest that effective tax rates have fallen meaningfully, consistent with a reduced incentive to over-allocate interest expense to the United States.[4]

The final regulations are the same as the 2018 FTC proposed regulations in this regard except for minor technical modifications.

iii. Clarifications to the Look-Through Rules

Before the TCJA, dividends, interest, rents and royalties (''look-through payments'') paid to a United States shareholder by its CFC were generally allocated to the general category to the extent that they were not treated as passive category income. Because TCJA split the general category income into three categories, it created a question of how to assign look-through payments. To address this issue, the 2018 FTC proposed regulations specified that these look-through payments be assigned to the general category or foreign branch category. They may not be assigned to the section 951A category. This treatment is consistent with the fact that payments of dividends, interest, rents, and royalties made directly to a United States shareholder are not included in the new section 951A category. By contrast, certain interest, rents, and royalties earned by a foreign branch can meet the definition of foreign branch category income, and the general category is a residual category that encompasses all income that is not specifically assigned to any other category.

The Treasury Department and the IRS considered as an alternative not issuing guidance for the treatment of look-through payments but concluded that affected taxpayers and the overall U.S. economy would benefit from the issuance of final regulations on this issue.

The final regulations are the same as the 2018 FTC proposed regulations in this regard except for minor technical modifications.

II. Paperwork Reduction Act

The rules relating to foreign tax credits that were modified by the Act are reflected in several revised and new schedules added to existing forms discussed in this Part II of the Special Analyses. For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (''PRA''), the reporting burden associated with the revised and new schedules will be reflected in the PRA submission associated with the forms described in this Part II. Additionally, a revised collection of information is added with respect to section 986 in § 1.986(a)–1(a)(2)(iv).

The collection of information in § 1.986(a)–1(a)(2)(iv) is an election to translate foreign income taxes denominated in nonfunctional currency using the spot rate as of the date of payment (rather than the average exchange rate for the year). This election may be made by an individual or corporation and may be made on behalf of a foreign corporation by a U.S. shareholder. A pass-through entity cannot make this election. This election can be made for all foreign income taxes denominated in nonfunctional currency, or it can be made only with respect to all foreign income taxes denominated in nonfunctional currency that are recorded on the separate books and records of a dollar functional currency QBU of the taxpayer. This election, if made with respect to dollar functional currency QBUs, will match the exchange rate used to determine the dollar amount of the foreign tax credit with the exchange rate used to determine the dollar amount of income that is used to pay the tax. The election is made once and applies to all future years. The election is made by attaching a statement to a timely filed U.S. income tax return for the first year to which the election applies. For purposes of the PRA, the reporting burden associated with § 1.986(a)–1(a)(2)(iv) will be reflected in the PRA submission associated with the Form 1040 series and Form 1120 series.

Form 1118, Foreign Tax Credit—Corporations, has been revised to add new Schedule C (Tax Deemed Paid With Respect to Section 951(a)(1) Inclusions by Domestic Corporation Filing Return (Section 960(a)), Schedule D (Tax Deemed Paid With Respect to Section 951A Income by Domestic Corporation Filing the Return (Section 960(d)), and Schedule E (Tax Deemed Paid With Respect to Previously Taxed Income by Domestic Corporation Filing the Return (Section 960(b)). In addition, the existing schedules of Form 1118 have been modified to account for the two new separate categories of income under section 904(d); the repeal of section 902 indirect credits for foreign taxes deemed paid with respect to dividends from foreign corporations; modified indirect

[4] DeBacker, Jason, and Roy Kasher, ''Effective Tax Rates on Business Investment Under the Tax Cuts and Jobs Act'', May 2018.

credits under section 960 for inclusions under sections 951(a)(1) and 951A; the modified section 78 gross up with respect to inclusions under sections 951(a)(1) and 951A; the revised sourcing rule for certain income from the sale of inventory under section 863(b); the repeal of the fair market value method for apportioning interest expense under 864(e); new adjustments for purposes of section 904 with respect to expenses allocable to certain stock or dividends for which a dividends received deduction is allowed under section 245A; the election to increase pre-2018 section 904(g) Overall Domestic Loss (ODL) recapture; and limited foreign tax credits with respect to inclusions under section 965. For purposes of the PRA, the reporting burden associated with these changes is reflected in the PRA submission associated with Form 1118 (OMB control number 1545–0123, which represents a total estimated burden time, including all other related forms and schedules, of 3.157 billion hours and total estimated monetized costs of $58.148 billion).

Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, has also been revised to add Schedule E–1 (Taxes Paid, Accrued, or Deemed Paid on Accumulated Earnings and Profits (E&P) of Foreign Corporation) and Schedule P (Previously Taxed Earnings and Profits of U.S. Shareholder of Certain Foreign Corporations) and to amend Schedule E (Income, War Profits, and Excess Profits Taxes Paid or Accrued) and Schedule J (Accumulated Earnings & Profits (E&P) of Controlled Foreign Corporations). These changes to the Form 5471 reflect the two new separate categories of income under section 904(d); the repeal of section 902 indirect credits for foreign taxes deemed paid with respect to dividends from foreign corporations; modified indirect credits under section 960 for inclusions under sections 951(a)(1) and 951A; and limited foreign tax credits with respect to inclusions under section 965. For purposes of the PRA, the reporting burden associated with these changes is reflected in the PRA submission associated with Schedules E, E–1, J, and P of Form 5471 (OMB control number 1545–0123).

Schedule B (Specifically Attributable Taxes and Income (Section 999(c)(2)) of the Form 5713, International Boycott Report, has also been revised to reflect the repeal of section 902. Schedule C (Tax Effect of the International Boycott Provisions) of the Form 5713 has been revised to account for the new section 904(d) categories of income. For purposes of the PRA, the reporting burden associated with these changes is reflected in the PRA submission associated with Schedules B and C of Form 5713 (OMB control number 1545–0216, which represents a total estimated burden time, including all other related forms and schedules, of 143,498 hours).

Schedules K and K–1 of the following forms have been revised to account for the new section 904(d) categories of income: Form 1065, U.S. Return of Partnership Income, Form 1120–S, U.S. Income Tax Return for an S Corporation, and Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships. Form 1116, Foreign Tax Credit (Individual, Estate, or Trust), has also been revised to account for the new section 904(d) categories of income. For purposes of the PRA, the reporting burden associated with these changes is reflected in the PRA submission associated with Forms 1065 and 1120S (OMB control number 1545–0123); Form 8865 (OMB control number 1545–1668, which represents a total estimated burden time, including all other related forms and schedules, of 289,354 hours), and Form 1116 (OMB control numbers 1545–0121, which represents a total estimated burden time, including all other related forms and schedules, of 25,066,693 hours; and 1545–0074, which represents a total estimated burden time, including all other related forms and schedules, of 1.784 billion hours and total estimated monetized costs of $31.764 billion).

The IRS estimates the number of affected filers for the aforementioned forms to be the following:

Form	Number of respondents * (estimated)
Form 1116	8,000,000
Form 1118	15,000
Form 1040	150,000,000
Form 1065	4,000,000
Form 1065 Schedule K–1	24,750,000
Form 1120	1,700,000
Form 1120–S	4,750,000
Form 1120–S Schedule K–1	7,500,000
Form 5471	28,000
Form 5471 Schedule E	10,000
Form 5471 Schedule J	25,500
Form 5713 Schedule B	<1,000
Form 5713 Schedule C	<1,000
Form 8865	14,500

Data tabulated from 2015 and 2016 Business Return Transaction File and E-file data.

* Except for K–1 filings, which count the total number of K–1s received; same issuer K–1s are aggregated at the recipient level.

The estimates for the number of impacted filers with respect to the collections of information described in this part II of the Special Analysis section are based on filers of U.S. income tax returns that file a Form 1040 or Form 1120 because only filers of these forms would be subject to the collection of information requirement. The IRS estimates the number of impacted filers to be the following:

TAX FORMS IMPACTED

Collection of information	Number of respondents (estimated)	Forms to which the information may be attached
§ 1.986(a)–1(a)(2)(iv).	1,625–3,250	Form 1040 series and Form 1120 series.

Data tabulated from 2015 and 2016 Business and Individual Return Transaction File and E-file data.

The current status of the PRA submissions related to foreign tax credits is provided in the following table. The burden estimates provided in the above narrative are aggregate amounts that relate to the entire package of forms associated with the OMB control numbers 1545–0123 (which represents a total estimated burden time for all forms and schedules for corporations of 3.157 billion hours and total estimated monetized costs of $58.148 billion ($2017)), 1545–0074 (which represents 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)), 1545–0216 (which represents a total estimated burden time, including all other related forms and schedules, of 143,498 hours), 1545–1668 (which represents a total estimated burden time, including all other related forms and schedules of 289,354 hours), and 1545–0121 (which represents a total estimated burden time, including all other related forms and schedules of 25,066,693 hours). The overall burden estimates provided for the OMB control numbers below are aggregate amounts that relate to the entire package of forms associated with the applicable OMB control number and will in the future include, but not isolate, the estimated burden of only the foreign tax credit-related forms that are included in the tables in this Part II. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the regulations. These burdens have been reported for other regulations related to the taxation of cross-border income and the Treasury Department and the 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 TCJA. No burden estimates specific to the forms affected by the regulations are currently available. The Treasury Department and the IRS have not estimated the burden, including that of any new information collections, related to the requirements under the regulations. The Treasury Department and the IRS estimate PRA burdens on a taxpayer-type basis rather than a provision-specific basis. 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 comments on all aspects of information collection burdens related to these final regulations, including estimates for how much time it would take to comply with the paperwork burdens described above for each relevant form and ways for the IRS to minimize the paperwork burden. Proposed revisions (if any) to these forms that reflect the information collections contained in these final regulations will be made available for public comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.html* and will not be finalized until after these forms have been approved by OMB under the PRA.

Form	Type of filer	OMB No.(s)	Status
Form 1116	All other Filers (mainly trusts and estates) (Legacy system).	1545–0121	Published in the **Federal Register** on 3/23/17. Public comment period closed 5/22/18. Approved by OMB through 10/30/2020.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201704-1545-023.*		
	Business (NEW Model)	1545–0123	Published in the **Federal Register** on 10/8/18. Public Comment period closes 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 (all forms) scheduled 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 1118, 1065, 1065 Schedule K–1, 1120–S.	Business (NEW Model)	1545–0123	Published in the **Federal Register** on 10/8/18. Public Comment period closes 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 5471 (including Schedules E, J).	Business (NEW Model)	1545–0123	Published in the **Federal Register** on 10/8/18. Public Comment period closes 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 5713 Schedules B, C	All other Filers (mainly trusts and estates) (Legacy system).	1545–0216	Published in the **Federal Register** on 3/28/18. Public Comment period closed 5/29/18. Renewal submitted on 10/11/18 for review to OIRA. New 2018 Forms not included in renewal to OIRA due to timing of submission.
	Link: *https://www.federalregister.gov/documents/2018/10/29/2018-23515/agency-information-collection-activities-submission-for-omb-review-comment-request-multiple-internal.*		
	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.*		
	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 8865	All other Filers (mainly trusts and estates) (Legacy system).	1545–1668	Published in the **Federal Register** on 10/1/18. Public Comment period closed on 11/30/18. ICR in process by Treasury as of 10/17/18.

Form	Type of filer	OMB No.(s)	Status
	Link: *https://www.federalregister.gov/documents/2018/10/01/2018-21288/proposed-collection-comment-request-for-regulation-project.*		
	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.*		

In 2018, the IRS released and invited comments on drafts of the above forms in order to give members of the public advance notice and an opportunity to submit comments. The IRS received no comments on the portions of the forms that relate to foreign tax credits during the comment period. Consequently, the IRS made the forms available in late 2018 for use by the public. The IRS is contemplating making additional changes to the forms in order to implement final regulations.

III. Regulatory Flexibility Act

It is hereby certified that this final regulation 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 (RFA) (5 U.S.C. chapter 6).

These final regulations provide guidance needed to comply with statutory changes and affect individuals and corporations claiming foreign tax credits. The domestic small business entities that are subject to the foreign tax credit rules in the Code and these final regulations are generally those domestic small business entities that are at least 10 percent corporate shareholders of foreign corporations, and so are eligible to claim dividends-received deductions or compute foreign taxes deemed paid under section 960 with respect to inclusions under subpart F and section 951A from CFCs. Other provisions of the TCJA, such as the new separate foreign tax credit limitation category for foreign branch income and the repeal of the option to allocate and apportion interest expense on the basis of the fair market value (rather than tax basis) of a taxpayer's assets, might also affect domestic small business entities that operate in foreign jurisdictions. Based on 2017 Statistics of Income data, the Treasury Department and the IRS computed the fraction of taxpayers owning a CFC by gross receipts size class. The smaller size classes have a relatively small fraction of taxpayers that own CFCs, which suggests that many domestic small business entities will be unaffected by these regulations.

Many of the important aspects of these final regulations, including all of the rules in §§ 1.861–8(d)(2)(C), 1.861–10, 1.861–12, 1.861–13, 1.901(j)–1, 1.904–5, 1.904(b)–3, 1.954–1, 1.960–1 through 1.960–3, and 1.965–5(c)(1)(iii) apply only to U.S. persons that operate a foreign business in corporate form, and, in most cases, only if the foreign corporation is a CFC. Because it takes significant resources and investment for a business to operate outside of the United States in corporate form, and in particular to own a CFC, the owners of such businesses will infrequently be domestic small business entities, as indicated by the Table.

FRACTION OF U.S. CORPORATE TAXPAYERS REPORTING CFC OWNERSHIP, BY GROSS RECEIPTS SIZE CLASS

Gross receipts size class	Percentage with a CFC
<1 mil	0.40
1–5 mil	0.80
5–10 mil	2.70
10–20 mil	4.50
20–30 mil	9.30
30–50 mil	12.00
50–100 mil	19.70
100–150 mil	26.80
150–200 mil	32.50
200–250 mil	37.40
250–500 mil	43.70
>=500 mil	63.50

*Data based on 2017 Statistics of Income sample for all 1120 returns except 1120–S (return type=2) (1120–L, 1120–RIC, 1120–F, 1120–REIT, 1120–PC,1120, 1120–L Consolidated 1504c return (controlling industries 524142 and 524143),1120–PC Consolidated 1504C return (controlling industries 524156, 524159), and 1120 Section 594/1504c consolidated return (controlling industries not 524142, 524143, 524156, 524159), 1120 Non-consolidated return).

The Treasury Department and the IRS project that the final regulations are unlikely to affect a substantial number of domestic small business entities but data are unavailable to estimate with certainty and certify in accordance with RFA that the number of small entities affected will not be substantial.

The Treasury Department and the IRS have determined that these final regulations will not have a significant economic impact on domestic small business entities. Based on published information from 2013, foreign tax credits as a percentage of three different tax-related measures of annual receipts (see Table for variables) by corporations are substantially less than the 3 to 5 percent threshold for significant economic impact. The amount of foreign tax credits in 2013 is an upper bound on the change in foreign tax credits resulting from the final regulations.

Size (by business receipts)	Under $500,000 (%) (%)	$500,000 under $1,000,000 (%)	$1,000,000 under $5,000,000 (%)	$5,000,000 under $10,000,000 (%)	$10,000,000 under $50,000,000 (%)	$50,000,000 under $100,000,000 (%)	$100,000,000 under $250,000,000 (%)	$250,000,000 or more
FTC/Total Receipts	0.03	0.00	0.00	0.01	0.01	0.03	0.09	0.56

Size (by business receipts)	Under $500,000 (%) (%)	$500,000 under $1,000,000 (%)	$1,000,000 under $5,000,000 (%)	$5,000,000 under $10,000,000 (%)	$10,000,000 under $50,000,000 (%)	$50,000,000 under $100,000,000 (%)	$100,000,000 under $250,000,000 (%)	$250,000,000 or more
FTC/(Total Receipts-Total Deductions)	0.48	0.03	0.04	0.26	0.22	0.51	1.20	9.00
FTC/Business Receipts	0.05	0.00	0.00	0.01	0.01	0.04	0.10	0.64

Source: Statistics of Income (2013) Form 1120 available at *https://www.irs.gov/statistics*.

The collection of information in § 1.986(a)–1(a)(2)(iv) of the final regulations (relating to the election to translate creditable foreign taxes at the spot rate on the date of payment instead of the average exchange rate for the year) may affect some small business entities with significant foreign operations. The data to assess the number of small entities potentially affected by § 1.986(a)–1(a)(2)(iv) are not readily available. However, businesses with significant foreign operations are generally not small businesses, as indicated by the data above. Further, as demonstrated in the table in this Part III of the Special Analyses, foreign tax credits generally do not have a significant economic impact on small business entities. Therefore, the Treasury Department and the IRS have determined that a substantial number of domestic small business entities will not be subject to § 1.986(a)–1(a)(2)(iv). Consequently, the Treasury Department and the IRS have determined, and hereby certify, that § 1.986(a)–1(a)(2)(iv) will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f), the proposed regulations preceding these final regulations (REG–105600–18) were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses and no comments were received.

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 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 OMB has determined that this Treasury decision 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 section 801 of the CRA when the agency for good cause finds that such procedure would be impracticable, unnecessary, or contrary to the public interest and that 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. In general, the statutory provisions to which these rules relate were enacted on December 22, 2017, and apply to taxable years of foreign corporations beginning after 2017 and to the taxable years of U.S. persons in which or with which such taxable years of foreign corporations end. In many cases, these taxable years have already ended. This means that the statutory provisions are currently effective, and taxpayers may be subject to Federal income tax liability for their 2018 taxable year reflecting these provisions. In certain cases, taxpayers may be required to file returns reflecting this Federal income liability during the 60-day period that begins after this rule is published in the **Federal Register**.

These final regulations provide crucial guidance for taxpayers on how to apply the relevant statutory rules, compute their tax liability and accurately file their U.S. income tax returns. These final regulations resolve statutory ambiguity, prevent abuse, and grant taxpayer relief that would not be available based solely on the statute. As taxpayers must already comply with the statute, a 60-day delay in the effective date of the final regulations is unnecessary and contrary to the public interest. A delay would place certain taxpayers in the unusual position of having to determine whether to file U.S. income tax returns during the pre-effective date period based on final regulations that are not yet effective. If taxpayers chose not to follow the final regulations and did not amend their returns after the regulations became effective, it would place significant strain on the IRS to ensure that taxpayers correctly calculated their tax liabilities. For example, these final regulations provide significant guidance on foreign branch category income, a provision added by the TCJA along with a broad grant of regulatory authority to provide additional guidance. Therefore, the rules in this Treasury decision are effective on the date of publication in the **Federal Register** and apply in certain cases to taxable years of foreign corporations and U.S. persons beginning before such date.

The foregoing good cause statement only applies to the 60-day delayed effective date provision of section 801(3) of the CRA and is permitted under section 808(2) of the CRA. The Treasury Department and the IRS hereby comply with all aspects of the CRA and the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

Drafting Information

The principal authors of these regulations are Karen J. Cate, Jeffrey P. Cowan, Jeffrey L. Parry, Larry R. Pounders, and Suzanne M. Walsh 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.

Adoption of 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:

■ 1. Revising the entries for §§ 1.861–8, 1.861–9 and 1.861–9T, 1.861–10(e), and 1.861–11.

■ 2. Adding entries for §§ 1.861–13, 1.861–17, 1.901(j)–1, 1.904–1, 1.904–2, and 1.904–3 in numerical order.

■ 3. Revising entries for §§ 1.904–4, 1.904–5, and 1.904–6.

■ 4. Adding entries for §§ 1.904(g)–3 and 1.905–3 in numerical order.

■ 5. Revising the entry for § 1.960–1.

■ 6. Adding entries for §§ 1.960–2, 1.960–3, 1.960–4, and 1.986(a)–1 in numerical order.

The revisions and additions read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 1.861–8 also issued under 26 U.S.C. 250(c), 26 U.S.C. 864(e)(7), and 26 U.S.C. 882(c).

Sections 1.861–9 and 1.861–9T also issued under 26 U.S.C. 863(a), 26 U.S.C. 864(e)(7), 26 U.S.C. 865(i), and 26 U.S.C. 7701(f).

Section 1.861–10(e) also issued under 26 U.S.C. 863(a), 26 U.S.C. 864(e)(7), 26 U.S.C. 865(i), and 26 U.S.C. 7701(f).

Section 1.861–11 also issued under 26 U.S.C. 863(a), 26 U.S.C. 864(e)(7), 26 U.S.C. 865(i), and 26 U.S.C. 7701(f).

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Section 1.861–13 also issued under 26 U.S.C. 864(e)(7).

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Section 1.861–17 also issued under 26 U.S.C. 864(e)(7).

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Section 1.901(j)–1 also issued under 26 U.S.C. 901(j)(4).

* * * * *

Section 1.904–1 also issued under 26 U.S.C. 904(d)(7).

Section 1.904–2 also issued under 26 U.S.C. 904(d)(7).

Section 1.904–3 also issued under 26 U.S.C. 904(d)(7).

Section 1.904–4 also issued under 26 U.S.C. 250(c), 26 U.S.C. 865(j), 26. U.S.C. 904(d)(2)(J)(i), 26 U.S.C. 904(d)(6)(C), 26 U.S.C. 904(d)(7), and 26 U.S.C. 951A(f)(1)(B).

Section 1.904–5 also issued under 26 U.S.C. 904(d)(7) and 26 U.S.C. 951A(f)(1)(B).

Section 1.904–6 also issued under 26 U.S.C. 904(d)(7).

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Section 1.904(g)–3 also issued under 26 U.S.C. 904(g)(4).

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Section 1.905–3 also issued under 26 U.S.C. 989(c)(4).

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Section 1.960–1 also issued under 26 U.S.C. 960(f).

Section 1.960–2 also issued under 26 U.S.C. 960(f).

Section 1.960–3 also issued under 26 U.S.C. 960(f).

Section 1.960–4 also issued under 26 U.S.C. 951A(f)(1)(B) and 26 U.S.C. 960(f).

* * * * *

Section 1.986(a)–1 also issued under 26 U.S.C. 986(a)(1)(C) and 26 U.S.C. 986(a)(1)(D)(ii).

* * * * *

■ **Par. 2.** Section 1.861–8 is amended by:

■ 1. In paragraph (a)(1), removing the last sentence.

■ 2. In paragraph (a)(4), removing the fourth through sixth sentences.

■ 3. Removing paragraph (a)(5).

■ 4. Revising paragraph (c)(2).

■ 5. Adding paragraph (c)(4).

■ 6. Revising paragraph (d)(2).

■ 7. In paragraph (e)(1), adding two sentences after the sixth sentence.

■ 8. In paragraph (e)(6)(i), adding a new first sentence and revising the new second sentence.

■ 9. Removing paragraph (e)(6)(iii).

■ 10. Removing and reserving paragraph (e)(10).

■ 11. Removing paragraph (e)(12)(iv).

■ 12. Adding paragraphs (e)(13) through (15).

■ 13. Removing and reserving paragraph (f)(1)(i).

■ 14. Adding paragraph (f)(1)(ii).

■ 15. Revising paragraphs (f)(4)(ii) and (g).

■ 16. Adding paragraph (h).

The revisions and additions read as follows:

§ 1.861–8 Computation of taxable income from sources within the United States and from other sources and activities.

* * * * *

(c) * * *

(2) *Apportionment based on assets.* Certain taxpayers are required by paragraph (e)(2) of this section and § 1.861–9T to apportion interest expense on the basis of assets. A taxpayer may apportion other deductions based on the comparative value of assets that generate income within each grouping, provided that this method reflects the factual relationship between the deduction and the groupings of income and is applied in accordance with the rules of § 1.861–9T(g). In general, such apportionments must be made either on the basis of the tax book value of those assets or, except in the case of interest expense, on the basis of their fair market value. *See* § 1.861–9(h). Taxpayers using the fair market value method for their last taxable year beginning before January 1, 2018, must change to the tax book value method (or the alternative tax book value method) for purposes of apportioning interest expense for their first taxable year beginning after December 31, 2017. The Commissioner's approval is not required for this change. In the case of any corporate taxpayer that both uses tax book value or alternative tax book value, and owns directly or indirectly (within the meaning of § 1.861–12T(c)(2)(ii)(B)) 10 percent or more of the total combined voting power of all classes of stock entitled to vote in any other corporation (domestic or foreign) that is not a member of the affiliated group (as defined in section 864(e)(5)), the taxpayer must adjust its basis in that stock in the manner described in § 1.861–12(c)(2). For the definition of related persons formerly contained in § 1.861–8T(c)(2), see paragraph (c)(4) of this section.

* * * * *

(4) *Cross-referenced definition of related persons.* The term related persons means two or more persons in a relationship described in section 267(b). In determining whether two or more corporations are members of the same controlled group under section 267(b)(3), a person is considered to own stock owned directly by such person, stock owned by with the application of section 1563(e)(1), and stock owned by application of section 267(c). In determining whether a corporation is related to a partnership under section 267(b)(10), a person is considered to own the partnership interest owned directly by such person and the partnership interest owned with the application of section 267(e)(3).

(d) * * *

(2) *Allocation and apportionment to exempt, excluded, or eliminated income*—(i) *In general.* For further guidance, see § 1.861–8T(d)(2)(i).

(ii) *Exempt income and exempt asset defined*—(A) *In general.* For purposes of this section, the term *exempt income* means any gross income to the extent that it is exempt, excluded, or eliminated for Federal income tax purposes. The term *exempt asset* means any asset to the extent income from the asset is (or is treated as under paragraph (d)(2)(ii)(B) or (C) of this section) exempt, excluded, or eliminated for Federal income tax purposes.

(B) *Certain stock and dividends.* For further guidance, see § 1.861–8T(d)(2)(ii)(B).

(C) *Foreign-derived intangible income and inclusions under section 951A(a)*—(*1*) *Exempt income.* The term ''exempt income'' includes an amount of a domestic corporation's gross income included in gross foreign-derived deduction eligible income (or gross FDDEI), and also includes an amount of a domestic corporation's gross income from an inclusion under section 951A(a) and the gross up under section 78 attributable to such an inclusion, in each case equal to the amount of the deduction allowed under section 250(a) for such gross income (taking into account the reduction under section 250(a)(2)(B), if any). Therefore, for purposes of apportioning deductions using a gross income method, gross income does not include gross income included in gross FDDEI, an inclusion under section 951A(a), or the gross up under section 78 attributable to an inclusion under section 951A(a), in an amount equal to the amount of the deduction allowed under section 250(a)(1)(A), (B)(i), or (B)(ii), respectively (taking into account the reduction under section 250(a)(2)(B), if any). The term *gross foreign-derived deduction eligible income,* or *gross FDDEI,* means the portion of the domestic corporation's gross income (determined without regard to the amounts described in section 250(b)(3)(A)(i)(I) through (VI)) that is derived from sales and services described in section 250(b)(4)(A) and (B).

(*2*) *Exempt assets*—(*i*) *Assets that produce foreign-derived intangible income.* The term ''exempt asset'' includes the portion of a domestic corporation's assets that produce gross FDDEI equal to the amount of such assets multiplied by the fraction that equals the amount of the domestic corporation's deduction allowed under section 250(a)(1)(A) (taking into account the reduction under section 250(a)(2)(B)(i), if any) divided by its gross FDDEI. No portion of the value of stock in a foreign corporation is treated as an exempt asset by reason of this paragraph (d)(2)(ii)(C)(*2*)(*i*), including by reason of a transfer of intangible property to a foreign corporation subject to section 367(d) that gives rise to gross FDDEI.

(*ii*) *Controlled foreign corporation stock that gives rise to inclusions under section 951A(a).* The term ''exempt asset'' includes a portion of the value of a United States shareholder's stock in a controlled foreign corporation if the United States shareholder is a domestic corporation that is eligible for a deduction under section 250(a) with respect to income described in section 250(a)(1)(B)(i) and all or a portion of the domestic corporation's stock in the controlled foreign corporation is characterized as GILTI inclusion stock. The portion of foreign corporation stock that is treated as an exempt asset for a taxable year equals the portion of the value of such foreign corporation stock (determined in accordance with §§ 1.861–9(g), 1.861–12, and 1.861–13) that is characterized as GILTI inclusion stock multiplied by a fraction that equals the amount of the domestic corporation's deduction allowed under section 250(a)(1)(B)(i) (taking into account the reduction under section 250(a)(2)(B)(ii), if any) divided by its GILTI inclusion amount (as defined in § 1.951A–1(c)(1) or, in the case of a member of a consolidated group, § 1.1502–51(b)) for such taxable year. The portion of controlled foreign corporation stock treated as an exempt asset under this paragraph (d)(2)(ii)(C)(*2*)(*ii*) is treated as attributable to the relevant categories of GILTI inclusion stock described in each of paragraphs (d)(2)(ii)(C)(*3*)(*i*) through (*v*) of this section based on the relative value of the portion of the stock in each such category.

(*3*) *GILTI inclusion stock.* For purposes of paragraph (d)(2)(ii)(C)(*2*)(*ii*) of this section, the term *GILTI inclusion stock* means the aggregate of the portions of the value of controlled foreign corporation stock that are—

(*i*) Assigned to the section 951A category under § 1.861–13(a)(2);

(*ii*) Assigned to a particular treaty category under § 1.861–13(a)(3)(i) (relating to resourced gross tested income stock);

(*iii*) Assigned under § 1.861–13(a)(1) to the gross tested income statutory grouping within the foreign source passive category less the amount described in § 1.861–13(a)(5)(iii)(A);

(*iv*) Assigned under § 1.861–13(a)(1) to the gross tested income statutory grouping within the U.S. source general category less the amount described in § 1.861–13(a)(5)(iv)(A); and

(*v*) Assigned under § 1.861–13(a)(1) to the gross tested income statutory grouping within the U.S. source passive category less the amount described in § 1.861–13(a)(5)(iv)(B).

(*4*) *Non-applicability to section 250(b).* Paragraphs (d)(2)(ii)(C)(*1*) through (*3*) of this section do not apply when apportioning deductions for purposes of determining deduction eligible income or foreign-derived deduction eligible income under the operative section of section 250(b).

(*5*) *Example.* The following example illustrates the application of the rules in this paragraph (d)(2)(ii)(C).

(*i*) *Facts.* USP, a domestic corporation, directly owns all of the stock of CFC1 and CFC2, both of which are controlled foreign corporations. The tax book value of CFC1 and CFC2's stock is $10,000x and $9,000x, respectively. Pursuant to § 1.861–13(a), $6,100x of the stock of CFC1 is assigned to the section 951A category under § 1.861–13(a)(2) (''section 951A category stock'') and the remaining $3,900x of the stock of CFC1 is assigned to the general category (''general category stock''). Additionally, $4,880x of the stock of CFC2 is section 951A category stock and the remaining $4,120x of the stock of CFC2 is general category stock. Under section 951A and the section 951A regulations (as defined in § 1.951A–1(a)(1)), USP's GILTI inclusion amount is $610x. The portion of USP's deduction under section 250 described in section 250(a)(1)(B)(i) is $305x. No portion of USP's deduction is reduced by reason of section 250(a)(2)(B)(ii).

(*ii*) *Analysis.* For purposes of apportioning deductions where section 904 is the operative section, under paragraph (d)(2)(ii)(C)(*1*) of this section, $305x of USP's gross income attributable to its GILTI inclusion amount is exempt income. Under paragraph (d)(2)(ii)(C)(*3*) of this section, the GILTI inclusion stock of CFC1 is the $6,100x of stock that is section 951A category stock and the GILTI inclusion stock of CFC2 is the $4,880x of stock that is section 951A category stock. Under paragraph (d)(2)(ii)(C)(*2*) of this section, the portion of the value of the stock of CFC1 and CFC2 that is treated as an exempt asset equals the portion of the value of the stock of CFC1 and CFC2 that is GILTI inclusion stock multiplied by 50% ($305x/$610x). Accordingly, the exempt portion of the stock of CFC1 is $3,050x (50% × $6,100x) and the exempt portion of CFC2's stock is $2,440x (50% × $4,880x). Therefore, the stock of CFC1 taken into account for purposes of apportioning deductions is $3,050x of non-exempt section 951A category stock and $3,900x of general category stock. The stock of CFC2 taken into account for purposes of apportioning deductions is $2,440x of non-exempt section 951A category stock and $4,120x of general category stock.

(iii) *Income that is not considered tax exempt.* For further guidance, see § 1.861–8T(d)(2)(iii).

(A) For further guidance, see § 1.861–8T(d)(2)(iii)(A) and (B).

(B) [Reserved]

(C) Dividends for which a deduction is allowed under section 245A;

(D) Foreign earned income as defined in section 911 (however, the rules of § 1.911–6 do not require the allocation and apportionment of certain deductions, including home mortgage interest, to foreign earned income for purposes of determining the deductions disallowed under section 911(d)(6)); and

(E) Inclusions for which a deduction is allowed under section 965(c). *See* § 1.965–6(c).

(iv) *Value of stock attributable to previously taxed earnings and profits.* No portion of the value of stock in a controlled foreign corporation is treated as an exempt asset by reason of the controlled foreign corporation having previously taxed earnings and profits. For example, no portion of the value of stock in a controlled foreign corporation is treated as an exempt asset by reason of the adjustment under § 1.861–12(c)(2) in respect of previously taxed earnings and profits described in section 959(c)(1) or (c)(2) (including earnings and profits described in section 959(c)(2) by reason of section 951A(f)(1) and § 1.951A–6(b)(1)). *See also* § 1.965–6(c).

(e) * * * (1) * * * Paragraphs (e)(13) and (14) of this section contain rules with respect to the allocation and apportionment of the deduction allowed under section 250(a). Paragraph (e)(15) of this section contains rules with respect to the allocation and apportionment of a taxpayer's distributive share of a partnership's deductions. * * *

* * * * *

(6) * * * (i) * * * The deduction for foreign income, war profits and excess profits taxes allowed by section 164 (including with respect to a controlled foreign corporation)) is allocated and apportioned among the applicable statutory and residual groupings under the principles of § 1.904–6(a)(1)(i), (ii), and (iv). The deduction for state and local taxes (*state income taxes*) allowed by section 164 is considered definitely related and allocable to the gross income with respect to which such state income taxes are imposed. * * *

* * * * *

(13) *Foreign-derived intangible income.* The portion of the deduction that is allowed for foreign-derived intangible income under section 250(a)(1)(A) (taking into account the reduction under section 250(a)(2)(B)(i), if any) is considered definitely related and allocable to the class of gross income included in the taxpayer's foreign-derived deduction eligible income (as defined in section 250(b)(4)). If necessary, the portion of the deduction is apportioned within the class ratably between the statutory grouping (or among the statutory groupings) of gross income and the residual grouping of gross income based on the relative amounts of foreign-derived deduction eligible income in each grouping.

(14) *Global intangible low-taxed income and related section 78 gross up.* The portion of the deduction (taking into account the reduction under section 250(a)(2)(B)(ii), if any) that is allowed for the global intangible low-taxed income amount described in section 250(a)(1)(B)(i), and that is allowed for the section 78 gross up under section 250(a)(1)(B)(ii), is considered definitely related and allocable to the class of gross income included under section 951A(a) and section 78, respectively. If necessary (for example, because a portion of the inclusion under section 951A(a) is passive category income or U.S. source income), the portion of the deduction is apportioned within the class ratably between the statutory grouping (or among the statutory groupings) of gross income and the residual grouping of gross income based on the relative amounts of gross income in each grouping.

(15) *Distributive share of partnership deductions.* In general, if deductions are incurred by a partnership in which the taxpayer is a partner, the taxpayer's deductions that are allocated and apportioned include the taxpayer's distributive share of the partnership's deductions. See §§ 1.861–9(e), 1.861–17(f), and 1.904–4(n)(1)(ii) for special rules for apportioning a partner's distributive share of deductions of a partnership.

(f) * * *

(1) * * *

(ii) *Separate foreign tax credit limitations.* Section 904(d)(1) and other sections described in § 1.904–4(m) require that a separate foreign tax credit limitation be determined with respect to each separate category of income specified in those sections. Accordingly, the foreign source income within each separate category described in § 1.904–5(a)(4)(v) constitutes a separate statutory grouping of income. U.S. source income is treated as income in the residual grouping for purposes of determining the limitation on the foreign tax credit.

* * * * *

(4) * * *

(ii) *Example*—(A) *Facts.* USP, a domestic corporation, purchases and sells consumer items in the United States and foreign markets. Its sales in foreign markets are made to related foreign subsidiaries. USP reported $1,500,000x as sales during the taxable year of which $1,000,000x was domestic sales and $500,000x was foreign sales. USP took a deduction for expenses incurred by its marketing department during the taxable year in the amount of $150,000x. These expenses were determined to be allocable to both domestic and foreign sales and are apportionable between such sales. On audit of USP's return for the taxable year, the IRS adjusted, under section 482, USP's sales to related foreign subsidiaries by increasing the sales price by a total of $100,000x, thereby increasing USP's foreign sales and total sales by the same amount. Before the audit, USP allocated and apportioned the marketing department deduction as follows:

TABLE 1 TO PARAGRAPH (f)(4)(ii)(A)

To gross income from domestic sales: $150,000x × ($1,000,000x/$1,500,000x)	$100,000x
To gross income from foreign sales: $150,000x × ($500,000x/$1,500,000x)	50,000x
Total	150,000x

(B) *Analysis.* As a result of the section 482 adjustment, the apportionment of the deduction for the marketing department expenses is redetermined as follows:

TABLE 2 TO PARAGRAPH (f)(4)(ii)(B)

To gross income from domestic sales: $150,000x × ($1,000,000x/$1,600,000x)	$93,750x
To gross income from foreign sales: $150,000x × ($600,000x/$1,600,000x)	56,250x
Total	150,000x

* * * * *

(g) *Examples.* The following examples illustrate the principles of the rules in this section. In each example, unless otherwise specified, section 904 is the operative section. In addition, in each example, where a method of allocation or apportionment is illustrated as an acceptable method, it is assumed that such method is used by the taxpayers on a consistent basis from year to year. Further, it is assumed that each party named in each example operates on a calendar year accounting basis and, where the party is a U.S. taxpayer, files returns on a calendar year basis.

(1) through (18) [Reserved]

(19) *Example 19: Supportive expense*—(i) *Facts*—(A) USP, a domestic corporation, purchases and sells products both in the United States and in foreign countries. USP has no foreign subsidiary and no international department. During the taxable year, USP incurs the following expenses with respect to its worldwide activities:

TABLE 3 TO PARAGRAPH (g)(19)(i)(A)

Personnel department expenses	$50,000x
Training department expenses	35,000x
General and administrative expenses	55,000x
President's salary	40,000x
Sales manager's salary	20,000x
Total	200,000x

(B) USP has domestic gross receipts from sales of $750,000x and foreign gross receipts from sales of $500,000x and has gross income from such sales in the same ratio, namely $300,000x from domestic sources and $200,000x from foreign sources that is general category income.

(ii) *Analysis*—(A) *Allocation.* The above expenses are definitely related and allocable to all of USP's gross income derived from both domestic and foreign markets.

(B) *Apportionment.* For purposes of applying the foreign tax credit limitation, the statutory grouping is gross income from sources outside the United States in general category income and the residual grouping is gross income from sources within the United States. USP's deductions for its worldwide sales activities must be apportioned between these groupings. USP does not have a separate international division which performs essentially all of the functions required to manage and oversee its foreign activities. The president and sales manager do not maintain time records. The division of their time between domestic and foreign activities varies from day to day and cannot be estimated on an annual basis with any reasonable degree of accuracy. Similarly, there are no facts which would justify a method of apportionment of their salaries or of one of the other listed deductions based on more specific factors than gross receipts or gross income. An acceptable method of apportionment would be on the basis of gross receipts. The apportionment of the $200,000x deduction is as follows:

TABLE 4 TO PARAGRAPH (g)(19)(ii)(B)

Apportionment of the $200,000x expense to the statutory grouping of gross income: $200,000x × [$500,000x/($500,000x + $750,000x)]	$80,000x
Apportionment of the $200,000x expense to the residual grouping of gross income: $200,000x × [$750,000x/($500,000x + $750,000x)]	120,000x
Total apportioned supportive expense	200,000x

(20) *Example 20: Supportive expense*—(i) *Facts.* Assume the same facts as in paragraph (g)(19)(i) of this section (the facts in *Example 19*), except that USP's president devotes only 5% of his time to the foreign operations and 95% of his time to the domestic operations and that USP's sales manager devotes approximately 10% of her time to foreign sales and 90% of her time to domestic sales.

(ii) *Analysis*—(A) *Allocation.* The expenses incurred by USP with respect to its worldwide activities are definitely related, and therefore allocable to USP's gross income from both its foreign and domestic markets.

(B) *Apportionment.* On the basis of the additional facts it is not acceptable to apportion the salaries of the president and the sales manager on the basis of gross receipts. It is acceptable to apportion such salaries between the statutory grouping (gross income from sources without the United States) and residual grouping (gross income from sources within the United States) on the basis of time devoted to each sales activity. Remaining expenses may still be apportioned on the basis of gross receipts. The apportionment is as follows:

TABLE 5 TO PARAGRAPH (g)(20)(ii)(B)

Apportionment of the $200,000x expense to the statutory grouping of gross income:	
President's salary: $40,000x × 5%	$2,000x
Sales manager's salary: $20,000x × 10%	2,000x
Remaining expenses: $140,000x × [$500,000x/($500,000x + $750,000x)]	56,000x
Subtotal: Apportionment of expense to statutory grouping	60,000x
Apportionment of the $200,000x expense to the residual grouping of gross income:	
President's salary: $40,000x × 95%	38,000x
Sales manager's salary: $20,000x × 90%	18,000x
Remaining expenses: $140,000x × [$750,000x/($500,000x + $750,000x)]	84,000x
Subtotal: Apportionment of expense to residual grouping	140,000x
Total: Apportioned supportive expense	200,000x

(21) *Example 21: Supportive expense*—(i) *Facts.* FC, a foreign corporation doing business in the United States, is a manufacturer of metal stamping machines. FC has no U.S. subsidiaries and no separate division to manage and oversee its business in the United States. FC manufactures and sells these machines in the United States and in foreign countries A and B and has a separate manufacturing facility in each country. Sales of these machines are FC's only source of income. In Year 1, FC incurs general and administrative expenses related to both its U.S. and foreign operations of $100,000x. It has machine sales of $500,000x, $1,000,000x, and $1,000,000x on which it earns gross income of $200,000x, $400,000x, and $400,000x in the United States, Country A, and Country B, respectively. The income from the manufacture and sale of the machines in countries A and B is not effectively connected with FC's business in the United States.

(ii) *Analysis*—(A) *Allocation.* The $100,000x of general and administrative expense is definitely related to the income to which it gives rise, namely a part of the gross income from sales of machines in the United States, in Country A, and in Country B. The expenses are allocable to this class of income, even though FC's gross income from sources outside the United States is excluded income since it is not effectively connected with a U.S. trade or business.

(B) *Apportionment.* Since FC is a foreign corporation, the statutory grouping is gross income effectively connected with FC's trade of business in the United States, namely gross income from sources within the United States, and the residual grouping is gross income not effectively connected with a trade or business in the United States, namely gross income from countries A and B. Since there are no facts that would require a method of apportionment other than on the basis of sales or gross income, the amount may be apportioned between the two groupings on the basis of amounts of gross income as follows:

TABLE 6 TO PARAGRAPH (g)(21)(ii)(B)

Apportionment of general and administrative expense to the statutory grouping, gross income from sources within the United States: $100,000x × [$200,000x/($200,000x + $400,000x + $400,000x)]	$20,000x
Apportionment of general and administrative expense to the residual grouping, gross income from sources without the United States: $100,000x × [($400,000x + $400,000x)/($200,000x + $400,000x + $400,000x)]	80,000x
Total apportioned general and administrative expense	100,000x

(22) through (24) [Reserved]

(25) *Example 25: Income taxes*—(i) *Facts.* USP, a domestic corporation, is a manufacturer and distributor of electronic equipment with operations in states A, B, and C. USP also has a foreign branch, as defined in section 904(d)(1)(B) and § 1.904–4(f), in Country Y which manufactures and distributes the same type of electronic equipment. In Year 1, USP has taxable income from these activities, as described under the Code (without taking into account the deduction for state income taxes), of $1,000,000x, of which $200,000x is foreign source foreign branch category income and $800,000x is domestic source income. States A, B, and C each determine USP's income subject to tax within their state by making adjustments to USP's taxable income as determined under the Code, and then apportioning the adjusted taxable income on the basis of the relative amounts of USP's payroll, property, and sales within each state as compared to USP's worldwide payroll, property, and sales. The adjustments made by states A, B, and C all involve adding and subtracting enumerated items from taxable income as determined under the Code. However, in making these adjustments to taxable income, none of the states specifically exempts foreign source income as determined under the Code. On this basis, it is determined that USP has taxable income of $550,000x, $200,000x, and $200,000x in states A, B, and C, respectively. The corporate tax rates in states A, B, and C are 10%, 5%, and 2%, respectively, and USP has total state income tax liabilities of $69,000x ($55,000x + $10,000x + $4,000x), which it deducts as an expense for Federal income tax purposes.

(ii) *Analysis*—(A) *Allocation.* USP's deduction of $69,000x for state income taxes is definitely related and thus allocable to the gross income with respect to which the taxes are imposed. Since the statutes of states A, B, and C do not specifically exempt foreign source income (as determined under the Code) from taxation and since, in the aggregate, states A, B, and C tax $950,000x of USP's income while only $800,000x is domestic source income under the Code, it is presumed that state income taxes are imposed on $150,000x of foreign source income. The deduction for state income taxes is therefore related and allocable to both USP's foreign source and domestic source income.

(B) *Apportionment.* For purposes of computing the foreign tax credit limitation, USP's income is comprised of one statutory grouping, foreign source foreign branch category gross income, and one residual grouping, gross income from sources within the United States. The state income tax deduction of $69,000x must be apportioned between these two groupings. Corporation USP calculates the apportionment on the basis of the relative amounts of foreign source foreign branch category taxable income and U.S. source taxable income subject to state taxation. In this case, state income taxes are presumed to be imposed on $800,000x of domestic source income and $150,000x of foreign source general category income.

TABLE 7 TO PARAGRAPH (g)(25)(ii)(B)

State income tax deduction apportioned to foreign source foreign branch category income (statutory grouping): $69,000x × ($150,000x/$950,000x)	$10,895x
State income tax deduction apportioned to income from sources within the United States (residual grouping): $69,000x × ($800,000x/$950,000x)	58,105x
Total apportioned state income tax deduction	69,000x

(26) *Example 26: Income taxes*—(i) *Facts.* Assume the same facts as in paragraph (g)(25)(i) of this section (the facts in *Example 25*), except that the language of state A's statute and the statute's operation exempt from taxation all foreign source income, as determined under the Code, so that foreign source income is not included in adjusted taxable income subject to apportionment in state A (and factors relating to USP's Country Y branch are not taken into account in computing the state A apportionment fraction).

(ii) *Analysis*—(A) *Allocation.* USP's deduction of $69,000x for state income taxes is definitely related and thus allocable to the gross income with respect to which the taxes are imposed. Since state A exempts all foreign source income by statute, state A is presumed to impose tax on $550,000x of USP's $800,000x of domestic source income. USP's state A tax of $55,000x is allocable, therefore, solely to domestic source income. Since the statutes of states B and C do not specifically exclude all foreign source income as determined under the Code, and since states B and C impose tax on $400,000x ($200,000x + $200,000x) of USP's income of which only $250,000x ($800,000x − $550,000x) is presumed to be domestic source, the deduction for the $14,000x of income taxes imposed by states B and C is related and allocable to both foreign source and domestic source income.

(B) *Apportionment*—(*1*) For purposes of computing the foreign tax credit limitation, USP's income is comprised of one statutory grouping, foreign source foreign branch category gross income, and one residual grouping, gross income from sources within the United States. The deduction of $14,000x for income taxes of states B and C must be apportioned between these two groupings.

(*2*) Corporation USP calculates the apportionment on the basis of the relative amounts of foreign source foreign branch category income and U.S. source income subject to state taxation.

TABLE 8 TO PARAGRAPH (g)(26)(ii)(B)(*2*)

States B and C income tax deduction apportioned to foreign source foreign branch category income (statutory grouping): $14,000x × ($150,000x/$400,000x)	$5,250x
States B and C income tax deduction apportioned to income from sources within the United States (residual grouping): $14,000x × ($250,000x/$400,000x)	8,750x
Total apportioned state income tax deduction	14,000x

(*3*) Of USP's total income taxes of $69,000x, the amount allocated and apportioned to foreign source foreign branch category income equals $5,250x. The total amount of state income taxes allocated and apportioned to U.S. source income equals $63,750x ($55,000x + $8,750x).

(27) *Example 27: Income tax*—(i) *Facts.* Assume the same facts as in paragraph (g)(25)(i) of this section (the facts in *Example 25*), except that state A, in which USP has significant income-producing activities, does not impose a corporate income tax or other state tax computed on the basis of income derived from business activities conducted in state A. USP therefore has a total state income tax liability in Year 1 of $14,000x ($10,000x paid to state B plus $4,000x paid to state C), all of which is subject to allocation and apportionment under paragraph (b) of this section.

(ii) *Analysis*—(A) *Allocation*—(*1*) USP's deduction of $14,000x for state income taxes is definitely related and allocable to the gross income with respect to which the taxes are imposed. However, in these facts, an adjustment is necessary before the aggregate state taxable incomes can be compared with U.S. source income on the Federal income tax return in the manner described in paragraphs (g)(25)(ii) and (g)(26)(ii) of this section (the analysis in *Examples 25* and *26*). Unlike the facts in paragraphs (g)(25)(i) and (g)(26)(i) of this section (the facts in *Examples 25* and *26*), state A imposes no income tax and does not define taxable income attributable to activities in state A. The total amount of USP's income subject to state taxation is, therefore, $400,000x ($200,000x in state B and $200,000x in state C). This total presumptively does not include any income attributable to activities performed in state A and therefore cannot properly be compared to total U.S. source taxable income reported by USP for Federal income tax purposes, which does include income attributable to state A activities.

(*2*)(*i*) Accordingly, before applying the method used in paragraphs (g)(25)(ii) and (g)(26)(ii) of this section (the analysis in *Examples 25* and *26*) to the facts of the example in this paragraph (g)(27), it is necessary first to estimate the amount of taxable income that state A could reasonably attribute to USP's activities in state A, and then to reduce federal taxable income by that amount.

(*ii*) Any reasonable method may be used to attribute taxable income to USP's activities in state A. For example, the rules of the Uniform Division of Income for Tax Purposes Act (''UDITPA'') attribute income to a state on the basis of the average of three ratios that are based upon the taxpayer's facts—property within the state over total property, payroll within the state over total payroll, and sales within the state over total sales—and, with adjustments, provide a reasonable method for this purpose. When applying the rules of UDITPA to estimate U.S. source income derived from state A activities, the taxpayer's UDITPA factors must be adjusted to eliminate both taxable income and factors attributable to a foreign branch. Therefore, in the example in this paragraph (g)(27) all taxable income as well as UDITPA apportionment factors (property, payroll, and sales) attributable to USP's Country Y branch must be eliminated.

(*3*)(*i*) Since it is presumed that, if state A had had an income tax, state A would not attempt to tax the income derived by USP's Country Y branch, any reasonable estimate of the income that would be taxed by state A must exclude any foreign source income.

(*ii*) When using the rules of UDITPA to estimate the income that would have been taxable by state A in these facts, foreign source income is excluded by starting with federally defined taxable income (before deduction for state income taxes) and subtracting any income derived by USP's Country Y branch. The hypothetical state A taxable income is then determined by multiplying the resulting difference by the average of USP's state A property, payroll, and sales ratios, determined using the principles of UDITPA (after adjustment by eliminating the Country Y branch factors). The resulting product is presumed to be exclusively U.S. source income, and the allocation and apportionment method described in paragraph (g)(26) of this section (*Example 26*) must then be applied.

(*iii*) If, for example, state A taxable income were determined to equal $550,000x, then $550,000x of U.S. source income for Federal income tax purposes would be presumed to constitute state A taxable income. Under paragraph (g)(26) of this section (*Example 26*), the remaining $250,000x ($800,000x − $550,000x) of U.S. source income for Federal income tax purposes would be presumed to be subject to tax in states B and C. Since states B and C impose tax on $400,000x, the application of Example 25 would result in a presumption that $150,000x is foreign source income and $250,000x is domestic source income. The deduction for the $14,000x of income taxes of states B and C would therefore be related and allocable to both foreign source and domestic source income and would be subject to apportionment.

(B) *Apportionment.* The deduction of $14,000x for income taxes of states B and C is apportioned in the same manner as in paragraph (g)(26) of this section (*Example 26*). As a result, $5,250x of the $14,000x of state B and state C income taxes is apportioned to foreign source foreign branch category income ($14,000x × $150,000x/$400,000x), and $8,750x ($14,000x × $250,000x/$400,000x) of the $14,000x of state B and state C income taxes is apportioned to U.S. source income.

(h) *Applicability date.* This section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 3.** Section 1.861–8T is amended by:

■ 1. Revising paragraphs (c)(2) and (d)(2)(ii)(A).

■ 2. Redesignating paragraphs (d)(2)(ii)(B)(*1*) and (*2*) as paragraphs (d)(2)(ii)(B)(*1*)(*i*) and (*ii*).

■ 3. Designating paragraph (d)(2)(ii)(B) introductory text as paragraph (d)(2)(ii)(B)(*1*) introductory text.

■ 4. Designating the undesignated paragraph following newly redesignated paragraph (d)(2)(ii)(B)(*1*)(*ii*) as paragraph (d)(2)(ii)(B)(*2*).

■ 5. Adding paragraph (d)(2)(ii)(C).

■ 6. Adding the word ''and'' at the end of paragraph (d)(2)(iii)(B).

■ 7. Revising paragraph (d)(2)(iii)(C).

■ 8. Removing and reserving paragraph (d)(2)(iii)(D) and adding reserved paragraph (d)(2)(iii)(E).

■ 9. Revising paragraph (d)(2)(iv).

■ 10. Removing paragraphs (e)(3) through (f)(1)(i), (f)(1)(ii), and (f)(1)(iii) through (g).

■ 11. Adding paragraph (e)(3), reserved paragraphs (e)(4) through (15), paragraph (f), and reserved paragraph (g).

The revisions and additions read as follows:

§ 1.861–8T Computation of taxable income from sources within the United States and from other sources and activities (temporary).

* * * * *

(c) * * *

(2) *Apportionment based on assets.* For further guidance, see § 1.861–8(c)(2).

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(A) *In general.* For further guidance, see § 1.861–8(d)(2)(ii)(A).

* * * * *

(C) *Foreign-derived intangible income and inclusions under section 951A(a).* For further guidance, see § 1.861–8(d)(2)(ii)(C).

(iii) * * *

(C) For further guidance, see § 1.861–8(d)(2)(iii)(C) through (E).

(D) and (E) [Reserved]

(iv) *Value of stock attributable to previously taxed earnings and profits.* For further guidance, see § 1.861–8(d)(2)(iv).

(e) * * *

(3) *Research and experimental expenditures.* For further guidance, see § 1.861–8(e)(3) through (15).

(4) through (15) [Reserved]

(f) *Miscellaneous matters.* For further guidance, see § 1.861–8(f) through (g).

(g) [Reserved]

* * * * *

■ **Par. 4.** Section 1.861–9 is amended by:

■ 1. Revising the section heading.

■ 2. Removing paragraphs (a) through (e)(1).

■ 3. Adding paragraph (a), reserved paragraph (b), and paragraphs (c), (d), and (e)(1).

■ 4. Removing the last sentence in paragraphs (e)(2) and (3).

■ 5. Removing paragraphs (e)(4) through (f)(3)(i).

■ 6. Adding paragraphs (e)(4) through (10), (f) heading, (f)(1) and (2), (f)(3) heading, and (f)(3)(i).

■ 7. Revising the heading of paragraph (f)(4).

■ 8. Removing the language ''noncontrolled section 902 corporation'' wherever it appears in paragraphs (f)(4)(i) and (ii) and adding the language ''noncontrolled 10-percent owned foreign corporation'' in its place.

■ 9. Removing the last sentence of paragraph (f)(4)(ii).

■ 10. Revising paragraph (f)(4)(iii).

■ 11. Removing paragraphs (f)(5) through (h)(3).

■ 12. Adding paragraphs (f)(5), (g), (h) introductory text, and (h)(1) and reserved paragraphs (h)(2) and (3).

■ 13. Revising paragraph (h)(5).

■ 14. In paragraph (i)(2)(i):

■ i. Revising the first and second sentences.

■ ii. Removing the language ''paragraph (i)(2)'' from the third and fourth sentences and adding the language ''paragraph (i)(2)(i)'' in its place.

■ 15. Revising paragraphs (j) and (k).

The revisions and additions read as follows:

§ 1.861–9 Allocation and apportionment of interest expense and rules for asset-based apportionment.

(a) *In general.* For further guidance, see § 1.861–9T(a) through (b).

(b) [Reserved]

(c) *Allowable deductions.* For further guidance, see § 1.861–9T(c) introductory text.

(1) *Disallowed deductions.* For further guidance, see § 1.861–9T(c)(1) through (4).

(2) through (4) [Reserved]

(5) *Section 163(j).* If a taxpayer is subject to section 163(j), the taxpayer's deduction for business interest expense is limited to the sum of the taxpayer's business interest income, 30 percent of the taxpayer's adjusted taxable income for the taxable year, and the taxpayer's floor plan financing interest expense. In the taxable year that any deduction is permitted for business interest expense with respect to a disallowed business interest carryforward, that business interest expense is apportioned for purposes of this section under rules set forth in paragraph (d), (e), or (f) of this section (as applicable) as though it were incurred in the taxable year in which the expense is deducted.

(d) *Apportionment rules for individuals, estates, and certain trusts.* For further guidance, see § 1.861–9T(d).

(e) *Partnerships*—(1) *In general—aggregate rule.* For further guidance, see § 1.861–9T(e)(1).

* * * * *

(4) *Entity rule for less than 10 percent limited partners*—(i) *Partnership interest expense.* A limited partner (whether individual or corporate), whose ownership, together with ownership by persons that bear a relationship to the partner described in section 267(b) or section 707, of the capital and profits interests of the partnership is less than 10 percent directly allocates its distributive share of partnership interest expense to its distributive share of partnership gross income. Under § 1.904–4(n)(1)(ii), such a partner's distributive share of foreign source income of the partnership is treated as passive income (subject to the high-taxed income exception of section 904(d)(2)(B)(iii)(II)), except in the case of income from a partnership interest held in the ordinary course of the partner's active trade or business, as defined in § 1.904–4(n)(1)(ii)(B). A partner's distributive share of partnership interest expense (other than partnership interest expense that is directly allocated to identified property under § 1.861–10T) is apportioned in accordance with the partner's relative distributive share of gross foreign source income in each separate category and of gross domestic source income from the partnership. To the extent that partnership interest expense is directly allocated under § 1.861–10T, a comparable portion of the income to which such interest expense is allocated is disregarded in determining the partner's relative distributive share of gross foreign source income in each separate category and domestic source income. The partner's distributive share of the interest expense of the partnership that is directly allocable under § 1.861–10T is allocated according to the treatment, after application of § 1.904–4(n)(1), of the partner's distributive share of the income to which the expense is allocated.

(ii) *Other interest expense of the partner.* For further guidance, see § 1.861–9T(e)(4)(ii).

(5) *Tiered partnerships.* For further guidance, see § 1.861–9T(e)(5) through (7).

(6) and (7) [Reserved]

(8) *Special rule for downstream partnership loans*—(i) *In general.* For purposes of apportioning interest expense that is not directly allocable under paragraph (e)(4) of this section or § 1.861–10T, the disregarded portion of a downstream partnership loan is not considered an asset of a downstream partnership loan lender (DPL lender). The disregarded portion of a downstream partnership loan is the portion of the value of the loan (as determined under paragraph (h)(4)(i) of this section) that bears the same proportion to the total value of the loan as the matching income amount that is included by the DPL lender for a taxable year with respect to the loan bears to the total amount of downstream partnership loan interest income (DPL interest income) that is included directly or indirectly in gross income by the DPL lender with respect to the loan during that taxable year.

(ii) *Treatment of interest expense and interest income attributable to a downstream partnership loan.* If a DPL lender (or any other person in the same affiliated group as the DPL lender) takes into account a distributive share of downstream partnership loan interest expense (DPL interest expense), the DPL lender must assign an amount of DPL interest income corresponding to the matching income amount for the taxable year that is attributable to the same loan to the same statutory and residual groupings as the statutory and residual groupings of gross income from which the DPL interest expense is deducted (or would be deducted, without regard to any limitations on the deductibility of interest, such as section 163(j)) by the DPL lender (or any other person in the same affiliated group as the DPL lender).

(iii) *Anti-avoidance rule for third party back-to-back loans.* If, with a principal purpose of avoiding the rules in this paragraph (e)(8), a person makes a loan to a person that is not related (within the meaning of section 267(b) or 707) to the lender, the unrelated person makes a loan to a partnership, and the first loan would constitute a downstream partnership loan if made directly to the partnership, then the rules of this paragraph (e)(8) apply as if the first loan was made directly to the partnership and the interest expense paid by the partnership is treated as made with respect to the first loan. Such a series of loans will be subject to this recharacterization rule without regard to whether there was a principal purpose of avoiding the rules in this paragraph (e)(8) if the loan to the unrelated person would not have been made or maintained on substantially the same terms but for the loan of funds by the unrelated person to the partnership. The principles of this paragraph (e)(8)(iii) also apply to similar transactions that involve more than two loans and regardless of the order in which the loans are made.

(iv) *Anti-avoidance rule for loans held by CFCs.* A loan receivable held by a controlled foreign corporation with respect to a loan to a partnership in which a United States shareholder (as defined in § 1.904–5(a)(4)(vi)) of the controlled foreign corporation owns an interest, directly or indirectly through one or more other partnerships or other pass-through entities (as defined in § 1.904–5(a)(4)(iv)), is recharacterized as a loan receivable held directly by the United States shareholder with respect to the loan to such partnership for purposes of this paragraph (e)(8) if the loan was made or transferred with a principal purpose of avoiding the rules in this paragraph (e)(8). An appropriate amount of income derived by the United States shareholder (or any other person in the same affiliated group as the United States shareholder) from the controlled foreign corporation is treated as DPL interest income. Appropriate adjustments must be made to the value and characterization of the stock of the controlled foreign corporation under §§ 1.861–9 and 1.861–12 in order to reflect the portion of the downstream partnership loan held by the controlled foreign corporation that is disregarded under paragraph (e)(8)(i) of this section.

(v) *Interest equivalents.* The principles of this paragraph (e)(8) apply in the case of a partner, or any person in the same affiliated group as the partner, that takes into account a distributive share of an expense or loss (to the extent deductible) that is allocated and apportioned in the same manner as interest expense under §§ 1.861–9(b) and 1.861–9T(b) and has a matching income amount (treating such interest equivalent as interest income or expense for purposes of paragraph (e)(8)(vi)(B) of this section) with respect to the transaction that gives rise to that expense or loss.

(vi) *Definitions.* For purposes of this paragraph (e)(8), the following definitions apply.

(A) *Affiliated group.* The term *affiliated group* has the meaning provided in § 1.861–11(d)(1).

(B) *Matching income amount.* The term *matching income amount* means the lesser of the total amount of the DPL interest income included directly or indirectly in gross income by the DPL lender for the taxable year with respect to a downstream partnership loan or the total amount of the distributive shares of the DPL interest expense of the DPL lender (or any other person in the same affiliated group as the DPL lender) with respect to the loan.

(C) *Downstream partnership loan.* The term *downstream partnership loan* means a loan to a partnership for which the loan receivable is held, directly or indirectly through one or more other partnerships or other pass-through entities, either by a person that owns an interest, directly or indirectly through one or more other partnerships or other pass-through entities, in the partnership, or by any person in the same affiliated group as that person.

(D) *Downstream partnership loan interest expense (DPL interest expense).* The term *downstream partnership loan interest expense,* or *DPL interest expense,* means an item of interest expense paid or accrued with respect to a downstream partnership loan, without regard to whether the expense was currently deductible (for example, by reason of section 163(j)).

(E) *Downstream partnership loan interest income (DPL interest income).* The term *downstream partnership loan interest income,* or *DPL interest income,* means an item of gross interest income received or accrued with respect to a downstream partnership loan.

(F) *Downstream partnership loan lender (DPL lender).* The term *downstream partnership loan lender,* or *DPL lender,* means the person that holds the receivable with respect to a downstream partnership loan. If a partnership holds the receivable, then any partner in the partnership (other than a partner described in paragraph (e)(4)(i) of this section) is also considered a DPL lender.

(vii) *Examples.* The following examples illustrate the application of the rules in this paragraph (e)(8).

(A) *Example 1*—(*1*) *Facts.* US1, a domestic corporation, directly owns 60% of PRS, a foreign partnership that is not engaged in a U.S. trade or business. The remaining 40% of PRS is directly owned by US2, a domestic corporation that is unrelated to US1. US1, US2, and PRS all use the calendar year as their taxable year. In Year 1, US1 loans $1,000x to PRS. For Year 1, US1 has $100x of interest income with respect to the loan and PRS has $100x of interest expense with respect to the loan. US1's distributive share of the interest expense is $60x. Under paragraph (e)(2) of this section, $45x of US1's distributive share of the interest expense is apportioned to U.S. source income and $15x is apportioned to foreign source foreign branch category income. Under paragraph (h)(4)(i) of this section, the total value of the loan between US1 and PRS is $1,000x.

(*2*) *Analysis.* The loan by US1 to PRS is a downstream partnership loan and US1 is a DPL lender. Under paragraph (e)(8)(vi)(B) of this section, the matching income amount is $60x, the lesser of the DPL interest income included by US1 with respect to the loan for the taxable year ($100x) and US1's distributive share of the DPL interest expense ($60x). Under paragraph (e)(8)(ii) of this section, US1 assigns $45x of the DPL interest income to U.S. source income and $15x of the DPL interest income to foreign source foreign branch category income. The source and separate category of the remaining $40x of US1's DPL interest income is determined under the generally applicable rules. Under paragraph (e)(8)(i) of this section, the disregarded portion of the downstream partnership loan is $600x ($1,000x × $60x/$100x).

(B) *Example 2*—(*1*) *Facts.* The facts are the same as in paragraph (e)(8)(vii)(A)(*1*) of this section (the facts in *Example 1*), except that US1 and US2 are part of the same affiliated group, US2's distributive share of the interest expense is $40x, and under paragraph (e)(2) of this section, $30x of US2's distributive share of the interest expense is apportioned to U.S. source income and $10x is apportioned to foreign source foreign branch category income.

(*2*) *Analysis.* The loan by US1 to PRS is a downstream partnership loan and US1 is a DPL lender. Under paragraph (e)(8)(vi)(B) of this section, the matching income amount is $100x, the lesser of the DPL interest income included by US1 with respect to the loan for the taxable year ($100x) and the total amount of US1 and US2's distributive shares of the DPL interest expense ($100x). Under paragraph (e)(8)(ii) of this section, US1 assigns $75x of the DPL interest income to U.S. source income and $25x of the DPL interest income to foreign source foreign branch category income. Under paragraph (e)(8)(i) of this section, the disregarded portion of the downstream partnership loan is $1,000x ($1,000x × $100x/$100x).

(C) *Example 3*—(*1*) *Facts.* US1, a domestic corporation, owns 80% of PRS, a foreign partnership that is not engaged in a U.S. trade or business. The remaining 20% of PRS is owned by US2, a domestic corporation that is unrelated to US1. US1, US2, and PRS all use the calendar year as their taxable year. In Year 1, US1 loans $3,000x to Bank and Bank loans $3,000x to PRS. US1 makes the loan to Bank with a principal purpose of avoiding the rules in this paragraph (e)(8). For Year 1, US1 has $150x of interest income with respect to the loan to Bank and PRS has $175x of interest expense with respect to the loan from Bank. US1's distributive share of the interest expense is $140x. Under paragraph (e)(2) of this section, $126x of US1's distributive share of the interest expense is apportioned to U.S. source income and $14x is apportioned to foreign source foreign branch category income. Under paragraph (h)(4)(i) of this section, the total value of the loan between US1 and PRS is $3,000x.

(*2*) *Analysis.* Under paragraph (e)(8)(iii) of this section, because the loan from US1 to Bank is made with a principal purpose of avoiding the rules of this paragraph (e)(8), the rules of this paragraph (e)(8) apply as if the loan by US1 to Bank was made directly to PRS. Accordingly, the loan by US1 to Bank is a downstream partnership loan and US1 is a DPL lender. Under paragraph (e)(8)(vi)(B) of this section, the matching income amount is $140x, the lesser of the DPL interest income included by US1 with respect to the loan for the taxable year ($150x) and US1's distributive share of the DPL interest expense ($140x). Under paragraph (e)(8)(ii) of this section, US1 assigns $126x of the DPL interest income to U.S. source income and $14x of the DPL interest income to foreign source foreign branch category income. The source and separate category of the remaining $10x of US1's DPL interest income is determined under the generally applicable rules. Under paragraph (e)(8)(i) of this section, the disregarded portion of the downstream partnership loan is $2,800x ($3,000x × $140x/$150x).

(D) *Example 4*—(*1*) *Facts.* US1, a domestic corporation, directly owns all of the outstanding stock of CFC, a controlled foreign corporation, and 90% of PRS, a foreign partnership that is not engaged in a U.S. trade or business. The remaining 10% of PRS is owned by US2, a domestic corporation that is unrelated to US1 and CFC. US1, US2, and PRS all use the calendar year as their taxable year. In Year 1, US1 loans $900x to CFC and CFC loans $900x to PRS. CFC makes the loan with a principal purpose of avoiding the rules in this paragraph (e)(8). For Year 1, CFC has $90x of interest income and $90x of interest expense with respect to the loan to PRS, and US1 has $90x of interest income with respect to the loan to CFC. PRS has $90x of interest expense with respect to the loan, and US1's distributive share of the interest expense is $81x. Under paragraph (e)(2) of this section, $54x of US1's distributive share of the interest expense is apportioned to U.S. source income and $27x is apportioned to foreign source foreign branch category income. Under paragraph (h)(4)(i) of this section, the total value of the loan between CFC and PRS is $900x.

(*2*) *Analysis.* Under paragraph (e)(8)(iv) of this section, because the loan from CFC to PRS is made with a principal purpose of avoiding the rules of this paragraph (e)(8), the loan from CFC to PRS is recharacterized as a loan receivable held directly by US1, and an appropriate amount of income derived by US1, in this case, the $90x of interest income from the loan to CFC, is treated as DPL interest income. Accordingly, the loan from CFC to PRS is a downstream partnership loan and US1 is a DPL lender. Under paragraph (e)(8)(vi)(B) of this section, the matching income amount is $81x, the lesser of the DPL interest income included by US1 ($90x) and US1's distributive share of the DPL interest expense ($81x). Under paragraph (e)(8)(ii) of this section, US1 assigns $54x of the DPL interest income to U.S. source income and $27x of the DPL interest income to foreign source foreign branch category income. The source and separate category of the remaining $9x of US1's interest income is determined under the generally applicable rules. Under paragraph (e)(8)(i) of this section, the disregarded portion of the downstream partnership loan is $810x ($900x x $81x/$90x). Appropriate adjustments are made to the value and characterization of the stock of CFC under §§ 1.861–9 and 1.861–12 in order to reflect the $810x disregarded portion of the downstream partnership loan.

(9) [Reserved]

(10) *Characterizing certain partnership assets as foreign branch category assets.* For purposes of applying this paragraph (e) to section 904 as the operative section, a partner that is a United States person that has a distributive share of partnership income that is treated as foreign branch category income under § 1.904–4(f)(1)(i)(B) characterizes its pro rata share of the partnership assets that give rise to such income as assets in the foreign branch category.

(f) *Corporations*—(1) *Domestic corporations.* For further guidance, see § 1.861–9T(f)(1).

(2) *Section 987 QBUs of domestic corporations*—(i) *In general.* In the application of the asset method described in paragraph (g) of this section, a domestic corporation—

(A) Takes into account the assets of any section 987 QBU (as defined in § 1.987–1(b)(2)), translated according to the rules set forth in paragraph (g) of this section; and

(B) Combines with its own interest expense any deductible interest expense incurred by a section 987 QBU, translated according to the rules under section 987.

(ii) *Coordination with section 987(3).* For purposes of computing foreign currency gain or loss under section 987(3) (including section 987 gain or loss recognized under § 1.987–5), the rules of this paragraph (f)(2) do not apply. *See* § 1.987–4.

(iii) *Example.* The following example illustrates the application of the rules in this paragraph (f)(2).

(A) *Facts.* X is a domestic corporation that operates B, a branch doing business in a foreign country. B is a section 987 QBU (as defined in § 1.987–1(b)(2)) as well as a foreign branch (as defined in § 1.904–4(f)(3)(iii)). In 2020, without regard to B, X has gross domestic source income of $1,000x and gross foreign source general category income of $500x and incurs $200 of interest expense. Using the tax book value method of apportionment, X, without regard to B, determines the value of its assets that generate domestic source income to be $6,000x and the value of its assets that generate foreign source general category income to be $1,000x. Applying the translation rules of section 987, X (through B) earned $500 of gross foreign source foreign branch category income and incurred $100x of interest expense. B incurred no other expenses. For 2020, the average functional currency book value of B's assets that generate foreign source foreign branch category income translated at the year-end rate for 2020 is $3,000x.

(B) *Analysis.* The combined assets of X and B for 2020 (averaged under § 1.861–9T(g)(3)) consist 60% ($6,000x/$10,000x) of assets generating domestic source income, 30% ($3,000x/$10,000x) of assets generating foreign source foreign branch category income, and 10% ($1,000x/$10,000x) of assets generating foreign source general category income. The combined interest expense of X and B is $300x. Thus, $180x ($300x x 60%) of the combined interest expense is apportioned to domestic source income, $90x ($300x × 30%) is apportioned to foreign source foreign branch category income, and $30x ($300x × 10%) is apportioned to foreign source general category income, yielding net U.S. source income of $820 ($1,000x − $180x), net foreign source foreign branch category income of $410 ($500x − $90x), and net foreign source general category income of $470x ($500x − $30x).

(3) *Controlled foreign corporations*—(i) *In general.* For purposes of computing subpart F income and tested income and computing earnings and profits for all Federal income tax purposes, the interest expense of a controlled foreign corporation may be apportioned using either the asset method described in paragraph (g) of this section or the modified gross income method described in paragraph

(j) of this section, subject to the rules of paragraphs (f)(3)(ii) and (iii) of this section.

* * * * *

(4) *Noncontrolled 10-percent owned foreign corporations.* * * *

(iii) *Stock characterization.* The stock of a noncontrolled 10-percent owned foreign corporation is characterized under the rules in § 1.861–12(c)(4).

(5) *Other relevant provisions.* For further guidance, see § 1.861–9T(f)(5).

(g) *Asset method*—(1) *In general.* (i) For further guidance, see § 1.861–9T(g)(1)(i).

(ii) A taxpayer may elect to determine the value of its assets on the basis of either the tax book value or the fair market value of its assets. However, for taxable years beginning after December 31, 2017, the fair market value method is not allowed with respect to allocations and apportionments of interest expense. *See* section 864(e)(2). For rules concerning the application of an alternative method of valuing assets for purposes of the tax book value method, see paragraph (i) of this section. For rules concerning the application of the fair market value method, see paragraph (h) of this section.

(iii) [Reserved]

(iv) For rules relating to earnings and profits adjustments by taxpayers using the tax book value method for the stock in certain 10 percent owned corporations, see § 1.861–12(c)(2).

(v) [Reserved]

(2) *Asset values*—(i) *General rule*—(A) *Average of values.* For purposes of determining the value of assets under this section, an average of values (book or market) within each statutory grouping and the residual grouping is computed for the year on the basis of values of assets at the beginning and end of the year. For the first taxable year beginning after December 31, 2017 (*post-2017 year*), a taxpayer that determined the value of its assets on the basis of the fair market value method for purposes of apportioning interest expense in its prior taxable year may choose to determine asset values under the tax book value method (or the alternative tax book value method) by treating the value of its assets as of the beginning of the post-2017 year as equal to the value of its assets at the end of the first quarter of the post-2017 year, provided that each member of the affiliated group (as defined in § 1.861–11T(d)) determines its asset values on the same basis. Where a substantial distortion of asset values would result from averaging beginning-of-year and end-of-year values, as might be the case in the event of a major corporate acquisition or disposition, the taxpayer must use a different method of asset valuation that more clearly reflects the average value of assets weighted to reflect the time such assets are held by the taxpayer during the taxable year.

(B) *Tax book value method.* Under the tax book value method, the value of an asset is determined based on the adjusted basis of the asset. For purposes of determining the value of stock in a 10 percent owned corporation at the beginning and end of the year under the tax book value method, the tax book value is determined without regard to any adjustments under section 961(a) or 1293(d), see § 1.861–12(c)(2)(i)(B)(*1*), and before the adjustment required by § 1.861–12(c)(2)(i)(A) to the basis of stock in the 10 percent owned corporation. The average of the tax book value of the stock at the beginning and end of the year is then adjusted with respect to earnings and profits as described in § 1.861–12(c)(2)(i).

(ii) *Special rule for qualified business units of domestic corporations with functional currency other than the U.S. dollar*—(A) *Tax book value method.* For further guidance, see § 1.861–9T(g)(2)(ii)(A).

(*1*) *Section 987 QBU.* For further guidance, see § 1.861–9T(g)(2)(ii)(A)(*1*).

(*2*) *U.S. dollar approximate separate transactions method.* In the case of a branch to which the U.S. dollar approximate separate transactions method of accounting described in § 1.985–3 applies, the beginning-of-year dollar amount of the assets is determined by reference to the end-of-year balance sheet of the branch for the immediately preceding taxable year, adjusted for U.S. generally accepted accounting principles and Federal income tax accounting principles, and translated into U.S. dollars as provided in § 1.985–3(c). The end-of-year dollar amount of the assets of the branch is determined in the same manner by reference to the end-of-year balance sheet for the current taxable year. The beginning-of-year and end-of-year dollar tax book value of assets, as so determined, within each grouping is then averaged as provided in paragraph (g)(2)(i) of this section.

(B) *Fair market value method.* For further guidance, see § 1.861–9T(g)(2)(ii)(B).

(iii) *Adjustment for directly allocated interest.* For further guidance, see § 1.861–9T(g)(2)(iii).

(iv) *Assets in intercompany transactions.* For further guidance, see § 1.861–9T(g)(2)(iv).

(3) *Characterization of assets.* For further guidance, see § 1.861–9T(g)(3).

(4) *Characterization of lower tier entities at the level of a CFC.* In the case of a controlled foreign corporation that is applying the asset method, see for example § 1.861–12T(c)(3)(ii) (requiring the application of § 1.861–9T(g) at the level of the controlled foreign corporation) or paragraph (f)(3)(i) of this section, the controlled foreign corporation (and any lower-tier controlled foreign corporations) must characterize stock of a lower-tier 10 percent owned corporation by applying § 1.861–12 and treating the controlled foreign corporation as the relevant taxpayer for such purposes. In the case of a controlled foreign corporation that owns stock in one or more lower-tier corporations, in applying the asset method, the first-tier controlled foreign corporation must take into account the stock in the lower-tier corporations. Therefore, the controlled foreign corporation (and any lower-tier controlled foreign corporations) must make basis adjustments in lower-tier 10 percent owned corporations under § 1.861–12(c)(2) for purposes of valuing and characterizing the assets of such controlled foreign corporation. For purposes of this paragraph (g)(4), the stock of each such lower-tier corporation is characterized by reference to the assets owned during the lower-tier corporation's taxable year that ends during the first-tier controlled foreign corporation's taxable year. The analysis of assets under this paragraph (g)(4) and § 1.861–12 of a controlled foreign corporation that is in a chain of 10 percent owned corporations must begin at the lowest-tier 10 percent owned corporation and proceed up the chain to the first-tier controlled foreign corporation. *See also* § 1.861–12T(c)(3)(ii).

(h) *Fair market value method.* An affiliated group (as defined in § 1.861–11T(d)) or other taxpayer (the *taxpayer*) that elects to use the fair market value method of apportionment values its assets according to the methodology described in this paragraph (h). Effective for taxable years beginning after December 31, 2017, the fair market value method is not allowed for purposes of apportioning interest expense. *See* section 864(e)(2). However, a taxpayer may continue to apportion deductions other than interest expense that are properly apportioned based on fair market value according to the methodology described in this paragraph (h). *See* § 1.861–8(c)(2).

(1) *Determination of values.* For further guidance, see § 1.861–9T(h)(1) through (3).

(2) and (3) [Reserved]

* * * * *

(5) *Characterizing stock in related persons.* Stock in a related person held by the taxpayer or by another related person shall be characterized on the basis of the fair market value of the taxpayer's pro rata share of assets held by the related person attributed to each statutory grouping and the residual grouping under the stock characterization rules of § 1.861–12T(c)(3)(ii), except that the portion of the value of intangible assets of the taxpayer and related persons that is apportioned to the related person under § 1.861–9T(h)(2) shall be characterized on the basis of the net income before interest expense of the related person within each statutory grouping or residual grouping (excluding income that is passive under § 1.904–4(b)).

* * * * *

(i) * * *

(2) * * * (i) Except as provided in this paragraph (i)(2)(i), a taxpayer may elect to use the alternative tax book value method. For the taxpayer's first taxable year beginning after December 31, 2017, the Commissioner's approval is not required to switch from the fair market value method to the alternative tax book value method for purposes of apportioning interest expense. * * *

* * * * *

(j) *Modified gross income method.* For further guidance, see § 1.861–9T(j) introductory text.

(1) For further guidance, see § 1.861–9T(j)(1).

(2) For further guidance, see § 1.861–9T(j)(2) introductory text.

(i) *Step 1.* For further guidance, see § 1.861–9T(j)(2)(i).

(ii) *Step 2.* Moving to the next higher-tier controlled foreign corporation, combine the gross income of such corporation within each grouping with its pro rata share (as determined under principles similar to section 951(a)(2)) of the gross income net of interest expense of all lower-tier controlled foreign corporations held by such higher-tier corporation within the same grouping adjusted as follows:

(A) Exclude from the gross income of the higher-tier corporation any dividends or other payments received from the lower-tier corporation other than interest income received from the lower-tier corporation;

(B) Exclude from the gross income net of interest expense of any lower-tier corporation any gross subpart F income, net of interest expense apportioned to such income;

(C) Then apportion the interest expense of the higher-tier controlled foreign corporation based on the adjusted combined gross income amounts; and

(D) Repeat paragraphs (j)(2)(ii)(A) through (C) of this section for each next higher-tier controlled foreign corporation in the chain.

(k) *Applicability date.* This section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 5.** Section 1.861–9T is amended by:

■ 1. Adding paragraph (c)(5).

■ 2. Revising paragraph (e)(4)(i).

■ 3. Adding paragraph (e)(8) and reserved paragraphs (e)(9) and (10).

■ 4. Revising paragraph (f)(2) and removing the undesignated paragraph and example paragraphs following paragraph (f)(2)(ii).

■ 5. Removing and reserving paragraph (f)(3)(i).

■ 6. Revising paragraphs (f)(4) and (g)(1)(ii).

■ 7. Removing and reserving paragraphs (g)(1)(iii) through (v) and (g)(2)(i).

■ 8. Revising paragraph (g)(2)(ii)(A)(*2*).

■ 9. Removing and reserving paragraph (g)(2)(v).

■ 10. Revising paragraphs (h) introductory text and (j)(2)(ii).

■ 11. Removing the undesignated paragraph following paragraph (j)(2)(ii)(B).

The additions and revisions read as follows:

§ 1.861–9T Allocation and apportionment of interest expense (temporary).

* * * * *

(c) * * *

(5) *Section 163(j).* For further guidance, see § 1.861–9(c)(5).

* * * * *

(e) * * *

(4) * * *

(i) *Partnership interest expense.* For further guidance, see § 1.861–9(e)(4)(i).

* * * * *

(8) *Special rule for downstream partnership loans.* For further guidance, see § 1.861–9(e)(8) through (10).

(9) and (10) [Reserved]

(f) * * *

(2) *Section 987 QBUs of domestic corporations.* For further guidance, see § 1.861–9(f)(2) through (f)(3)(i).

* * * * *

(4) *Noncontrolled 10-percent owned foreign corporations.* For further guidance, see § 1.861–9(f)(4).

* * * * *

(g) * * *

(1) * * *

(ii) For further guidance, see § 1.861–9(g)(1)(ii) through (g)(2)(i).

* * * * *

(2) * * *

(ii) * * *

(A) * * *

(*2*) *U.S. dollar approximate separate transactions method.* For further guidance, see § 1.861–9(g)(2)(ii)(A)(*2*).

* * * * *

(h) *Fair market value method.* For further guidance, see § 1.861–9(h).

* * * * *

(j) * * *

(2) * * *

(ii) *Step 2.* For further guidance, see § 1.861–9(j)(2)(ii).

* * * * *

■ **Par. 6.** Section 1.861–10 is amended by:

■ 1. Revising paragraph (e)(8)(vi).

■ 2. Removing and reserving paragraph (e)(10).

■ 3. Adding paragraph (f).

The revisions and addition read as follows:

§ 1.861–10 Special allocations of interest expense.

* * * * *

(e) * * *

(8) * * *

(vi) *Classification of hybrid stock.* In determining the amount of its related group indebtedness for any taxable year, a U.S. shareholder must not treat stock in a related controlled foreign corporation as related group indebtedness, regardless of whether the related controlled foreign corporation claims a deduction for interest under foreign law for distributions on such stock. For purposes of determining the foreign base period ratio under paragraph (e)(2)(iv) of this section for a taxable year that ends on or after December 4, 2018, the rules of this paragraph (e)(8)(vi) apply to determine the related group debt-to-asset ratio in each taxable year included in the foreign base period, including in taxable years that end before December 4, 2018.

* * * * *

(f) *Applicability date.* This section applies to taxable years that end on or after December 4, 2018.

■ **Par. 7.** Section 1.861–10T is amended by revising paragraph (e) to read as follows:

§ 1.861–10T Special allocations of interest expense (temporary).

* * * * *

(e) *Treatment of certain related group indebtedness.* For further guidance, see § 1.861–10(e).

* * * * *

■ **Par. 8.** Section 1.861–11 is amended by:

■ 1. Removing paragraphs (a) through (c).

■ 2. Adding paragraphs (a), (b), and (c).
■ 3. Removing the language '', except that section 936 corporations are also included within the affiliated group to the extent provided in paragraph (d)(2) of this section'' from the first sentence of paragraph (d)(1).
■ 4. Removing and reserving paragraph (d)(2).
■ 5. Adding paragraph (h).

The revisions and addition read as follows:

§ 1.861–11 Special rules for allocating and apportioning interest expense of an affiliated group of corporations.

(a) *In general.* For further guidance, see § 1.861–11T(a).

(b) *Scope of application*—(1) *Application of section 864(e)(1) and (5) (concerning the definition and treatment of affiliated groups).* Section 864(e)(1) and (5) and the portions of this section implementing section 864(e)(1) and (5) apply to the computation of foreign source taxable income for purposes of section 904 (relating to various limitations on the foreign tax credit). Section 864(e)(1) and (5) and the portions of this section implementing section 864(e)(1) and (5) also apply in connection with section 907 to determine reductions in the amount allowed as a foreign tax credit under section 901. Section 864(e)(1) and (5) and the portions of this section implementing section 864(e)(1) and (5) also apply to the computation of the combined taxable income of the related supplier and a foreign sales corporation (FSC) (under sections 921 through 927) as well as the combined taxable income of the related supplier and a domestic international sales corporation (DISC) (under sections 991 through 997).

(2) *Nonapplication of section 864(e)(1) and (5) (concerning the definition and treatment of affiliated groups).* For further guidance, see § 1.861–11T(b)(2).

(c) *General rule for affiliated corporations.* For further guidance, see § 1.861–11T(c).

* * * * *

(h) *Applicability dates.* This section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 9.** Section 1.861–11T is amended by revising paragraph (b)(1) to read as follows:

§ 1.861–11T Special rules for allocating and apportioning interest expense of an affiliated group of corporations (temporary).

* * * * *

(b) * * *

(1) *Application of section 864(e)(1) and (5) (concerning the definition and treatment of affiliated groups).* For further guidance, see § 1.861–11(b)(1).

* * * * *

■ **Par. 10.** Section 1.861–12 is amended by:
■ 1. Removing paragraphs (a) through (c)(1).
■ 2. Adding paragraphs (a), (b), and (c)(1).
■ 3. Revising paragraphs (c)(3) and (4).
■ 4. Removing paragraph (c)(5) and paragraphs (d) through (j).
■ 5. Adding paragraphs (d) and (e) and reserved paragraphs (f) through (j).

The revisions read as follows:

§ 1.861–12 Characterization rules and adjustments for certain assets.

(a) *In general.* The rules in this section apply to taxpayers apportioning expenses under an asset method to income in the various separate categories described in § 1.904–5(a)(4)(v), and supplement other rules provided in §§ 1.861–9 through 1.861–11T. The principles of the rules in this section also apply in apportioning expenses among statutory and residual groupings for any other operative section. See also § 1.861–8(f)(2)(i) for a rule requiring conformity of allocation methods and apportionment principles for all operative sections. Paragraph (b) of this section describes the treatment of inventories. Paragraph (c)(1) of this section concerns the treatment of various stock assets. Paragraph (c)(2) of this section describes a basis adjustment for stock in 10 percent owned corporations. Paragraph (c)(3) of this section sets forth rules for characterizing the stock in controlled foreign corporations. Paragraph (c)(4) of this section describes the treatment of stock of noncontrolled 10-percent owned foreign corporations. Paragraph (d)(1) of this section concerns the treatment of notes. Paragraph (d)(2) of this section concerns the treatment of notes of controlled foreign corporations. Paragraph (e) of this section describes the treatment of certain portfolio securities that constitute inventory or generate income primarily in the form of gains. Paragraph (f) of this section describes the treatment of assets that are funded by interest that is capitalized, deferred, or disallowed. Paragraph (g) of this section concerns the treatment of FSC stock and of assets of the related supplier generating foreign trade income. Paragraph (h) of this section concerns the treatment of DISC stock and of assets of the related supplier generating qualified export receipts.

(b) *Inventories.* For further guidance, see § 1.861–12T(b).

(c) *Treatment of stock*—(1) *In general.* For further guidance, see § 1.861–12T(c)(1).

* * * * *

(3) *Characterization of stock of controlled foreign corporations*—(i) *Operative sections*—(A) *Operative sections other than section 904.* For purposes of applying this section to an operative section other than section 904, stock in a controlled foreign corporation (as defined in section 957) is characterized as an asset in the relevant groupings on the basis of the asset method described in paragraph (c)(3)(ii) of this section, or the modified gross income method described in paragraph (c)(3)(iii) of this section. Stock in a controlled foreign corporation whose interest expense is apportioned on the basis of assets is characterized in the hands of its United States shareholders under the asset method described in paragraph (c)(3)(ii) of this section. Stock in a controlled foreign corporation whose interest expense is apportioned on the basis of modified gross income is characterized in the hands of its United States shareholders under the modified gross income method described in paragraph (c)(3)(iii) of this section.

(B) *Section 904 as operative section.* For purposes of applying this section to section 904 as the operative section, § 1.861–13 applies to characterize the stock of a controlled foreign corporation as an asset producing foreign source income in the separate categories described in § 1.904–5(a)(4)(v), or as an asset producing U.S. source income in the residual grouping, in the hands of the United States shareholder, and to determine the portion of the stock that gives rise to an inclusion under section 951A(a) that is treated as an exempt asset under § 1.861–8(d)(2)(ii)(C). Section 1.861–13 also provides rules for subdividing the stock in the various separate categories and the residual grouping into a section 245A subgroup and a non-section 245A subgroup in order to determine the amount of the adjustments required by section 904(b)(4) and § 1.904(b)–3(c) with respect to the section 245A subgroup, and provides rules for determining the portion of the stock that gives rise to a dividend eligible for a deduction under section 245(a)(5) that is treated as an exempt asset under § 1.861–8(d)(2)(ii)(B).

(ii) *Asset method.* For further guidance, see § 1.861–12T(c)(3)(ii).

(iii) *Modified gross income method.* Under the modified gross income method, the taxpayer characterizes the tax book value of the stock of the first-tier controlled foreign corporation based on the gross income, net of interest expense, of the controlled foreign corporation (as computed under § 1.861–9T(j) to include certain gross income, net of interest expense, of lower-tier controlled foreign corporations) within each relevant category for the taxable year of the controlled foreign corporation ending with or within the taxable year of the taxpayer. For purposes of this paragraph (c)(3)(iii), however, the gross income, net of interest expense, of the first-tier controlled foreign corporation includes the total amount of gross subpart F income, net of interest expense, of any lower-tier controlled foreign corporation that was excluded under the rules of § 1.861–9(j)(2)(ii)(B).

(4) *Characterization of stock of noncontrolled 10-percent owned foreign corporations*—(i) *In general.* Except in the case of a nonqualifying shareholder described in paragraph (c)(4)(ii) of this section, the principles of § 1.861–12(c)(3), including the relevant rules of § 1.861–13 when section 904 is the operative section, apply to characterize stock in a noncontrolled 10-percent owned foreign corporation (as defined in section 904(d)(2)(E)). Accordingly, stock in a noncontrolled 10-percent owned foreign corporation is characterized as an asset in the various separate categories on the basis of either the asset method described in § 1.861–12T(c)(3)(ii) or the modified gross income method described in § 1.861–12(c)(3)(iii). Stock in a noncontrolled 10-percent owned foreign corporation the interest expense of which is apportioned on the basis of assets is characterized in the hands of its shareholders under the asset method described in § 1.861–12T(c)(3)(ii). Stock in a noncontrolled 10-percent owned foreign corporation the interest expense of which is apportioned on the basis of gross income is characterized in the hands of its shareholders under the modified gross income method described in § 1.861–12(c)(3)(iii).

(ii) *Nonqualifying shareholders.* Stock in a noncontrolled 10-percent owned foreign corporation is characterized as a passive category asset in the hands of a shareholder that either is not a domestic corporation or is not a United States shareholder with respect to the noncontrolled 10-percent owned foreign corporation for the taxable year. Stock in a noncontrolled 10-percent owned foreign corporation is characterized as in the separate category described in section 904(d)(4)(C)(ii) in the hands of any shareholder with respect to whom look-through treatment is not substantiated. *See also* § 1.904–5(c)(4)(iii)(B). In the case of a noncontrolled 10-percent owned foreign corporation that is a passive foreign investment company with respect to a shareholder, stock in the noncontrolled 10-percent owned foreign corporation is characterized as a passive category asset in the hands of the shareholder if such shareholder does not meet the ownership requirements described in section 904(d)(2)(E)(i)(II).

(d) *Treatment of notes*—(1) *General rule.* For further guidance, see § 1.861–12T(d)(1).

(2) *Characterization of related controlled foreign corporation notes.* The debt of a controlled foreign corporation is characterized in the same manner as the interest income derived from that debt obligation. See §§ 1.904–4 and 1.904–5(c)(2) for rules treating interest income as income in a separate category.

(e) Portfolio securities that constitute inventory or generate primarily gains. For further guidance, see § 1.861–12T(e) through (i).

* * * * *

■ **Par. 11.** Section 1.861–12T is amended by:

■ 1. Revising paragraph (a).

■ 2. Removing paragraphs (c)(2)(vi).

■ 3. Revising paragraph (c)(3)(i) and removing the undesignated paragraph following paragraph (c)(3)(i)(B).

■ 4. Revising paragraph (c)(3)(iii).

■ 5. Removing paragraph (c)(5).

■ 6. Revising paragraph (d)(2).

■ 7. Removing and reserving paragraph (j).

The revisions read as follows:

§ 1.861–12T Characterization rules and adjustments for certain assets (temporary).

(a) *In general.* For further guidance, see § 1.861–12(a).

* * * * *

(c) * * *

(3) * * *

(i) *Operative sections.* For further guidance, see § 1.861–12(c)(3)(i).

* * * * *

(iii) *Modified gross income method.* For further guidance, see § 1.861–12(c)(3)(iii).

* * * * *

(d) * * *

(2) *Characterization of related controlled foreign corporation notes.* For further guidance, see § 1.861–12(d)(2).

* * * * *

■ **Par. 12.** § 1.861–13 is added to read as follows:

§ 1.861–13 Special rules for characterization of controlled foreign corporation stock.

(a) *Methodology.* For purposes of allocating and apportioning deductions for purposes of section 904 as the operative section, stock in a controlled foreign corporation owned directly or indirectly through a partnership or other pass-through entity by a United States shareholder is characterized by the United States shareholder under the rules described in this section. In general, paragraphs (a)(1) through (5) of this section characterize the stock of the controlled foreign corporation as an asset in the various statutory groupings and residual grouping based on the type of income that the stock of the controlled foreign corporation generates, has generated, or may reasonably be expected to generate when the income is included by the United States shareholder.

(1) *Step 1: Characterize stock as generating income in statutory groupings under the asset or modified gross income method*—(i) *Asset method.* A United States shareholder of a controlled foreign corporation that apportions its interest expense on the basis of assets must characterize stock of the controlled foreign corporation using the asset method described in § 1.861–12T(c)(3)(ii) to assign the assets of the controlled foreign corporation to the statutory groupings described in paragraphs (a)(1)(i)(A)(*1*) through (*10*) and (a)(1)(i)(B) of this section. If the controlled foreign corporation owns stock in a lower-tier noncontrolled 10-percent owned foreign corporation, the assets of the lower-tier noncontrolled 10-percent owned foreign corporation are assigned to a gross subpart F income grouping to the extent such assets generate income that, if distributed to the controlled foreign corporation, would be gross subpart F income of the controlled foreign corporation. *See also* § 1.861–12(c)(4).

(A) *General and passive categories.* Within each of the controlled foreign corporation's general category and passive category, each of the following subgroups within each category is a separate statutory grouping—

(*1*) Foreign source gross tested income;

(*2*) For each applicable treaty, U.S. source gross tested income that, when taken into account by a United States shareholder under section 951A, is resourced in the hands of the United States shareholder (*resourced gross tested income*);

(*3*) U.S. source gross tested income not described in paragraph (a)(1)(i)(A)(*2*) of this section;

(*4*) Foreign source gross subpart F income;

(*5*) For each applicable treaty, U.S. source gross subpart F income that, when included by a United States shareholder under section 951(a)(1), is resourced in the hands of the United States shareholder (*resourced gross subpart F income*);

(*6*) U.S. source gross subpart F income not described in paragraph (a)(1)(i)(A)(*5*) of this section;

(*7*) Foreign source gross section 245(a)(5) income;

(*8*) U.S. source gross section 245(a)(5) income;

(*9*) Any other foreign source gross income (*specified foreign source general category gross income* or *specified foreign source passive category gross income,* as the case may be); and

(*10*) Any other U.S. source gross income (*specified U.S. source general category gross income* or *specified U.S. source passive category gross income,* as the case may be).

(B) *Section 901(j) income.* For each country described in section 901(j), all gross income from sources in that country.

(ii) *Modified gross income method.* A United States shareholder of a controlled foreign corporation that apportions its interest expense on the basis of modified gross income must characterize stock of the controlled foreign corporation using the modified gross income method under § 1.861–12(c)(3)(iii) to assign the modified gross income of the controlled foreign corporation to the statutory groupings described in paragraphs (a)(1)(i)(A)(*1*) through (*10*) and (a)(1)(i)(B) of this section. For purposes of this paragraph (a)(1)(ii), the rules described in §§ 1.861–12(c)(3)(iii) and 1.861–9T(j)(2) apply to combine gross income in a statutory grouping that is earned by the controlled foreign corporation with gross income of lower-tier controlled foreign corporations that is in the same statutory grouping. For example, foreign source general category gross tested income (net of interest expense) earned by the controlled foreign corporation is combined with its pro rata share of the foreign source general category gross tested income (net of interest expense) of lower-tier controlled foreign corporations. If the controlled foreign corporation owns stock in a lower-tier noncontrolled 10-percent owned foreign corporation, gross income of the lower-tier noncontrolled 10-percent owned foreign corporation is assigned to a gross subpart F income grouping to the extent that the income, if distributed to the upper-tier controlled foreign corporation, would be gross subpart F income of the upper-tier controlled foreign corporation. *See also* § 1.861–12(c)(4).

(2) *Step 2: Assign stock to the section 951A category.* A controlled foreign corporation is not treated as earning section 951A category income. The portion of the value of the stock of the controlled foreign corporation that is assigned to the section 951A category (as defined in § 1.904–4(g)) equals the value of the portion of the stock of the controlled foreign corporation that is assigned to the foreign source gross tested income statutory groupings within the general category (*general category gross tested income stock*) multiplied by the United States shareholder's inclusion percentage. Under § 1.861–8(d)(2)(ii)(C)(*2*)(*ii*), a portion of the value of stock assigned to the section 951A category may be treated as an exempt asset. The portion of the general category gross tested income stock that is not characterized as a section 951A category asset remains a general category asset and may result in expenses being disregarded under section 904(b)(4). *See* paragraph (a)(5)(ii) of this section and § 1.904(b)–3. No portion of the passive category gross tested income stock or U.S. source gross tested income stock is assigned to the section 951A category.

(3) *Step 3: Assign stock to a treaty category*—(i) *Inclusions under section 951A(a).* The portion of the value of the stock of the controlled foreign corporation that is assigned to a particular treaty category due to an inclusion of U.S. source income under section 951A(a) that was resourced under a particular treaty equals the value of the portion of the stock of the controlled foreign corporation that is assigned to the resourced gross tested income statutory grouping within each of the controlled foreign corporation's general or passive categories (*resourced gross tested income stock*) multiplied by the United States shareholder's inclusion percentage. Under § 1.861–8(d)(2)(ii)(C)(*2*)(*ii*), a portion of the value of stock assigned to a particular treaty category by reason of this paragraph (a)(3)(i) may be treated as an exempt asset. The portion of the resourced gross tested income stock that is not characterized as a treaty category asset remains a U.S. source general or passive category asset, as the case may be, that is in the residual grouping and may result in expenses being disregarded under section 904(b)(4) for purposes of determining entire taxable income under section 904(a). *See* paragraph (a)(5)(iv) of this section and § 1.904(b)–3.

(ii) *Inclusions under section 951(a)(1).* The portion of the value of the stock of the controlled foreign corporation that is assigned to a particular treaty category due to an inclusion of U.S. source income under section 951(a)(1) that was resourced under a treaty equals the value of the portion of the stock of the controlled foreign corporation that is assigned to the resourced gross subpart F income statutory grouping within each of the controlled foreign corporation's general category or passive category.

(4) *Step 4: Aggregate stock within each separate category and assign stock to the residual grouping.* The portions of the value of stock of the controlled foreign corporation assigned to foreign source statutory groupings that were not specifically assigned to the section 951A category under paragraph (a)(2) of this section (Step 2) are aggregated within the general category and the passive category to characterize the stock as general category stock and passive category stock, respectively. The portions of the value of stock of the controlled foreign corporation assigned to U.S. source statutory groupings that were not specifically assigned to a particular treaty category under paragraph (a)(3) of this section (Step 3) are aggregated to characterize the stock as U.S. source category stock, which is in the residual grouping. Stock assigned to the separate category for income described in section 901(j)(1) remains in that category.

(5) *Step 5: Determine section 245A and non-section 245A subgroups for each separate category and U.S. source category*—(i) *In general.* In the case of stock of a controlled foreign corporation that is held directly or indirectly through a partnership or other pass-through entity by a United States shareholder that is a domestic corporation, stock of the controlled foreign corporation that is general category stock, passive category stock, and U.S. source category stock is subdivided between a section 245A subgroup and a non-section 245A subgroup under paragraphs (a)(5)(ii) through (v) of this section for purposes of applying section 904(b)(4) and § 1.904(b)–3(c). Each subgroup is treated as a statutory grouping under § 1.861–8(a)(4) for purposes of allocating and apportioning deductions under §§ 1.861–8 through 1.861–14T and 1.861–17 in applying section 904 as the operative section. Deductions apportioned to each section 245A subgroup are disregarded under section 904(b)(4). *See* § 1.904(b)–3. Deductions apportioned to the statutory groupings for gross section 245(a)(5) income are not disregarded under section 904(b)(4); however, a portion of the stock assigned to those groupings is treated as exempt under § 1.861–8T(d)(2)(ii)(B).

(ii) *Section 245A subgroup of general category stock.* The portion of the general category stock of the controlled foreign corporation that is assigned to the section 245A subgroup of the general category equals the value of the general category gross tested income stock of the controlled foreign corporation that is not assigned to the section 951A category under paragraph (a)(2) of this section (Step 2), plus the value of the portion of the stock of the controlled foreign corporation that is assigned to the specified foreign source general category gross income statutory grouping.

(iii) *Section 245A subgroup of passive category stock.* The portion of passive category stock of the controlled foreign corporation that is assigned to the section 245A subcategory of the passive category equals the sum of—

(A) The value of the portion of the stock of the controlled foreign corporation that is assigned to the gross tested income statutory grouping within foreign source passive category income multiplied by a percentage equal to 100 percent minus the United States shareholder's inclusion percentage for passive category gross tested income; and

(B) The value of the portion of the stock of the controlled foreign corporation that was assigned to the specified foreign source passive category gross income statutory grouping.

(iv) *Section 245A subgroup of U.S. source category stock.* The portion of U.S. source category stock of the controlled foreign corporation that is assigned to the section 245A subgroup of the U.S. source category equals the sum of—

(A) The value of the portion of the stock of the controlled foreign corporation that is assigned to the U.S. source general category gross tested income statutory grouping multiplied by a percentage equal to 100 percent minus the United States shareholder's inclusion percentage for the general category;

(B) The value of the portion of the stock of the controlled foreign corporation that is assigned to the U.S. source passive category gross tested income statutory grouping multiplied by a percentage equal to 100 percent minus the United States shareholder's inclusion percentage for the passive category;

(C) The value of the resourced gross tested income stock of the controlled foreign corporation that is not assigned to a particular treaty category under paragraph (a)(3)(i) of this section (Step 3);

(D) The value of the portion of the stock of the controlled foreign corporation that is assigned to the specified U.S. source general category gross income statutory grouping; and

(E) The value of the portion of the stock of the controlled foreign corporation that is assigned to the specified U.S. source passive category gross income statutory grouping.

(v) *Non-section 245A subgroup.* The value of stock of a controlled foreign corporation that is not assigned to the section 245A subgroup within the general or passive category or the residual grouping is assigned to the non-section 245A subgroup within such category or grouping. The value of stock of a controlled foreign corporation that is assigned to the section 951A category, the separate category for income described in section 901(j)(1), or a particular treaty category is always assigned to a non-section 245A subgroup.

(b) *Definitions.* This paragraph (b) provides definitions that apply for purposes of this section.

(1) *Gross section 245(a)(5) income.* The term *gross section 245(a)(5) income* means all items of gross income described in section 245(a)(5)(A) and (B).

(2) *Gross subpart F income.* The term *gross subpart F income* means all items of gross income that are taken into account by a controlled foreign corporation in determining its subpart F income under section 952, except for items of gross income described in section 952(a)(5).

(3) *Gross tested income.* The term *gross tested income* has the meaning provided in § 1.951A–2(c)(1).

(4) *Inclusion percentage.* The term *inclusion percentage* has the meaning provided in § 1.960–2(c)(2).

(5) *Separate category.* The term *separate category* has the meaning provided in § 1.904–5(a)(4)(v).

(6) *Treaty category.* The term *treaty category* means a category of income earned by a controlled foreign corporation for which section 904(a), (b), and (c) are applied separately as a result of income being resourced under a treaty. See, for example, section 245(a)(10), 865(h), or 904(h)(10). A United States shareholder may have multiple treaty categories for amounts of income resourced by the United States shareholder under a treaty. *See* § 1.904–5(m)(7).

(7) *U.S. source category.* The term *U.S. source category* means the aggregate of U.S. source income in each separate category listed in section 904(d)(1).

(c) *Examples.* The following examples illustrate the application of the rules in this section.

(1) *Example 1: Asset method*—(i) *Facts*—(A) USP, a domestic corporation, directly owns all of the stock of a controlled foreign corporation, CFC1. The tax book value of CFC1's stock is $20,000x. USP uses the asset method described in § 1.861–12T(c)(3)(ii) to characterize the stock of CFC1. USP's inclusion percentage is 70%.

(B) CFC1 owns the following assets with the following values as determined under §§ 1.861–9(g)(2) and 1.861–9T(g)(3): Assets that generate income described in the foreign source gross tested income statutory grouping within the general category ($4,000x), assets that generate income described in the foreign source gross subpart F income statutory grouping within the general category ($1,000x), assets that generate specified foreign source general category gross income ($3,000x), and assets that generate income described in the foreign source gross subpart F income statutory grouping within the passive category ($2,000x).

(C) CFC1 also owns all of the stock of CFC2, a controlled foreign corporation. The tax book value of CFC1's stock in CFC2 is $6,000x. CFC2 owns the following assets with the following values as determined under §§ 1.861–9(g)(2) and 1.861–9T(g)(3): Assets that generate income described in the foreign source gross subpart F income statutory grouping within the general category ($2,250x) and assets that generate specified foreign source general category gross income ($750x).

(ii) *Analysis*—(A) *Step 1*—(*1*) *Characterization of CFC2 stock.* CFC2 has total assets of $3,000x, $2,250x of which are in the foreign source gross subpart F income statutory grouping within the general category and $750x of which are in the specified foreign source general category gross income statutory grouping. Accordingly, CFC2's stock is characterized as $4,500x ($2,250x/$3,000x × $6,000x) in the foreign source gross subpart F income statutory grouping within the general category and $1,500x ($750x/$3,000x × $6,000x) in the specified foreign source general category gross income statutory grouping.

(*2*) *Characterization of CFC1 stock.* CFC1 has total assets of $16,000x, $4,000x of which are in the foreign source gross tested income statutory grouping within the general category, $5,500x of which are in the foreign source gross subpart F income statutory grouping within the general category (including the portion of CFC2 stock assigned to that statutory grouping), $4,500x of which are in the specified foreign source gross general category income statutory grouping (including the portion of CFC2 stock assigned to that statutory grouping), and $2,000x of which are in the foreign source gross subpart F income statutory grouping within the passive category. Accordingly, CFC1's stock is characterized as $5,000x ($4,000x/$16,000x × $20,000x) in the foreign source gross tested income statutory grouping within the general category, $6,875x ($5,500x/$16,000x × $20,000x) in the foreign source gross subpart F income statutory grouping within the general category, $5,625x ($4,500x/$16,000x × $20,000x) in the specified foreign source gross general category income statutory grouping, and $2,500x ($2,000x/$16,000x × $20,000x) in the foreign source gross subpart F income statutory grouping within the passive category.

(B) *Step 2.* The value of the portion of the stock of CFC1 that is general category gross tested income stock is $5,000x. USP's inclusion percentage is 70%. Accordingly, under paragraph (a)(2) of this section, $3,500x of the stock of CFC1 is assigned to the section 951A category and a portion thereof may be treated as an exempt asset under § 1.861–8(d)(2)(ii)(C)(*2*)(*ii*). The remainder, $1,500x, remains a general category asset.

(C) *Step 3.* No portion of the stock of CFC1 is resourced gross tested income stock or assigned to the resourced gross subpart F income statutory grouping in any treaty category. Accordingly, no portion of the stock of CFC1 is assigned to a treaty category under paragraph (a)(3) of this section.

(D) *Step 4*—(*1*) *General category stock.* The total value of the portion of the stock of CFC1 that is general category stock is $14,000x, which is equal to $1,500x (the value of the portion of the general category stock of CFC1 that was not assigned to the section 951A category in paragraph (c)(1)(ii)(B) of this section (Step 2)) plus $6,875x (the value of the portion of the stock of CFC1 assigned to the foreign source gross subpart F income statutory grouping within the general category) plus $5,625x (the value of the portion of the stock of CFC1 assigned to the specified foreign source gross income statutory grouping within the general category).

(*2*) *Passive category stock.* The total value of the portion of the stock of CFC1 that is passive category stock is $2,500x.

(*3*) *U.S source category stock.* No value of the portion of the stock of CFC1 is U.S. source category stock.

(E) *Step 5*—(*1*) *General category stock.* Under paragraph (a)(5)(ii) of this section, the value of the portion of the stock of CFC1 assigned to the section 245A subgroup of general category stock is $7,125x, which is equal to $1,500x (the value of the portion of the general category stock of CFC1 that was not assigned to the section 951A category in paragraph (c)(1)(ii)(B) of this section (Step 2)) plus $5,625x (the value of the portion of the stock of CFC1 assigned to the specified foreign source general category gross income statutory grouping). Under paragraph (a)(5)(v) of this section, the remainder of the general category stock of CFC1, $6,875x, is assigned to the non-section 245A subgroup of general category stock.

(*2*) *Passive category stock.* No portion of the passive category stock of CFC1 is in the foreign source gross tested income statutory grouping or the specified foreign source passive category gross income statutory grouping. Accordingly, under paragraph (a)(5)(iii) of this section, no value of the portion of the stock of CFC1 is assigned to the section 245A subgroup of passive category stock. Under paragraph (a)(5)(v) of this section, the passive category stock of CFC1, $2,500x is assigned to the non-section 245A subgroup of passive category stock.

(*3*) *Section 951A category stock.* Under paragraph (a)(5)(v) of this section, all of the section 951A category stock, $3,500x, is assigned to the non-section 245A subgroup of section 951A category stock.

(F) *Summary.* For purpose of the allocation and apportionment of expenses, $14,000x of the stock of CFC1 is characterized as general category stock, $7,125x of which is in the section 245A subgroup and $6,875x of which is in the non-section 245A subgroup; $2,500x of the stock of CFC1 is characterized as passive category stock, all of which is in the non-section 245A subgroup; and $3,500x of the stock of CFC1 is characterized as section 951A category stock, all of which is in the non-section 245A subgroup.

(2) *Example 2: Asset method with noncontrolled 10-percent owned foreign corporation*—(i) *Facts.* The facts are the same as in paragraph (c)(1)(i) of this section (the facts in *Example 1*), except that CFC1 does not own CFC2 and instead owns 20% of the stock of FC2, a foreign corporation that is a noncontrolled 10-percent owned foreign corporation. The tax book value of CFC1's stock in FC2 is $6,000x. FC2 owns assets with the following values as determined under §§ 1.861–9(g)(2) and 1.861–9T(g)(3): Assets that generate specified foreign source general category gross income ($3,000x). All of the assets of FC2 generate income that, if distributed to CFC1 as a dividend, would be foreign source gross subpart F income in the general category to CFC1.

(ii) *Analysis*—(A) *Step 1*—(*1*) *Characterization of FC2 stock.* All of the assets of FC2 generate income that, if distributed to CFC1, would be foreign source gross subpart F income in the general category to CFC1. Accordingly, under paragraph (a)(1)(i) of this section, all of CFC1's stock in FC2 ($6,000x) is characterized as in the foreign source gross subpart F income statutory grouping within the general category.

(*2*) *Characterization of CFC1 stock.* CFC1 has total assets of $16,000x, $4,000x of which are in the foreign source gross tested income statutory grouping within the general category, $7,000x of which are in the foreign source gross subpart F income statutory grouping within the general category (including the FC2 stock assigned to that statutory grouping), $3,000x of which are in the specified foreign source general category gross income statutory grouping, and $2,000x of which are in the foreign source gross subpart F income statutory grouping within the passive category. Accordingly, CFC1's stock is characterized as $5,000x ($4,000x/$16,000x × $20,000x) in the foreign source gross tested income statutory grouping within the general category, $8,750x ($7,000x/$16,000x × $20,000x) in the foreign source gross subpart F income statutory grouping within the general category, $3,750x ($3,000x/$16,000x × $20,000x) in the specified foreign source general category gross income statutory grouping, and $2,500x ($2,000x/$16,000x × $20,000x) in the foreign source gross subpart F income statutory grouping within the passive category.

(B) *Step 2.* The analysis is the same as in paragraph (c)(1)(ii)(B) of this section (the analysis of Step 2 in *Example 1*).

(C) *Step 3.* The analysis is the same as in paragraph (c)(1)(ii)(C) of this section (the analysis of Step 3 in *Example 1*).

(D) *Step 4*—(*1*) *General category stock.* The total value of the portion of the stock of CFC1 that is general category stock is $14,000x, which is equal to $1,500x (the value of the portion of the general category stock of CFC1 that was not assigned to the section 951A category in paragraph (c)(2)(ii)(B) of this section (Step 2)) plus $3,750x (the value of the portion of the stock of CFC1 assigned to the specified foreign source gross income statutory grouping within the general category general category) plus $8,750x (the value of the portion of the stock of CFC1 assigned to the foreign source gross subpart F income statutory grouping within the general category).

(*2*) *Passive category stock.* The analysis is the same as in paragraph (c)(1)(ii)(D)(*2*) of this section (the analysis of Step 4 in *Example 1*).

(E) *Step 5*—(*1*) *General category stock.* Under paragraph (a)(5)(ii) of this section, the value of the stock of CFC1 assigned to the section 245A subgroup of general category stock is $5,250x, which is equal to $1,500x (the value of the portion of the general category stock of CFC1 that was not assigned to the section 951A category in paragraph (c)(2)(ii)(B) of this section (Step 2)) plus $3,750x (the value of the portion of the stock of CFC1 assigned to the specified foreign source general category gross income statutory grouping). Under paragraph (a)(5)(v) of this section, the remainder of the general category stock of CFC1, $8,750x, is assigned to the non-section 245A subgroup of general category stock.

(*2*) *Passive category stock.* The analysis is the same as in paragraph (c)(1)(ii)(E)(*2*) of this section (the analysis of Step 5 in *Example 1*).

(*3*) *Section 951A category stock.* The analysis is the same as in paragraph (c)(1)(ii)(E)(*3*) of this section (the analysis of Step 5 in *Example 1*).

(F) *Summary.* For purpose of the allocation and apportionment of expenses, $14,000x of the stock of CFC1 is characterized as general category stock, $5,250x of which is in the section 245A subgroup and $8,750x of which is in the non-section 245A subgroup; $2,500x of the stock of CFC1 is characterized as passive category stock, all of which is in the non-section 245A subgroup; and $3,500x of the stock of CFC1 is characterized as section 951A category stock, all of which is in the non-section 245A subgroup.

(3) *Example 3: Modified gross income method*—(i) *Facts*—(A) USP, a domestic corporation, directly owns all of the stock of a controlled foreign corporation, CFC1. The tax book value of CFC1's stock is $100,000x. CFC1 owns all of the stock of CFC2, a controlled foreign corporation. USP uses the modified gross income method described in § 1.861–12(c)(3)(iii) to characterize the stock in CFC1. USP's inclusion percentage is 100%.

(B) CFC1 earns $1,500x of foreign source gross tested income within the general category and $500x of foreign source gross subpart F income within the passive category. CFC1 incurs $1,000x of interest expense.

(C) CFC2 earns $3,000x of foreign source gross tested income within the general category, $2,000x of foreign source gross subpart F income within the general category, and $1,000x of specified foreign source general category gross income. CFC2 incurs $3,000x of interest expense.

(ii) *Analysis*—(A) *Step 1*—(*1*) *Determination of CFC2 gross income (net of interest expense).* CFC2 has total gross income of $6,000x. CFC2's $3,000x of interest expense is apportioned among the statutory groupings of gross income based on the gross income of CFC2 to determine the gross income (net of interest expense) of CFC2 in each statutory grouping. As a result, $1,500x ($3,000x/$6,000x × $3,000x) of interest expense is apportioned to foreign source gross tested income within the general category, $1,000x ($2,000x/$6,000x × $3,000x) of interest expense is apportioned to foreign source gross subpart F income within the general category, and $500x ($1,000x/ $6,000x × $3,000x) of interest expense is apportioned to specified foreign source general category gross income. Accordingly, CFC2 has the following amounts of gross income (net of interest expense): $1,500x ($3,000x − $1,500x) of foreign source gross tested income within the general category, $1,000x ($2,000x − $1,000x) of foreign source gross subpart F income within the general category, and $500x ($1,000x − $500x) of specified foreign source general category gross income.

(*2*) *Determination of CFC1 gross income (net of interest expense).* Before including the gross income consisting of subpart F income (net of interest expense) of CFC2, CFC1 has total gross income of $4,000x, including $1500x of CFC2's foreign source gross tested income within the general category and $500x of CFC2's specified foreign source general category gross income which are combined with CFC1's items of gross income under § 1.861–9(j)(2)(ii). CFC1's $1,000x of interest expense is apportioned among the statutory groupings of gross income of CFC1 to determine the gross income (net of interest expense) of CFC1 in each statutory grouping. As a result, $750x ($3,000x/$4,000x × $1,000x) of interest expense is apportioned to foreign source gross tested income within the general category, $125x ($500x/$4,000 × $1,000x) to foreign source gross subpart F income within the passive category, and $125x ($500x/$4,000x × $1,000x) to specified foreign source general category gross income. Accordingly, CFC1 has the following amounts of gross income (net of interest expense) before including the gross income consisting of subpart F income (net of interest expense) of CFC2: $2,250x ($3,000x − $750x) of foreign source gross tested income within the general category, $375x ($500x − $125x) of foreign source gross subpart F income within the passive category, and $375x ($500 − $125x) of specified foreign source general category gross income. After including the gross income consisting of subpart F income (net of interest expense) of CFC2, CFC1 has the following amounts of gross income (net of interest expense): $2,250x of foreign source gross tested income within the general category, $1,000x of foreign source gross subpart F income within the general category, $375x of specified foreign source general category gross income, and $375x of foreign source gross subpart F income within the passive category.

(*3*) *Characterization of CFC1 stock.* CFC1 is considered to have a total of $4,000x of gross income (net of interest expense) for purposes of characterizing the stock of CFC1. Accordingly, CFC1's stock is characterized as $56,250x ($2,250x/$4,000x × $100,000x) in the foreign source gross tested income statutory grouping within the general category, $25,000x ($1,000x/$4,000x × $100,000x) in the foreign source gross subpart F income statutory grouping within the general category, $9,375x ($375x/$4,000x × $100,000x) in the specified foreign source general category gross income statutory grouping, and $9,375x ($375x/$4,000x × $100,000x) in the foreign source gross subpart F income statutory grouping within the passive category.

(B) *Step 2.* The value of the portion of the stock of CFC1 that is general category gross tested income stock is $56,250x. USP's inclusion percentage is 100%. Accordingly, under paragraph (a)(2) of this section, all of the $56,250x of the stock of CFC1 is assigned to the section 951A category and a portion thereof may be treated as an exempt asset under § 1.861–8(d)(2)(ii)(C)(*2*)(*ii*).

(C) *Step 3.* No portion of the stock of CFC1 is resourced gross tested income or assigned to the resourced gross subpart F income statutory group in any treaty category. Accordingly, no portion of the stock of CFC1 is assigned to a treaty category under paragraph (a)(3) of this section.

(D) *Step 4*—(*1*) *General category stock.* The total value of the portion of the stock of CFC1 that is general category stock is $34,375x, which is equal to $25,000x (the value of the portion of the stock of CFC1 assigned to the subpart F income statutory grouping within the general category income statutory grouping) plus $9,375x (the value of the portion of the stock of CFC1 assigned to the specified foreign source general category gross income statutory grouping).

(*2*) *Passive category stock.* The total value of the portion of the stock of CFC1 that is passive category stock is $9,375x.

(*3*) *U.S. source category stock.* No value of the portion of the stock of CFC1 is U.S. source category stock.

(E) *Step 5*—(*1*) *General category stock.* All of the value of the general category gross tested income stock of CFC1 was assigned to the section 951A category in paragraph (c)(3)(ii)(B) of this section (Step 2). Accordingly, under paragraph (a)(5)(ii) of this section, the value of the stock of CFC1 assigned to the section 245A subgroup of general category stock is $9,375x, which is equal to the value of the portion assigned to the specified foreign source general category gross income statutory grouping. Under paragraph (a)(5)(v) of this section, the remainder of the general category stock of CFC1, $25,000x, is assigned to the non-section 245A subgroup of general category stock.

(*2*) *Passive category stock.* No portion of the passive category stock of CFC1 is in the foreign source gross tested income statutory grouping or the specified foreign source passive category gross income statutory grouping. Accordingly, under paragraph (a)(5)(iii) of this section, no value of the portion of the stock of CFC1 is assigned to the section 245A subgroup. Under paragraph (a)(5)(v) of this section, the passive category stock of CFC1, $9,375x, is assigned to the non-section 245A subgroup of passive category stock.

(*3*) *Section 951A category stock.* Under paragraph (a)(5)(v) of this section, all of the section 951A category stock, $56,250x, is assigned to the non-section 245A subgroup of section 951A category stock.

(F) *Summary.* For purposes of the allocation and apportionment of expenses, $56,250x of the stock of CFC1 is characterized as section 951A category stock, all of which is in the non-section 245A subgroup; $34,375x of the stock of CFC1 is characterized as general category stock, $9,375x of which is in the section 245A subgroup and $25,000x of which is in the non-section 245A subgroup; and $9,375x of the stock of CFC1 is characterized as passive category stock, all of which is in the non-section 245A subgroup.

(d) *Applicability dates.* This section applies for taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

§ 1.861–14 [Amended]

■ **Par. 13.** Section 1.861–14 is amended by:

■ 1. Removing the language '', except that section 936 corporations (as defined in § 1.861–11(d)(2)(ii)) are also included within the affiliated group to the extent provided in paragraph (d)(2) of this section'' from the first sentence of paragraph (d)(1).

■ 2. Removing and reserving paragraph (d)(2).

■ **Par. 14.** Section 1.861–17 is amended by:

■ 1. Adding paragraph (e)(3).

■ 2. Removing and reserving paragraph (g).

■ 3. Adding paragraph (i).

The additions and revisions read as follows:

§ 1.861–17 Allocation and apportionment of research and experimental expenditures.

* * * * *

(e) * * *

(3) *Change of method for taxable years beginning after December 31, 2017, and before January 1, 2020.* A taxpayer otherwise subject to the binding election described in paragraph (e)(1) of this section may change its method for each taxable year beginning after December 31, 2017, and before January 1, 2020, without the prior consent of the Commissioner. The taxpayer's use of a new method constitutes a binding election to use the new method for its return filed for its last year that begins before January 1,

2020, and for four taxable years thereafter.

* * * * *

(i) *Applicability date.* This section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 15.** Section 1.901(j)–1 is added to read as follows:

§ 1.901(j)–1 Denial of foreign tax credit with respect to certain foreign countries.

(a) *Sourcing rule for certain payments and inclusions.* Any income paid or accrued through one or more entities is treated as income from sources within a country described in section 901(j)(2) if the income was, without regard to such entities, from sources within that country.

(b) *Applicability date.* This section applies to taxable years that end on or after December 4, 2018.

§ 1.904–0 [Removed]

■ **Par. 16.** § 1.904–0 is removed.

■ **Par. 17.** § 1.904–1 is revised to read as follows:

§ 1.904–1 Limitation on credit for foreign taxes.

(a) *In general.* For each separate category described in § 1.904–5(a)(4)(v), the total credit for taxes paid or accrued (including those deemed to have been paid or accrued other than by reason of section 904(c)) does not exceed that proportion of the tax against which such credit is taken which the taxpayer's taxable income from foreign sources (but not in excess of the taxpayer's entire taxable income) in such separate category bears to the taxpayer's entire taxable income for the same taxable year.

(b) *Special computation of taxable income.* For purposes of computing the limitation under paragraph (a) of this section, the taxable income in the case of an individual, estate, or trust is computed without any deduction for personal exemptions under section 151 or 642(b).

(c) *Joint return.* In the case of spouses making a joint return, the applicable limitation prescribed by section 904(a) on the credit for taxes paid or accrued to foreign countries and possessions of the United States is applied with respect to the aggregate taxable income in each separate category from sources without the United States, and the aggregate taxable income from all sources, of the spouses.

(d) *Consolidated group.* For rules relating to the computation of the foreign tax credit limitation for a consolidated group, see § 1.1502–4.

(e) *Applicability dates.* This section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 18.** Section 1.904–2 is amended by:

■ 1. Revising paragraphs (a) through (d).

■ 2. Removing the language ''904(d)'' and adding the language ''904(c)'' in its place in paragraph (e).

■ 3. Removing and reserving paragraph (g).

■ 4. Revising paragraphs (h) and (i).

■ 5. Adding paragraphs (j) and (k).

The revisions and additions read as follows:

§ 1.904–2 Carryback and carryover of unused foreign tax.

(a) *Credit for foreign tax carryback or carryover.* A taxpayer who chooses to claim a credit under section 901 for a taxable year is allowed a credit under that section not only for taxes otherwise allowable as a credit but also for taxes deemed paid or accrued in that year as a result of a carryback or carryover of an unused foreign tax under section 904(c). However, the taxes so deemed paid or accrued are not allowed as a deduction under section 164(a). Foreign tax paid, accrued, or deemed paid under section 960 with respect to section 951A category income, including section 951A category income that is reassigned to a separate category for income resourced under a treaty, may not be carried back or carried forward or deemed paid or accrued under section 904(c). See § 1.904–6 for rules for allocating and apportioning taxes to separate categories. For special rules regarding these computations in case of taxes paid, accrued, or deemed paid with respect to foreign oil and gas extraction income or foreign oil related income, see section 907(f).

(b) *Years to which foreign taxes are carried.* If the taxpayer chooses the benefits of section 901 for a taxable year, any unused foreign tax paid or accrued in that year is carried first to the immediately preceding taxable year and then, as applicable, to each of the ten succeeding taxable years, in chronological order, but only to the extent not absorbed as taxes deemed paid or accrued under paragraphs (a) and (d) of this section in a prior taxable year.

(c) *Definitions.* This paragraph (c) provides definitions that apply for purposes of this section.

(1) *Unused foreign tax.* The term *unused foreign tax* means, with respect to each separate category for any taxable year, the excess of the amount of creditable foreign tax paid or accrued, or deemed paid under section 902 (as in effect on December 21, 2017) or section 960, in such year, over the applicable foreign tax credit limitation under section 904 for the separate category in such year. Unused foreign tax does not include any amount for which a credit is disallowed, including foreign income taxes for which a credit is disallowed or reduced when the tax is paid, accrued, or deemed paid.

(2) *Separate category.* The term *separate category* has the same meaning as provided in § 1.904–5(a)(4)(v).

(3) *Excess limitation*—(i) *In general.* The term *excess limitation* means, with respect to a separate category for any taxable year (the *excess limitation year*) and an unused foreign tax carried from another taxable year (the *excess credit year*), the amount (if any) by which the limitation for that separate category with respect to that excess limitation year exceeds the sum of—

(A) The creditable foreign tax actually paid or accrued or deemed paid under section 902 (as in effect on December 21, 2017) or section 960 with respect to the separate category in the excess limitation year; and

(B) The portion of any unused foreign tax for a taxable year preceding the excess credit year that is absorbed as taxes deemed paid or accrued in the excess limitation year under paragraphs (a) and (d) of this section.

(ii) *Deduction years.* Excess limitation for a taxable year absorbs unused foreign tax, regardless of whether the taxpayer chooses to claim a credit under section 901 for the year. In such case, the amount of the excess limitation, if any, for the year is determined in the same manner as though the taxpayer had chosen to claim a credit under section 901 for that year. For purposes of this determination, if the taxpayer has an overall foreign loss account, the excess limitation in a deduction year is determined based on the amount of the overall foreign loss the taxpayer would have recaptured if the taxpayer had chosen to claim a credit under section 901 for that year and had not made an election under § 1.904(f)–2(c)(2) to recapture more of the overall foreign loss account than is required under § 1.904(f)–2(c)(1).

(d) *Taxes deemed paid or accrued*—(1) *Amount deemed paid or accrued.* The amount of unused foreign tax with respect to a separate category that is deemed paid or accrued in any taxable year to which such unused foreign tax may be carried under paragraph (b) of this section is equal to the smaller of—

(i) The portion of the unused foreign tax that may be carried to the taxable year under paragraph (b) of this section; or

(ii) The amount, if any, of the excess limitation for such taxable year with respect to the separate category of such unused foreign tax.

(2) *Carryback or carryover tax deemed paid or accrued in the same separate category.* Any unused foreign tax, which is deemed to be paid or accrued under section 904(c) in the year to which it is carried, is deemed to be paid or accrued with respect to the same separate category as the category to which it was assigned in the year in which it was actually paid or accrued. However, see paragraphs (h) through (j) of this section for transition rules in the case of certain carrybacks and carryovers.

(3) *No duplicate disallowance of creditable foreign tax.* Foreign income taxes for which a credit is partially disallowed, including when the tax is paid, accrued, or deemed paid, are not reduced again by reason of the unused foreign tax being deemed to be paid or accrued in the year to which it is carried under section 904(c).

* * * * *

(h) *Transition rules for carryovers of pre-2003 unused foreign tax and carrybacks of post-2002 unused foreign tax paid or accrued with respect to dividends from noncontrolled section 902 corporations.* For transition rules for carryovers of pre-2003 unused foreign tax, and carrybacks of post-2002 unused foreign tax, paid or accrued with respect to dividends from noncontrolled section 902 corporations, see 26 CFR 1.904–2(h) (revised as of April 1, 2018).

(i) *Transition rules for carryovers of pre-2007 unused foreign tax and carrybacks of post-2006 unused foreign tax.* For transition rules for carryovers of pre-2007 unused foreign tax, and carrybacks of post-2006 unused foreign tax, see 26 CFR 1.904–2(i) (revised as of April 1, 2018).

(j) *Transition rules for carryovers and carrybacks of pre-2018 and post-2017 unused foreign tax*—(1) *Carryover of unused foreign tax*—(i) *In general.* For purposes of this paragraph (j), the terms *post-2017 separate category, pre-2018 separate category,* and *specified separate category* have the meanings set forth in § 1.904(f)–12(j)(1). The rules of this paragraph (j)(1) apply to reallocate to the taxpayer's post-2017 separate categories for foreign branch category income, general category income, passive category income, and specified separate categories of income, any unused foreign taxes (as defined in paragraph (c)(1) of this section) that were paid or accrued or deemed paid under sections 902 and 960 with respect to income in a pre-2018 separate category.

(ii) *Allocation to the same separate category.* Except as provided in paragraph (j)(1)(iii) of this section, to the extent any unused foreign taxes paid or accrued or deemed paid with respect to a separate category of income are carried forward to a taxable year beginning after December 31, 2017, such taxes are allocated to the same post-2017 separate category as the pre-2018 separate category from which the unused foreign taxes are carried.

(iii) *Exception for certain general category unused foreign taxes*—(A) *In general.* To the extent any unused foreign taxes with respect to general category income are carried forward to a taxable year beginning after December 31, 2017, a taxpayer may choose to allocate those taxes to the taxpayer's post-2017 separate category for foreign branch category income to the extent the unused foreign taxes would have been allocated to the taxpayer's post-2017 separate category for foreign branch category income, and would have been unused foreign taxes with respect to foreign branch category income if that separate category had applied in the year or years the unused foreign taxes arose. Any remaining unused foreign taxes paid or accrued or deemed paid with respect to general category income carried forward to a taxable year beginning after December 31, 2017, are allocated to the taxpayer's post-2017 separate category for general category income.

(B) *Safe harbor.* In lieu of applying paragraph (j)(1)(iii)(A) of this section, the taxpayer may choose to allocate the unused foreign taxes with respect to general category income in a taxable year beginning before January 1, 2018, to the taxpayer's post-2017 separate category for foreign branch category income based on a ratio equal to the amount of foreign income taxes assigned to the general category that were paid or accrued by the taxpayer's foreign branches (as defined in § 1.904–4(f)(3)(vii)) bears to all foreign income taxes assigned to the general category that were paid or accrued, or deemed paid by the taxpayer with respect to such taxable year. The amount of taxes paid or accrued by a foreign branch in a taxable year beginning before January1, 2018, means all foreign income taxes properly reflected on the separate set of books and records (as defined in § 1.989(a)–1(d)(1) and (2)) of the foreign branch as an expense (which does not include any taxes deemed paid under section 902 or 960).

(C) *Rules regarding the exception.* A taxpayer applying the exception described in this paragraph (j)(1)(iii) (the *branch carryover exception*) must apply the exception to all of its unused foreign taxes paid or accrued with respect to general category income that are carried forward to all taxable years beginning after December 31, 2017. A taxpayer may apply the branch carryover exception on a timely filed original return (including extensions) or an amended return. A taxpayer that applies the exception on an amended return must make appropriate adjustments to eliminate any double benefit arising from application of the exception to years that are not open for assessment.

(D) *Coordination rule.* See § 1.904(f)–12(j)(5) for coordination rule with respect to the exception described in paragraph (j)(1)(iii) of this section and the exceptions described in § 1.904(f)–12(j)(2) through (4).

(2) *Carryback of unused foreign tax*—(i) *In general.* The rules of this paragraph (j)(2) apply to any unused foreign taxes that were paid or accrued, or deemed paid under section 960, with respect to income in a post-2017 separate category.

(ii) *Passive category income and specified separate categories of income described in § 1.904–4(m).* Any unused foreign taxes paid or accrued or deemed paid with respect to passive category income or a specified separate category of income in a taxable year beginning after December 31, 2017, that are carried back to a taxable year beginning before January 1, 2018, are allocated to the same pre-2018 separate category as the post-2017 separate category from which the unused foreign taxes are carried.

(iii) *General category income and foreign branch category income.* Any unused foreign taxes paid or accrued or deemed paid with respect to general category income or foreign branch category income in a taxable year beginning after December 31, 2017, that are carried back to a taxable year beginning before January 1, 2018, are allocated to the taxpayer's pre-2018 separate category for general category income.

(k) *Applicability date.* Paragraphs (a) through (i) of this section apply to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018. Paragraph (j) of this section applies to taxable years beginning after December 31, 2017. Paragraph (j)(2) of this section also applies to the last taxable year beginning before January 1, 2018.

■ **Par. 19.** Section 1.904–3 is amended by:

■ 1. Revising the section heading.

■ 2. Removing the language ''a husband and wife'' and adding the language ''spouses'' in its place in paragraphs (a), (b), (c), and (d).

■ 3. Adding a sentence to the end of paragraph (a).

■ 4. Removing the second and third sentences in paragraph (d).

■ 5. Revising paragraphs (e) and (f)(1) through (3).

■ 6. Removing the language ''904(d)'' and adding the language ''904(c)'' in its place in paragraphs (f)(5)(i) and (ii).

■ 7. Removing paragraph (f)(6) and the undesignated paragraph following paragraph (f)(6)(ii).

■ 8. Removing and reserving paragraph (g).

■ 9. Adding paragraph (h).

The additions and revisions read as follows:

§ 1.904–3 Carryback and carryover of unused foreign tax by spouses making a joint return.

(a) * * * The rules in this section apply separately with respect to each separate category as defined in § 1.904–5(a)(4)(v).

* * * * *

(e) *Amounts carried from or through a joint return year to or through a separate return year*—(1) *In general.* It is necessary to allocate to each spouse the spouse's share of an unused foreign tax or excess limitation for any taxable year for which the spouses filed a joint return if—

(i) The spouses file separate returns for the current taxable year and an unused foreign tax is carried thereto from a taxable year for which they filed a joint return;

(ii) The spouses file separate returns for the current taxable year and an unused foreign tax is carried to such taxable year from a year for which they filed separate returns but is first carried through a year for which they filed a joint return; or

(iii) The spouses file a joint return for the current taxable year and an unused foreign tax is carried from a taxable year for which they filed joint returns but is first carried through a year for which they filed separate returns.

(2) *Computation and adjustments.* In the cases described in paragraph (e)(1) of this section, the separate carryback or carryover of each spouse to the current taxable year shall be computed in the manner described in § 1.904–2 but with the modifications set forth in paragraph (f) of this section. Where applicable, appropriate adjustments are made to take into account the fact that, for any taxable year involved in the computation of the carryback or the carryover, either spouse has combined foreign oil and gas income described in section 907(b) with respect to which the limitation in section 907(a) applies.

(f) * * * (1) *Separate category limitation.* The limitation in a separate category of a particular spouse for a taxable year for which a joint return is made shall be the portion of the limitation on the joint return which bears the same ratio to such limitation as such spouse's foreign source taxable income (with gross income and deductions taken into account to the same extent as taken into account on the joint return) in such separate category (but not in excess of the joint foreign source taxable income) bears to the joint foreign source taxable income in such separate category.

(2) *Unused foreign tax.* For purposes of this section, the term *unused foreign tax* means, with respect to a particular spouse and separate category for a taxable year for which a joint return is made, the excess of the foreign tax paid or accrued by that spouse with respect to that separate category over that spouse's separate category limitation.

(3) *Excess limitation.* For purposes of this section, the term *excess limitation* means, with respect to a particular spouse and separate category for a taxable year for which a joint return is made, the excess of that spouse's separate category limitation over the foreign taxes paid or accrued by such spouse with respect to such separate category for such taxable year.

* * * * *

(h) *Applicability date.* This section is applicable for taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 20.** Section 1.904–4 is amended by:

■ 1. Revising paragraph (a).

■ 2. Removing the word ''or'' from the end of paragraph (b)(2)(i)(A).

■ 3. Removing the period from the end of paragraph (b)(2)(i)(B) and adding a semicolon in its place.

■ 4. Adding paragraphs (b)(2)(i)(C) and (D).

■ 5. Revising the first and second sentences and adding a sentence after the second sentence of paragraph (b)(2)(ii).

■ 6. Revising paragraph (b)(2)(iv).

■ 7. In paragraph (c)(1):

■ i. Removing the language ''shall not be'' from the first sentence and adding the language ''is not'' in its place.

■ ii. Revising the second, third, and fourth sentences and removing the last two sentences.

■ 8. Removing the language ''1.861–14T'' in the first sentence of paragraph (c)(2)(i) and adding the language ''1.861–17'' in its place.

■ 9. Adding paragraph (c)(2)(iii).

■ 10. In paragraph (c)(3) introductory text:

■ i. Removing the language ''shall be'' in the first sentence and adding the language ''are'' in its place.

■ ii. Revising the second, third, and fourth sentences, and adding a sentence after the fourth sentence.

■ 11. Revising paragraphs (c)(4) and (c)(5)(ii).

■ 12. Removing the second and third sentences of paragraphs (c)(5)(iii)(A) and (B).

■ 13. Revising paragraph (c)(5)(iii)(C).

■ 14. In paragraph (c)(6)(i):

■ i. Revising the first sentence.

■ ii. Removing the language ''deemed paid or accrued'' and adding the language ''deemed paid'' in its place and removing the word ''taxable'' in the second sentence.

■ 15. In paragraph (c)(6)(iii):

■ i. Revising the first, fourth, fifth, and sixth sentences.

■ ii. Removing the word ''taxable'' in the second and third sentences.

■ iii. Removing the language ''deemed paid or accrued'' and adding the language ''deemed paid'' in its place and removing ''(A),'' ''(B),'' and ''(C)'' in the third sentence.

■ 16. Revising paragraph (c)(6)(iv).

■ 17. In paragraph (c)(7)(i):

■ i. Removing the language ''is reduced'' and adding the language ''would be reduced'' in its place in the first sentence.

■ ii. Revising the second and sixth sentences.

■ 18. In paragraph (c)(7)(iii):

■ i. Removing the language ''general category income'' and adding the language ''income in another separate category'' in its place in the third sentence.

■ ii. Removing the last sentence.

■ 19. Revising paragraph (c)(8).

■ 20. Adding paragraph (d).

■ 21. Revising paragraph (e)(1).

■ 22. Removing and reserving paragraph (e)(2)(i)(W).

■ 23. Removing the seventh sentence of paragraph (e)(3)(i).

■ 24. Removing the last sentence of paragraph (e)(3)(ii).

■ 25. Removing and reserving paragraphs (e)(3)(iv) and (e)(4)(i)(B).

■ 26. Removing paragraph (e)(5).

■ 27. Adding paragraphs (f) and (g).

■ 28. Revising paragraphs (h)(2), (4), and (5) and (k) through (n).

■ 29. Adding paragraphs (o), (p), and (q).

The revisions and additions read as follows:

§ 1.904–4 Separate application of section 904 with respect to certain categories of income.

(a) *In general.* A taxpayer is required to compute a separate foreign tax credit limitation for income received or accrued in a taxable year that is described in section 904(d)(1)(A) (section 951A category income), 904(d)(1)(B) (foreign branch category income), 904(d)(1)(C) (passive category income), 904(d)(1)(D) (general category income), or paragraph (m) of this section (specified separate categories). For purposes of this section, the definitions in § 1.904–5(a)(4) apply.

(b) * * *

(2) * * *

(i) * * *

(C) Distributive shares of partnership income treated as passive category income under paragraph (n)(1) of this section, and income from the sale of a partnership interest treated as passive category income under paragraph (n)(2) of this section; or

(D) Income treated as passive category income under the look-through rules in § 1.904–5.

(ii) *Exceptions.* Passive income does not include any export financing interest (as defined in paragraph (h) of this section), any high-taxed income (as defined in paragraph (c) of this section), financial services income (as defined in paragraph (e)(1)(ii) of this section), or any active rents and royalties (as defined in paragraph (b)(2)(iii) of this section). In addition, passive income does not include any income that would otherwise be passive but is excluded from passive category income under § 1.904–5(b)(1) or that is assigned to a separate category other than passive category income under § 1.904–5(c)(4)(iii). See also paragraph (k) of this section for rules relating to income resourced under a tax treaty. * * *

* * * * *

(iv) *Examples.* The following examples illustrate the application of this paragraph (b)(2).

(A) *Example 1.* For Year 1, USP, a domestic corporation, has a net foreign currency gain that would not constitute foreign personal holding company income if USP were a controlled foreign corporation because the gain is directly related to the business needs of USP. See section 954(c)(1)(D). Under paragraph (b)(2)(i)(A) of this section, the foreign currency gain is, therefore, not passive category income to USP because it is not income of a kind that would be foreign personal holding company income.

(B) *Example 2.* Controlled foreign corporation, CFC, is a wholly-owned subsidiary of USP, a domestic corporation. CFC is regularly engaged in the restaurant franchise business. USP licenses trademarks, tradenames, certain know-how, related services, and certain restaurant designs for which CFC pays USP an arm's length royalty. USP is regularly engaged in the development and licensing of such property. Some of the franchisees are unrelated to CFC and USP. Other franchisees are related to CFC or USP and use the licensed property outside of CFC's country of incorporation. CFC does not satisfy, but USP does satisfy, the active trade or business requirements of section 954(c)(2)(A). The royalty income earned by CFC from both its related and unrelated franchisees is foreign personal holding company income because CFC does not satisfy the active trade or business requirements of section 954(c)(2)(A) and, in addition, the royalty income from the related franchisees does not qualify for the same country exception of section 954(c)(3) or the look-through exception in section 954(c)(6). However, all of the royalty income earned by CFC is general category income to CFC under § 1.904–4(b)(2)(iii) because USP, a member of CFC's affiliated group, satisfies the active trade or business test (which is applied without regard to whether the royalties are paid by a related person). USP's inclusion under section 951(a)(1)(A) of CFC's royalty income is general category income to USP under § 1.904–5(c)(5) and paragraph (d) of this section. The royalties received by USP are general category income to USP under § 1.904–5(b)(1) and paragraph (d) of this section.

* * * * *

(c) * * * (1) * * * Income is considered to be high-taxed income if, after allocating expenses, losses, and other deductions of the United States person to that income under paragraph (c)(2) of this section, the sum of the foreign income taxes paid or accrued, and deemed paid under section 960, by the United States person with respect to such income (reduced by any portion of such taxes for which a credit is not allowed) exceeds the highest rate of tax specified in section 1 or 11, whichever applies (and with reference to section 15 if applicable), multiplied by the amount of such income (including the amount treated as a dividend under section 78). If, after application of this paragraph (c), income that would otherwise be passive income is determined to be high-taxed income, the income is treated as general category income, foreign branch category income, section 951A category income, or income in a specified separate category, as determined under the rules of this section, and any taxes imposed on that income are considered related to the same separate category of income under § 1.904–6. If, after application of this paragraph (c), passive income is zero or less than zero, any taxes imposed on the passive income are considered related to the same separate category of income to which the passive income (if not reduced to zero or less than zero) would have been assigned had the income been treated as high-taxed income (general category, foreign branch category, section 951A category, or a specified separate category). * * *

(2) * * *

(iii) *Coordination with section 904(b), (f) and (g).* The determination of whether foreign source passive income is high-taxed is made before taking into account any adjustments under section 904(b) or any allocation or recapture of a separate limitation loss, overall foreign loss, or overall domestic loss under section 904(f) and (g).

(3) * * * Paragraph (c)(4) of this section provides additional rules for inclusions under section 951(a)(1) or 951A(a) that are passive income, dividends from a controlled foreign corporation or noncontrolled 10-percent owned foreign corporation that are passive income, and income that is received or accrued by a United States person through a foreign QBU that is passive income. For purposes of this paragraph (c), a foreign QBU is a qualified business unit (as defined in section 989(a)), other than a controlled foreign corporation or noncontrolled 10-percent owned foreign corporation, that has its principal place of business outside the United States. The rules in this paragraph (c)(3) apply whether the income is received from a controlled foreign corporation of which the United States person is a United States shareholder, from a noncontrolled 10-percent owned foreign corporation of which the United States person is a United States shareholder that is a domestic corporation, or from any other person. In applying the rules in this paragraph (c)(3), passive income is not treated as subject to a withholding tax or other foreign tax when a credit is disallowed in full for such foreign tax, for example, under section 901(k). * * *

* * * * *

(4) *Dividends and inclusions from controlled foreign corporations, dividends from noncontrolled 10-percent owned foreign corporations, and income attributable to foreign QBUs.* Except as provided in paragraph (c)(5) of this section, the rules of this paragraph (c)(4) apply to all dividends and all amounts included in gross income of a United States shareholder under section 951(a)(1) or 951A(a) with respect to the foreign corporation that (after application of the look-through rules of section 904(d)(3) and § 1.904–5) are attributable to passive income received or accrued by a controlled foreign corporation, all dividends from a noncontrolled 10-percent owned foreign corporation that are received or accrued by a United States shareholder that (after application of the look-through rules of section 904(d)(4) and § 1.904–5) are treated as passive income,

and all amounts of passive income received or accrued by a United States person through a foreign QBU. The grouping rules of paragraphs (c)(3)(i) through (iv) of this section apply separately to dividends, to inclusions under section 951(a)(1) and to inclusions under section 951A(a) with respect to each controlled foreign corporation of which the taxpayer is a United States shareholder, and to dividends with respect to each noncontrolled 10-percent owned foreign corporation of which the taxpayer is a United States shareholder that is a domestic corporation. The grouping rules of paragraphs (c)(3)(i) through (iv) of this section also apply separately to income attributable to each foreign QBU of a controlled foreign corporation, noncontrolled 10-percent owned foreign corporation, any other look-through entity as defined in § 1.904–5(i), or any United States person.

(5) * * *

(ii) *Treatment of partnership income.* A partner's distributive share of income from a foreign or domestic partnership that is treated as passive income under paragraph (n)(1)(ii) of this section (generally providing that a less than 10 percent partner's distributive share of partnership income is passive income) is treated as a single item of income and is not grouped with other amounts. A distributive share of income from a partnership that is treated as passive income under paragraph (n)(1)(i) of this section is grouped according to the rules in paragraph (c)(3) of this section, except that the portion, if any, of the distributive share of income attributable to income earned by a domestic partnership through a foreign QBU is separately grouped under the rules of paragraph (c)(4) of this section.

* * * * *

(iii) * * *

(C) *Example.* The following example illustrates the application of this paragraph (c)(5)(iii).

(*1*) *Facts.* USP, a domestic corporation, owns all of the stock of CFC, a controlled foreign corporation organized and operating in Country X that uses the ''u'' as its functional currency. In Year 1, when the highest rate of U.S. tax in section 11 is 21%, CFC earns 100u of passive category foreign personal holding company income subject to no foreign tax. When included in USP's income under section 951(a), the applicable exchange rate is 1u=$1x. Therefore, USP's section 951(a) inclusion is $100x and no foreign taxes are deemed paid by USP with respect to the inclusion. At the end of Year 1, CFC has previously taxed earnings and profits of 100u and USP's basis in those earnings is $100x. In Year 2, CFC has no earnings and profits and distributes 100u to USP. The value of the earnings when distributed is $150x. Assume that under section 986(c), USP must recognize $50x of passive category income attributable to the appreciation of the previously taxed earnings and profits. Country X does not recognize any gain or loss on the distribution, but imposes a 10u withholding tax on USP with respect to the distribution.

(*2*) *Analysis.* Because the section 986(c) gain is not subject to any foreign withholding tax or other foreign tax, under paragraph (c)(3)(iii) of this section the section 986(c) gain is grouped with other items of USP's income that are subject to no withholding tax or other foreign tax. Under paragraph (c)(6)(iii) of this section, the 10u withholding tax is related to passive category income. See section 960(c) and § 1.960–4 for rules relating to the increase in limitation in the year of distribution of previously taxed earnings and profits.

* * * * *

(6) * * * (i) * * * The determination of whether an amount included in gross income under section 951(a)(1) or 951A(a) is high-taxed income is made in the taxable year the income is included in the gross income of the United States shareholder under section 951(a) or 951A(a) (for purposes of this paragraph (c), the *year of inclusion*). * * *

* * * * *

(iii) * * * If an item of income is considered high-taxed income in the year of inclusion and paragraph (c)(6)(i) of this section applies, then any increase in foreign income taxes imposed with respect to that item are considered to be related to the same separate category to which the income was assigned in the taxable year of inclusion. * * * The taxpayer shall treat any taxes paid or accrued, or deemed paid, on the distribution in excess of this amount as taxes related to the same category of income to which such inclusion would have been assigned had the income been treated as high-taxed income in the year of inclusion (general category income, section 951A category income, or income in a specified separate category). If these additional taxes are not creditable in the year of distribution, the carryover rules of section 904(c) apply (see section 904(c) and § 1.904–2(a) for rules disallowing carryovers in the section 951A category). For purposes of this paragraph (c)(6), the foreign tax on an inclusion under section 951(a)(1) or 951A(a) is considered increased on distribution of the earnings and profits associated with that inclusion if the total of taxes paid and deemed paid on the inclusion and the distribution (taking into account any reductions in tax and any withholding taxes) exceeds the total taxes deemed paid in the year of inclusion. * * *

(iv) *Increase in taxes paid by successors.* If passive earnings and profits previously included in income of a United States shareholder are distributed to a person that was not a United States shareholder of the distributing corporation in the year the earnings were included, any increase in foreign taxes paid or accrued, or deemed paid, on that distribution is treated as taxes related to general category income (or income in a specified separate category, if applicable) in the case of earnings and profits previously included under section 951(a)(1), and is treated as taxes related to section 951A category income (or income in a specified separate category, if applicable) in the case of earnings and profits previously included under section 951A(a), regardless of whether the previously-taxed income was considered high-taxed income under section 904(d)(2)(F) in the year of inclusion.

(7) * * * (i) * * * If the inclusion is considered to be high-taxed income, then the taxpayer treats the inclusion as general category income, section 951A category income, or income in a specified separate category as provided in paragraph (c)(1) of this section. * * * For purposes of this paragraph (c)(7)(i), the foreign tax on an inclusion under section 951(a)(1) or 951A(a) is considered reduced on distribution of the earnings and profits associated with the inclusion if the total taxes paid and deemed paid on the inclusion and the distribution (taking into account any reductions in tax and any withholding taxes) is less than the total taxes deemed paid in the year of inclusion. * * *

* * * * *

(8) *Examples.* The following examples illustrate the application of this paragraph (c). All of the examples assume that the highest tax rate under section 11 is 21%, unless otherwise noted.

(i) *Example 1.* CFC, a controlled foreign corporation, is a wholly-owned subsidiary of domestic corporation USP. CFC is a single qualified business unit (QBU) operating in foreign Country X. In Year 1, CFC earns $130x of gross royalty income that is passive income from Country X sources, and incurs $30x of expenses that do not include any payments to USP. CFC's $100x of pre-tax passive income from the royalty is subject to $30x of foreign tax, and is included under section 951(a)(1) in USP's gross income for the taxable year. USP allocates $50x of expenses to the $100x (consisting of the $70x section 951(a)(1) inclusion and $30x section 78 amount), resulting in net passive income of $50x. USP does not elect to exclude from subpart F under section 954(b)(4) the $70x of CFC's net passive income. After application of the high-tax kick-out rules of paragraph (c) of this section, the $50x of USP's net passive income is treated as general category income, and the $30x of taxes deemed paid are treated as taxes imposed on general category income, because the foreign taxes paid and deemed paid on the income exceed the highest U.S. tax rate multiplied by the $50x of net passive income ($30x > $10.5x (21% × $50x)).

(ii) *Example 2.* CFC, a controlled foreign corporation, is a wholly-owned subsidiary of domestic corporation USP. CFC is incorporated and operating in Country Y and has a branch in Country Z. CFC has two QBUs (QBU Y and QBU Z). In Year 1, CFC earns $65x of gross royalty income that is passive income in Country Y through QBU Y and $65x of gross royalty income that is passive income in Country Z through QBU Z. CFC allocates $15x of expenses to the gross royalty income earned by each QBU, resulting in pre-tax passive income of $50x in each QBU. Country Y imposes $5x of foreign tax on the royalty income earned in Y, and Country Z imposes $10x of tax on royalty income earned in Z. All of CFC's income constitutes foreign personal holding company income that is passive income and is included under section 951(a)(1) in USP's gross income for the taxable year. USP allocates $50x of expenses pro rata to the $100x section 951(a)(1) inclusion attributable to the QBUs (consisting of the $45x section 951(a)(1) inclusion derived through QBU Y, the $5x section 78 amount attributable to QBU Y, the $40x section 951(a)(1) inclusion derived through QBU Z, and the $10x section 78 amount attributable to QBU Z), resulting in net passive income of $50x. Pursuant to paragraph (c)(4) of this section, the high-tax kickout rules must be applied separately to the subpart F inclusion attributable to the income earned by QBU Y and the income earned by QBU Z. After application of the high-tax kickout rules, the $25x of net passive income attributable to QBU Y will be treated as passive category income because the foreign taxes paid and deemed paid on the income do not exceed the highest U.S. tax rate multiplied by the $25x of net passive income ($5x < $5.25x (21% × $25x)). The $25x of net passive income attributable to QBU Z will be treated as general category income because the foreign taxes paid and deemed paid on the income exceed the highest U.S. tax rate multiplied by the $25x of net passive income ($10x > $5.25x (21% × $25x)).

(iii) *Example 3.* Domestic corporation USP operates in branch form in foreign countries X and Y. The branches are qualified business units (QBUs), within the meaning of section 989(a). In Year 1, QBU X earns passive royalty income, interest income, and rental income. All of the QBU X passive income is from Country Z sources. The royalty income is not subject to a withholding tax, and is not taxed by Country X, and the interest and the rental income are subject to a 4% and 10% withholding tax, respectively. QBU Y earns interest income in Country Y that is not subject to foreign tax. For purposes of determining whether USP's foreign source passive income is high-taxed income, the rental income and the interest income earned in QBU X are treated as one item of income pursuant to paragraph (c)(3)(ii) of this section. The interest income earned in QBU Y and the royalty income earned in QBU X are each treated as a separate item of income under paragraphs (c)(4) and (c)(3)(iii) of this section. If, after allocation of expenses, QBU X's items of income composed of rental income and interest income are high-taxed income, the income may be treated as foreign branch category income.

(iv) *Example 4.* CFC, a controlled foreign corporation incorporated in foreign Country R, is a wholly-owned subsidiary of USP, a domestic corporation. USP and CFC have calendar year taxable years for both U.S. and Country R tax purposes. The highest tax rate under section 11 is 34% and 21% in Year 1 and Year 2, respectively. For Year 1, USP is required under section 951(a)(1) to include in gross income $80x (not including the section 78 amount) attributable to the earnings and profits of CFC for such year, all of which is foreign personal holding company income that is passive rent or royalty income. CFC does not make any distributions in Year 1. Foreign income taxes paid by CFC for Year 1 that are deemed paid by USP for such year under section 960(a) with respect to the section 951(a)(1) inclusion equal $20x. USP properly allocates $30x of expenses to the section 951(a)(1) inclusion. The foreign income tax paid with respect to the section 951(a)(1) inclusion does not exceed the highest U.S. tax rate multiplied by the amount of income after allocation of USP's expenses ($20x < $23.80x (34% × $70x)). Thus, USP's section 951(a)(1) inclusion for Year 1 is included in USP's passive category income and the $20x of taxes attributable to that inclusion are treated as taxes related to passive category income. In Year 2, CFC distributes $70x to USP, and under section 959 that distribution is treated as attributable to the earnings and profits with respect to the amount included in income by USP in Year 1 and is excluded from USP's gross income. Foreign Country R imposes a withholding tax of $14x on the distribution in Year 2. Under paragraph (c)(6)(i) of this section, the withholding tax in Year 2 does not affect the characterization of the Year 1 inclusion as passive category income, nor does it affect the characterization of the $20x of taxes paid in Year 1 as taxes paid with respect to passive category income. No further expenses of USP are allocable to the receipt of that distribution. In Year 2, the foreign taxes paid ($14x) exceed the product of the highest U.S. tax rate and the amount of the inclusion reduced by taxes deemed paid in the year of inclusion ($14x > $3.80x ((34% × $70x) − $20x)). Thus, under paragraph (c)(6)(iii) of this section, $3.80x ((34% × $70x) − $20x) of the $14x withholding tax paid in Year 2 is treated as taxes related to passive category income and the remaining $10.20x ($14x − $3.80x) of the withholding tax is treated as related to general category income.

(v) through (viii) [Reserved]

(ix) *Example 9.* USP, a domestic corporation, earns $100x of passive royalty income from sources within the United States. Under the laws of Country X, however, that royalty is considered to be from sources within Country X, and Country X imposes a 5% withholding tax on the payment of the royalty. USP also earns $100x of foreign source passive dividend income from Country Y subject to a 10% withholding tax to which $15x of expenses are allocated. In determining whether USP's passive income is high-taxed, the $5x withholding tax on USP's royalty income is allocated to passive income, and to the group of passive income described in paragraph (c)(3)(ii) of this section (passive income subject to a withholding tax of less than 15% (but greater than zero)). For purposes of determining whether the income is high-taxed, however, only the $85x of foreign source dividend income (and not the $100x of U.S. source royalty income) is taken into account. The foreign source dividend income is treated as passive category income because the foreign taxes paid on the passive income in the group ($15x) do not exceed the highest U.S. tax rate multiplied by the $85x of net foreign source income in the group ($15x < $17.85x ($100x − $15x) × 21%).

(x) *Example 10.* In Year 1, P, a U.S. citizen with a tax home in Country X, earns the following items of gross income: $400x of foreign source, passive interest income not subject to foreign withholding tax but subject to Country X income tax of $100x, $200x of foreign source, passive royalty income subject to a 5% foreign withholding tax (foreign tax paid is $10x), $1,300x of foreign source, passive rental income subject to a 25% foreign withholding tax (foreign tax paid is $325x), $500x of foreign source, general category loss, and $2,000x of U.S. source capital gain that is not subject to any foreign tax. P has a $900x deduction allocable to its passive rental income. P's only other deduction is a $700x capital loss on the sale of stock that is allocated to foreign source passive category income under § 1.865–2(a)(3)(i). The $700x capital loss is initially allocated to the group of passive income described in paragraph (c)(3)(iv) of this section (passive income subject to no withholding tax but subject to foreign tax other than withholding tax). This group comprises the $400x of interest income not subject to foreign withholding tax but subject to Country X income tax. Under paragraph (c)(2)(ii) of this section, the $300x amount by which the capital loss exceeds the income in the group must be reallocated to the net income in the other groups described in paragraph (c)(3) of this section, but the $500x general category separate limitation loss is not allocated until the high-tax kickout rules are applied to determine whether the passive income is high-taxed income. P's $200x of royalty income subject to a 5% withholding tax is described in paragraph (c)(3)(i) of this section (passive income that is subject to a withholding tax of less than 15%, but greater than zero). P's $1,300x of rental income subject to a 25% withholding tax is described in paragraph (c)(3)(ii) of this section (passive income that is subject to a withholding tax of 15% or greater). The $1,300x of rental income is reduced by the $900x deduction allocable to such income. Therefore, the total net income in the other groups under paragraph (c)(3) is $600x, the $200x of royalty income and the $400x of rental income. The ($300x) net loss in the net basis tax group thus reduces the royalty income by $100x to $100x ($200x − ($300x × (200x/600x))) and the rental income by $200x to

$200x ($400x − ($300x × (400x/600x))). The $100x of net royalty income is not high-taxed and remains passive category income because the foreign taxes of $10x do not exceed the highest U.S. rate of tax on that income, which is 37% for individuals ($10x < $37x (37% × $100x)). Under the high-tax kickout, the $200x of rental income and the $325x of associated foreign tax are assigned to the general category.

(xi) *Example 11.* The facts are the same as in paragraph (c)(8)(x) of this section (the facts in *Example 10*), except the amount of the capital loss that is allocated under § 1.865–2(a)(3)(i) and paragraph (c)(2) of this section to the group of foreign source passive income subject to no withholding tax but subject to foreign tax other than withholding tax is $1,200x. Under paragraph (c)(2)(ii) of this section, the excess deductions of $800x must be reallocated to the $200x of net royalty income subject to a 5% withholding tax and the $400x of net rental income subject to a 15% or greater withholding tax. The income in each of these groups is reduced to zero, and the foreign taxes imposed on the rental and royalty income are considered related to general category income. The remaining loss of $200x constitutes a separate limitation loss with respect to passive category income.

(xii) *Example 12.* In Year 1, USP, a domestic corporation, earns a $100x dividend that is foreign source passive income subject to a 30% withholding tax. The dividend is not paid by a specified 10-percent owned foreign corporation (as defined in section 245A(b)(1)). A foreign tax credit for the withholding tax on the dividend is disallowed under section 901(k). A deduction for the tax is allowed, however, under sections 164 and 901(k)(7). In determining whether USP's passive income is high-taxed, under paragraph (c)(3) of this section the $100x dividend and the $30x deduction are allocated to the group of income described in paragraph (c)(3)(iv) of this section (passive income subject to no withholding tax or other foreign tax).

(d) *General category income.* The term *general category income* means all income other than passive category income, foreign branch category income, section 951A category income, and income in a specified separate category. Any item that is excluded from the passive category under paragraph (c) or (h) of this section or § 1.904–5(b)(1) is included in general category income only to the extent that such item does not meet the definition of another separate category. General category income also includes income treated as general category income under the look-through rules referenced in § 1.904–5(a)(2).

(e) * * * (1) *In general*—(i) *Treatment of financial services income.* Passive income that is characterized as financial services income is not assigned to the passive category but is assigned in accordance with this paragraph (e)(1)(i). Financial services income that meets the definition of foreign branch category income (see paragraph (f)(1) of this section) is treated as income in that category. Financial services income of a controlled foreign corporation that is included in gross income of a United States shareholder under section 951A(a) is treated as section 951A category income in the hands of the United States shareholder. Financial services income that is neither treated as foreign branch category income nor treated as section 951A category income is treated as general category income. Distributions, interest, rents, or royalties received from a related person that is a financial services entity that would be assigned to the passive category under the look-through rules in § 1.904–5, but for the fact such amounts are paid by a financial services entity (and, therefore, not attributable to passive category income of the payor), are assigned to separate categories (other than the passive category) under the rules in this section.

(ii) *Definition of financial services income.* The term *financial services income* means income derived by a financial services entity, as defined in paragraph (e)(3) of this section, that is:

(A) Income derived in the active conduct of a banking, insurance, financing, or similar business (active financing income as defined in paragraph (e)(2) of this section);

(B) Passive income as defined in section 904(d)(2)(B) and paragraph (b) of this section as determined before the application of the exception for high-taxed income but after the application of the exception for export financing interest; or

(C) Incidental income as defined in paragraph (e)(4) of this section.

* * * * *

(f) *Foreign branch category income*—(1) *Foreign branch category income*—(i) *In general.* Except as provided in paragraph (f)(1)(ii) of this section, the term *foreign branch category income* means income of a United States person, other than a pass-through entity, that is—

(A) Income attributable to foreign branches of the United States person held directly or indirectly through disregarded entities;

(B) A distributive share of partnership income that is attributable to foreign branches held by the partnership directly or indirectly through disregarded entities, or held indirectly by the partnership through another partnership or other pass-through entity that holds the foreign branch directly or indirectly through disregarded entities; and

(C) Income from other pass-through entities determined under principles similar to those described in paragraph (f)(1)(i)(B) of this section.

(ii) *Passive category income excluded from foreign branch category income.* Income assigned to the passive category under paragraph (b) of this section is not foreign branch category income, regardless of whether the income is described in paragraph (f)(1)(i) of this section. Income that is treated as passive category income under the look-through rules in § 1.904–5 is also excluded from foreign branch category income, regardless of whether the income is attributable to a foreign branch. However, income that would be passive category income but for the application of section 904(d)(2)(B)(iii) (export financing interest and high-taxed income) or 904(d)(2)(C) (financial services income) and also meets the definition of foreign branch category income is foreign branch category income.

(2) *Gross income attributable to a foreign branch*—(i) *In general.* Except as provided in this paragraph (f)(2), gross income is attributable to a foreign branch to the extent the gross income (as adjusted to conform to Federal income tax principles) is reflected on the separate set of books and records (as defined in § 1.989(a)–1(d)(1) and (2)) of the foreign branch. Gross income that is not attributable to the foreign branch and is therefore attributable to the foreign branch owner is income in a separate category (other than the foreign branch category) under the other rules of this section.

(ii) *Income attributable to U.S. activities.* Except as provided in paragraph (f)(2)(vi) of this section, gross income attributable to a foreign branch does not include items arising from activities carried out in the United States, regardless of whether the items are reflected on the foreign branch's separate books and records.

(iii) *Income arising from stock*—(A) *In general.* Except as provided in paragraph (f)(2)(iii)(B) of this section, gross income attributable to a foreign branch does not include items of income arising from stock of a corporation (whether foreign or domestic), including gain from the disposition of such stock or any inclusion under sections 951(a), 951A(a), 1248, or 1293(a).

(B) *Exception for dealer property.* Paragraph (f)(2)(iii)(A) of this section does not apply to gain recognized from dispositions of stock in a corporation, if the stock would be dealer property (as defined in § 1.954–2(a)(4)(v)) if the foreign branch were a controlled foreign corporation.

(iv) *Disposition of interests in certain entities*—(A) *In general.* Except as provided in paragraph (f)(2)(iv)(B) of this section, gross income attributable to a foreign branch does not include gain from the disposition of an interest in a partnership or other pass-through entity or an interest in a disregarded entity. See also paragraph (n)(2) of this section for general rules relating to the sale of a partnership interest.

(B) *Exception for sales by a foreign branch in the ordinary course of business.* The rule in paragraph (f)(2)(iv)(A) of this section does not apply to gain from the sale or exchange of an interest in a partnership or other pass-through entity or an interest in a disregarded entity if the gain is reflected on the books and records of a foreign branch and the interest is held by the foreign branch in the ordinary course of its active trade or business. An interest is considered to be held in the ordinary course of the foreign branch's active trade or business only if the foreign branch—

(*1*) Directly engages in the same, or a related, trade or business as that partnership, other pass-through entity, or disregarded entity; and

(*2*) In the case of a partnership or other pass-through entity, the foreign branch owns 10 percent or more of the capital or profits interests in the partnership or other pass-through entity.

(v) *Adjustments to items of gross income reflected on the books and records.* If a principal purpose of recording or failing to record an item of gross income on the books and records of a foreign branch, or of making or not making a disregarded payment described in paragraph (f)(2)(vi) of this section, is the avoidance of Federal income tax, the purposes of section 904, or the purposes of section 250 (in connection with section 250(b)(3)(A)(i)(VI)), the item must be attributed to one or more foreign branches or the foreign branch owner in a manner that reflects the substance of the transaction. For purposes of this paragraph (f)(2)(v), interest received by a foreign branch from a related person is presumed to be attributable to the foreign branch owner (and not to the foreign branch) unless the interest income meets the definition of financial services income under paragraph (e)(1)(ii) of this section. For purposes of this paragraph (f)(2)(v), a related person is any person that bears a relationship to the foreign branch owner described in section 267(b) or 707.

(vi) *Attribution of gross income to which disregarded payments are allocable*—(A) *In general.* If a foreign branch makes a disregarded payment to its foreign branch owner and the disregarded payment is allocable to gross income that would be attributable to the foreign branch under the rules in paragraphs (f)(2)(i) through (v) of this section, the gross income attributable to the foreign branch is adjusted downward to reflect the allocable amount of the disregarded payment, and the gross income attributable to the foreign branch owner is adjusted upward by the same amount, translated (if necessary) from the foreign branch's functional currency to U.S. dollars at the spot rate (as defined in § 1.988–1(d)) on the date of the disregarded payment. For rules addressing multiple disregarded payments in a taxable year, see paragraph (f)(2)(vi)(F) of this section. Similarly, if a foreign branch owner makes a disregarded payment to its foreign branch and the disregarded payment is allocable to gross income attributable to the foreign branch owner, the gross income attributable to the foreign branch owner is adjusted downward to reflect the allocable amount of the disregarded payment, and the gross income attributable to the foreign branch is adjusted upward by the same amount, translated (if necessary) from U.S. dollars to the foreign branch's functional currency at the spot rate on the date of the disregarded payment. An adjustment to the attribution of gross income under this paragraph (f)(2)(vi) does not change the total amount, character, or source of the United States person's gross income; does not change the amount of a United States person's income in any separate category other than the foreign branch and general categories (or a specified separate category associated with the foreign branch and general categories); and has no bearing on the analysis of whether an item of gross income is eligible to be resourced under an income tax treaty. The principles of the rules in this paragraph (f)(2)(vi)(A) also apply in the case of disregarded payments between a foreign branch and another foreign branch with the same foreign branch owner if either foreign branch makes a disregarded payment to, or receives a disregarded payment from, the foreign branch owner.

(B) *Allocation of disregarded payments*—(*1*) *In general.* Except as provided in paragraph (f)(2)(vi)(B)(*2*) of this section, whether a disregarded payment is allocable to gross income attributable to a foreign branch or gross income attributable to its foreign branch owner, and the source and separate category of the gross income to which the disregarded payment is allocable, is determined under the following rules:

(*i*) Disregarded payments from a foreign branch owner to its foreign branch are allocable to gross income attributable to the foreign branch owner to the extent a deduction for that payment or any disregarded cost recovery deduction relating to that payment, if regarded, would be allocated and apportioned to gross income attributable to the foreign branch owner under the principles of §§ 1.861–8 through 1.861–14T and 1.861–17 (without regard to exclusive apportionment) by treating foreign source gross income and U.S. source gross income in each separate category (determined prior to the application of this paragraph (f)(2)(vi) to the disregarded payment at issue) each as a statutory grouping; and

(*ii*) Disregarded payments from a foreign branch to its foreign branch owner are allocable to gross income attributable to the foreign branch to the extent a deduction for that payment or any disregarded cost recovery deduction relating to that payment, if regarded, would be allocated and apportioned to gross income attributable to the foreign branch under the principles of §§ 1.861–8 through 1.861–14T and 1.861–17 (without regard to exclusive apportionment) by treating foreign source gross income and U.S. source gross income in each separate category (determined prior to the application of this paragraph (f)(2)(vi) to the disregarded payment at issue) each as a statutory grouping.

(*2*) *Special rule for certain disregarded payments.* Whether a disregarded payment made in connection with a sale or exchange of property is allocable to gross income attributable to a foreign branch or its foreign branch owner, and the source and separate category of the gross income to which the disregarded payment is allocable, is determined under the following rules:

(*i*) Except as provided in paragraph (f)(2)(vi)(D) of this section, disregarded payments from a foreign branch owner to its foreign branch in respect of non-inventory property are allocable to the gross income attributable to the foreign branch owner, if any, that is recognized with respect to a regarded sale or exchange of that property (including gross income arising in a later taxable year) to the extent of the adjusted disregarded gain with respect to the transferred property, and in the same proportions as the source and separate category of the gain recognized on the regarded sale or exchange of the transferred property;

(*ii*) Except as provided in paragraph (f)(2)(vi)(D) of this section, disregarded payments from a foreign branch to its foreign branch owner or to another foreign branch in respect of non-inventory property are allocable to the gross income attributable to the foreign branch, if any, that is recognized with respect to a regarded sale or exchange of that property (including gross income arising in a later taxable year) to the extent of the adjusted disregarded gain with respect to the transferred property, and in the same proportions as the source and separate category of the gain recognized on the regarded sale or exchange of the transferred property; and

(*iii*) The principles of paragraphs (f)(2)(vi)(B)(*2*)(*i*) and (*ii*) of this section apply in the case of disregarded payments in respect of inventory property between a foreign branch and its foreign branch owner or between foreign branches to the extent the disregarded payment, if regarded, would, for purposes of determining gross income, be subtracted from gross receipts that are regarded for Federal income tax purposes.

(*3*) *Timing of reattribution*—(*i*) *In general.* The gross income attributable to the foreign branch is adjusted under paragraph (f)(2)(vi)(B)(*1*) of this section only in the taxable year that a disregarded payment, if regarded, would be allowed as a deduction (including by giving rise to disregarded cost recovery deductions), or otherwise would be taken into account as an increase to cost of goods sold.

(*ii*) *Disregarded sales of property.* The gross income attributable to a foreign branch is adjusted under paragraph (f)(2)(vi)(B)(*2*) of this section only in the taxable year or years in which gain is recognized by reason of the disposition of property with an adjusted disregarded basis in a transaction that is regarded for Federal income tax purposes.

(C) *Exclusion of certain disregarded payments.* Paragraph (f)(2)(vi)(A) of this section does not apply to the following payments, accruals, or other transfers between a foreign branch and its foreign branch owner, or between foreign branches, that are disregarded for Federal income tax purposes:

(*1*) Interest, and interest equivalents that, if regarded, would be described in §§ 1.861–9(b) and 1.861–9T(b);

(*2*) Remittances from the foreign branch to its foreign branch owner, except as provided in paragraph (f)(2)(vi)(D) of this section;

(*3*) Contributions of money, securities, and other property from the foreign branch owner to its foreign branch, except as provided in paragraph (f)(2)(vi)(D) of this section; or

(*4*) Any disregarded payment that, if made to a foreign branch and regarded for Federal income tax purposes, could not result in the attribution of gross income to a foreign branch (for example, the sale of an interest in a partnership by a foreign branch to its foreign branch owner, unless the sale or exchange occurred in the ordinary course of business within the meaning of paragraph (f)(2)(iv)(B) of this section).

(D) *Certain transfers of intangible property*—(*1*) *In general.* For purposes of applying this paragraph (f)(2)(vi), the amount of gross income attributable to a foreign branch (and the amount of gross income attributable to its foreign branch owner) must be adjusted under the principles of paragraph (f)(2)(vi)(B) of this section to reflect all transactions that are disregarded for Federal income tax purposes in which property described in section 367(d)(4) is transferred to or from a foreign branch or between foreign branches, whether or not a disregarded payment is made in connection with the transfer. In determining the amount of gross income that is attributable to a foreign branch that must be adjusted by reason of this paragraph (f)(2)(vi)(D), the principles of sections 367(d) and 482 apply. For example, if a foreign branch owner transfers property described in section 367(d)(4) to a foreign branch, the principles of section 367(d) are applied by treating the foreign branch as a separate foreign corporation to which the property is transferred in exchange for stock of the corporation in a transaction described in section 351. Similarly, if a foreign branch remits property described in section 367(d)(4) to its foreign branch owner, the foreign branch is treated as having sold the transferred property to the foreign branch owner in exchange for annual payments contingent on the productivity or use of the property, the amounts of which are determined under the principles of section 367(d).

(*2*) *Transactions occurring before December 7, 2018.* Paragraph (f)(2)(vi)(D)(*1*) of this section does not apply to a disregarded transfer of property that occurred before December 7, 2018.

(*3*) *Transitory ownership*—(*i*) *In general.* Paragraph (f)(2)(vi)(D)(*1*) of this section does not apply to disregarded transfers of property by a foreign branch or a foreign branch owner (such foreign branch or foreign branch owner, the *limited transferor*), if the conditions in paragraphs (f)(2)(vi)(D)(*3*)(*ii*) and (*iii*) of this section are met.

(*ii*) *Transitory ownership period.* The limited transferor's ownership of the property is transitory.

(*iii*) *Use of property.* The limited transferor does not develop, exploit, or otherwise employ the property in a trade or business, other than in the ordinary course of the limited transferor's business during the period of transitory ownership.

(*iv*) *Predecessors.* For purposes of paragraphs (f)(2)(vi)(D)(*3*)(*ii*) and (*iii*) of this section, a reference to a limited transferor that is a foreign branch owner includes any predecessor to the foreign branch owner. No person is a predecessor with respect to a foreign branch under this paragraph (f)(2)(vi)(D)(*3*)(*iv*).

(E) *Amount of disregarded payments.* The amount of each disregarded payment used to make an adjustment under this paragraph (f)(2)(vi) (or the absence of any adjustment) must be determined in a manner that results in the attribution of the proper amount of gross income to each of a foreign branch and its foreign branch owner under the principles of section 482, applied as if the foreign branch were a corporation.

(F) *Multiple disregarded payments.* In the case of multiple disregarded payments, this paragraph (f)(2)(vi) is applied with respect to each disregarded payment, and under the ordering rules specified in paragraphs (f)(2)(vi)(F)(*1*) and (*2*) of this section. For purposes of this paragraph (f)(2)(vi), paragraph (f)(2)(vi)(F)(*1*) of this section applies before paragraph (f)(2)(vi)(F)(*2*) of this section.

(*1*) *Income initially attributable to a foreign branch.* In applying this paragraph (f)(2)(vi) to gross income that would, but for this paragraph (f)(2)(vi), be attributable to a foreign branch, adjustments related to disregarded payments from a foreign branch to another foreign branch are computed first, followed by adjustments related to disregarded payments from a foreign branch to its foreign branch owner, followed by adjustments related to disregarded payments from a foreign branch owner to its foreign branch.

(*2*) *Income initially attributable to a foreign branch owner.* In applying this paragraph (f)(2)(vi) to gross income that would, but for this paragraph (f)(2)(vi), be attributable to a foreign branch owner, adjustments related to disregarded payments from a foreign branch owner to a foreign branch are computed first, followed by adjustments related to disregarded payments from a foreign branch to another foreign branch, followed by adjustments related to disregarded payments from a foreign branch to its foreign branch owner.

(3) *Definitions.* The following definitions apply for purposes of this paragraph (f).

(i) *Adjusted disregarded basis.* The term *adjusted disregarded basis* means, with respect to property transferred in a transaction that is disregarded for Federal income tax purposes, the tentative disregarded basis of the property—

(A) Reduced by any disregarded cost recovery deductions with respect to the property; and

(B) Increased by any disregarded section 1016(a)(1) expenditures with respect to the property.

(ii) *Adjusted disregarded gain*—(A) *In general.* The term *adjusted disregarded gain* means, with respect to property transferred in a transaction that is disregarded for Federal income tax purposes, the lesser of—

(*1*) The adjusted disregarded basis of the property, reduced by the adjusted basis of the property at the time the property was transferred in a transaction that is disregarded for Federal income tax purposes; and

(*2*) The gain (if any) attributable to a regarded sale or exchange of the transferred property.

(B) *Limitation.* Adjusted disregarded gain may not be less than zero.

(iii) *Disregarded cost recovery deduction.* For a taxable year, the term *disregarded cost recovery deduction* means, with respect to property transferred in a transaction that is disregarded for Federal income tax purposes—

(A) The amounts that would be allowed as a deduction, and that would give rise to an adjustment described in section 1016(a)(2), with respect to the transferred property if the transfer (and the foreign branch) were regarded for Federal income tax purposes, to the extent that, under paragraph (f)(2)(vi)(B)(*1*) of this section, the deduction would be allocable to—

(*1*) Gross income attributable to a foreign branch owner, in the case of property transferred to a foreign branch owner; or

(*2*) Gross income attributable to a foreign branch, in the case of property transferred to a foreign branch; reduced by

(B) The amounts that are allowed as a deduction, and that give rise to an adjustment described in section 1016(a)(2), with respect to the transferred property to the extent that, under the principles of paragraph (f)(2)(vi)(B)(*1*) of this section, the deduction would be allocable to—

(*1*) Gross income attributable to a foreign branch owner, in the case of property transferred to a foreign branch owner; or

(*2*) Gross income attributable to a foreign branch, in the case of property transferred to a foreign branch.

(iv) *Disregarded entity.* The term *disregarded entity* means an entity described in § 301.7701–2(c)(2) of this chapter that is disregarded as an entity separate from its owner for Federal income tax purposes.

(v) *Disregarded payment.* The term *disregarded payment* means any amount described in paragraph (f)(3)(v)(A) or (B) of this section.

(A) *Transfers to or from a disregarded entity.* An amount described in this paragraph (f)(3)(v)(A) is an amount that is transferred to or from a disregarded entity in connection with a transaction that is disregarded for Federal income tax purposes and that is reflected on the separate set of books and records of a foreign branch.

(B) *Other disregarded amounts.* An amount described in this paragraph (f)(3)(v)(B) is any amount reflected on the separate set of books and records of a foreign branch that would constitute an item of income, gain, deduction, or loss (other than an amount described in paragraph (f)(3)(v)(A) of this section), a distribution to or contribution from the foreign branch owner, or a payment in exchange for property if the transaction to which the amount is attributable were regarded for Federal income tax purposes.

(vi) *Disregarded section 1016(a)(1) expenditure.* The term *disregarded section 1016(a)(1) expenditure* means a disregarded payment that, if regarded for Federal income tax purposes, would be described in section 1016(a)(1) and that, under the principles of paragraph (f)(2)(vi)(B)(*1*) of this section, would be allocable to—

(A) General category gross income, in the case of property held by a foreign branch owner; or

(B) Foreign branch category income, in the case of property held by a foreign branch.

(vii) *Foreign branch*—(A) *In general.* The term *foreign branch* means a qualified business unit (QBU), as defined in § 1.989(a)–1(b)(2)(ii) and (b)(3), that conducts a trade or business outside the United States. For an illustration of the principles of this paragraph (f)(3)(vii), see paragraph (f)(4)(i) of this section (Example 1).

(B) *Trade or business outside the United States.* Activities carried out in the United States, whether or not such activities are described in § 1.989(a)–1(b)(3), do not constitute the conduct of a trade or business outside the United States. Activities carried out outside the United States that constitute a permanent establishment under the terms of an income tax treaty between the United States and the country in which the activities are treated as carried out pursuant to a trade or business conducted outside the United States for purposes of this paragraph (f)(3)(vii)(B). In determining whether activities constitute a trade or business under § 1.989(a)–1(c), disregarded payments are taken into account and may give rise to a trade or business, provided that the activities (together with any other activities of the QBU) would otherwise satisfy the rule in § 1.989(a)–1(c).

(C) *Activities of a partnership, estate, trust, or corporation*—(*1*) *Treatment as a foreign branch.* For purposes of this paragraph (f)(3)(vii), the activities of a partnership, estate, trust, or corporation that conducts a trade or business that satisfies the requirements of § 1.989(a)–1(b)(2)(ii)(A) (as modified by paragraph (f)(3)(vii)(B) of this section) are—

(*i*) Deemed to satisfy the requirements of § 1.989(a)–1(b)(2)(ii)(B); and

(*ii*) Comprise a foreign branch.

(*2*) *Separate set of books and records.* A foreign branch described in this paragraph (f)(3)(vii)(C) is treated as maintaining a separate set of books and records with respect to the activities described in paragraph (f)(3)(vii)(C)(*1*) of this section, and must determine, as the context requires, the items of gross income, disregarded payments, and any other items that would be reflected on those books and records in applying this paragraph (f) with respect to the foreign branch. The principles of § 1.1503(d)–5(c) apply for purposes of determining which items would be reflected on such books and records.

(viii) *Foreign branch owner.* The term *foreign branch owner* means, with respect to a foreign branch, the person (including a foreign or domestic partnership or other pass-through entity) that owns the foreign branch, either directly or indirectly through one or more disregarded entities. For purposes of this paragraph (f)(3)(viii), the foreign branch owner does not include the foreign branch or another foreign branch of the person that owns the foreign branch.

(ix) *Remittance.* The term *remittance* means a transfer of property (within the meaning of section 317(a)) by a foreign branch that would be treated as a distribution if the foreign branch were treated as a separate corporation.

(x) *Tentative disregarded basis.* The term *tentative disregarded basis* means, in connection with the transfer of property in a transaction that is disregarded for Federal income tax purposes, the basis that property would have if the disregarded payment made in exchange for the transferred property were treated as the cost of such property under section 1012(a).

(4) *Examples.* The following examples illustrate the application of this paragraph (f).

(i) *Example 1: Determination of foreign branches and foreign branch owner*—(A) *Facts*—(*1*) P, a domestic corporation, is a partner in PRS, a domestic partnership. All other partners in PRS are unrelated to P. PRS conducts activities solely in Country A (the Country A Business), and those activities constitute a trade or business outside the United States within the meaning of paragraph (f)(3)(vii)(B) of this section. PRS reflects items of income, gain, loss, and expense of the Country A Business on the books and records of PRS's home office. PRS is in the business of manufacturing bicycles.

(*2*) PRS owns FDE1, a disregarded entity organized in Country B. FDE1 conducts activities in Country B (the Country B Business), and those activities constitute a trade or business outside the United States within the meaning of paragraph (f)(3)(vii)(B) of this section. FDE1 maintains a set of books and records that are separate from those of PRS, and the separate set of books and records reflects items of income, gain, loss, and expense with respect to the Country B Business. FDE1 is in the business of selling bicycles manufactured by PRS.

(*3*) FDE1 owns FDE2, a disregarded entity organized in Country C. FDE2 conducts activities in Country C (the Country C Business), and those activities constitute a trade or business outside the United States within the meaning of paragraph (f)(3)(vii)(B) of this section. FDE2 maintains a set of books and records that are separate from those of PRS and FDE1, and the separate set of books and records reflects items of income, gain, loss, and expense with respect to the Country C Business. FDE2's paper business is not related to FDE1's bicycle sales business, and FDE1 does not hold its interest in FDE2 in the ordinary course of its trade or business.

(B) *Analysis*—(*1*) Country A Business's activities comprise a trade or business conducted outside the United States within the meaning of § 1.989(a)–1(b)(2)(ii)(A) and (b)(3) (in each case, as modified by paragraph (f)(3)(vii) of this section). PRS does not maintain a separate set of books and records with respect to the Country A Business. However, under paragraph (f)(3)(vii)(C) of this section, the Country A Business's activities are deemed to satisfy the requirement of § 1.989(a)–1(b)(2)(ii)(B) that a QBU maintain a separate set of books and records with respect to the relevant activities. Thus, for purposes of this paragraph (f), the activities of the Country A Business constitute a QBU as defined in § 1.989–1(b)(2)(ii) and (b)(3), as modified by paragraph (f)(3)(vii) of this section, that conducts a trade or business outside the United States. Accordingly, the activities of the Country A Business constitute a foreign branch within the meaning of paragraph (f)(3)(vii) of this section. PRS, the person that owns the Country A Business, is the foreign branch owner, within the meaning of paragraph (f)(3)(viii) of this section, with respect to the Country A Business.

(*2*) Country B Business's activities comprise a trade or business outside the United States within the meaning of § 1.989(a)–1(b)(2)(ii)(A) and (b)(3) (in each case, as modified by paragraph (f)(3)(vii) of this section). PRS maintains a separate set of books and records with respect to the Country B Business, as described in § 1.989(a)–1(b)(2)(ii)(B). Thus, for purposes of this section, the activities of the Country B Business constitute a QBU as defined in § 1.989–1(b)(2)(ii) and (b)(3), as modified by paragraph (f)(3)(vii) of this section, that conducts a trade or business outside the United States. Accordingly, the activities of the Country B Business constitute a foreign branch within the meaning of paragraph (f)(3)(vii) of this section. Under paragraph (f)(3)(viii) of this section, PRS, the person that owns the Country B Business indirectly through FDE1 (a disregarded entity), is the foreign branch owner with respect to the Country B Business.

(*3*) The same analysis that applies to the Country B Business applies to the Country C Business. Accordingly, the activities of the Country C Business constitute a foreign branch within the meaning of paragraph (f)(3)(vii) of this section. PRS, the person that owns the Country C Business indirectly through FDE1 and FDE2 (disregarded entities), is the foreign branch owner with respect to the Country C Business.

(ii) *Example 2: Sale of foreign branch*—(A) *Facts.* The facts are the same as in paragraph (f)(4)(i)(A) of this section (the facts in *Example 1*), except that in Year 1, FDE1 sells FDE2 to an unrelated person, recording gain from the sale on its books and records. In Year 2, PRS sells FDE1 to another unrelated person, recording gain from the sale on its books and records. In each year, PRS allocates a portion of the gain to P.

(B) *Analysis*—(*1*) *Sale of FDE2.* Under paragraph (f)(1)(i)(B) of this section, P's distributive share of gain recognized by PRS in connection with the sales of FDE1 and FDE2 constitutes foreign branch category income if it is attributable to a foreign branch held by PRS directly or indirectly through one or more disregarded entities. PRS's gross income from the Year 1 sale of FDE2 is reflected on the separate set of books and records maintained with respect to the Country B Business (a foreign branch) operated by FDE1. Therefore, absent an exception, under paragraph (f)(2)(i) of this section PRS's gross income from the sale of FDE2 would be attributable to the Country B Business, and would constitute foreign branch category income. However, under paragraph (f)(2)(iv) of this section, gross income attributable to the Country B Business does not include gain from the sale or exchange of an interest in FDE2, a disregarded entity, unless the interest in FDE2 is held by the Country B Business in the ordinary course of its active trade or business (within the meaning of paragraph (f)(2)(iv)(B) of this section). In this case, the Country B Business does not hold FDE2 in the ordinary course of its active trade or business within the meaning of paragraph (f)(2)(iv)(B) of this section. As a result, P's distributive share of gain from the sale of FDE2 is not attributable to a foreign branch, and is not foreign branch category income.

(*2*) *Sale of FDE1.* The analysis of PRS's sale of FDE1 in Year 2 is the same as the analysis for the sale of FDE2, except that PRS, through its Country A Business, holds FDE1 in the ordinary course of its active trade or business within the meaning of paragraph (f)(2)(iv)(B) of this section because the Country A Business engages in a trade or business that is related to the trade or business of FDE1. Therefore, P's distributive share of gain from the sale of FDE1 is attributable to a foreign branch, and is foreign branch category income.

(iii) *Example 3: Disregarded payment for services*—(A) *Facts.* P, a domestic corporation, owns FDE, a disregarded entity that is a foreign branch within the meaning of paragraph (f)(3)(vii) of this section. FDE's functional currency is the U.S. dollar. In Year 1, P accrues and records on its books and records (and not FDE's books and records) $1,000x of gross income from the performance of services to unrelated parties that is not passive category income, $400x of which is foreign source income in respect of services performed outside the United States by employees of FDE and $600x of which is U.S. source income in respect of services performed in the United States. Absent the application of paragraph (f)(2)(vi) of this section, the $1,000x of gross income earned by P would be general category income that would not be attributable to FDE. FDE provides services in support of P's gross income from services. P compensates FDE for its services with an arm's length payment of $400x, which is disregarded for Federal income tax purposes. The deduction for the payment of $400x from P to FDE would be allocated to P's $1,000x of general category gross services income and apportioned entirely to the $400x of foreign source services income under §§ 1.861–8 and 1.861–8T principles (treating foreign source general category gross income and U.S. source general category gross income each as a statutory grouping) if the payment were regarded for Federal income tax purposes.

(B) *Analysis.* The disregarded payment from P, a United States person, to FDE, its foreign branch, is not recorded on FDE's separate books and records (as adjusted to conform to Federal income tax principles) within the meaning of paragraph (f)(2)(i) of this section because it is disregarded for Federal income tax purposes. However, the disregarded payment is allocable to gross income attributable to P because a deduction for the payment, if it were regarded, would be allocated and apportioned to the $400x of P's foreign source services income. Accordingly, under paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*3*) of this section, the amount of gross income attributable to the FDE foreign branch (and the gross income attributable to P) is adjusted in Year 1 to take the disregarded payment into account. As such, $400x of P's foreign source gross income from the performance of services is attributable to the FDE foreign branch for purposes of this section. Therefore, $400x of the foreign source gross income that P earned with respect to its services in Year 1 constitutes gross income that is assigned to the foreign branch category.

(iv) *Example 4: Disregarded payment for non-inventory property*—(A) *Facts.* P, a domestic corporation, owns FDE, a disregarded entity that is a foreign branch within the meaning of paragraph (f)(3)(vii) of this section. FDE's functional currency is the U.S. dollar. P holds Asset A, a non-depreciable asset, with an adjusted basis of $200x. In Year 1, P sells Asset A, which will be used in FDE's manufacturing business, to FDE for $500x. FDE makes no other disregarded payments with respect to Asset A. No adjustments described in section 1016(a) apply with respect to Asset A while FDE holds Asset A. In Year 3, FDE sells Asset A to a third party for $600x and reflects $400x of gross income on its separate set of books and records (that is, $600x amount realized less Asset A's $200x adjusted basis). Under sections 865(e)(1) and 904(d)(2)(B)(i), the income arising from the sale of Asset A is foreign source income that is not treated as passive category income. Asset A is not inventory property. Absent the application of paragraph (f)(2)(vi) of this section, the entire $400x of gross income earned by P by reason of FDE's sale of Asset A would be attributable to FDE and be treated as foreign branch category income.

(B) *Analysis*—(*1*) *Disregarded basis determinations.* If regarded, the $500x payment from FDE to P would result in FDE holding Asset A with a basis of $500x under section 1012. Accordingly, the tentative disregarded basis (within the meaning of paragraph (f)(3)(x) of this section) with respect to Asset A is $500x. Because there are no adjustments described in section 1016 with respect to Asset A (including any adjustments resulting from any disregarded payments made with respect to the transferred property), the adjusted disregarded basis (within the meaning of paragraph (f)(3)(i) of this section) with respect to Asset A is $500x.

(*2*) *Adjusted disregarded gain.* Under paragraph (f)(3)(ii) of this section, the adjusted disregarded gain with respect to Asset A is $300x, which is equal to the lesser of $300x (FDE's adjusted disregarded basis in Asset A ($500x) less the adjusted basis of Asset A at the time that Asset A was transferred to FDE ($200x)) and $400x (the gain (if any) attributable to the regarded sale or exchange of Asset A).

(*3*) *Attribution of gross income.* Under paragraph (f)(2)(vi)(A) of this section, the gross income attributable to FDE ($400x) is adjusted downward to the extent that the $500x disregarded payment from FDE to P is allocable to gross income of FDE that is reflected on FDE's separate set of books and records. Under paragraph (f)(2)(vi)(B)(*2*)(*ii*) of this section, the $500x payment from FDE to P is allocable to gross income attributable to FDE to the extent of FDE's adjusted disregarded gain ($300x) with respect to Asset A. The source and separate category of the gross income of FDE to which the payment is allocable is proportionate to the source and separate category of the gain recognized by FDE with respect to Asset A. Accordingly, $300x of the payment is allocable to foreign source income that would be foreign branch category income. Thus, under paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*3*) of this section, foreign source gross income attributable to P is adjusted upward by $300x (increasing foreign source general category income by $300x) and foreign source gross income attributable to FDE is adjusted downward by $300x (decreasing foreign source foreign branch category income by $300x) in Year 3.

(v) *Example 5: Disregarded payment for depreciable non-inventory property*—(A) *Facts.* The facts are the same as in paragraph (f)(4)(iv)(A) of this section (the facts in *Example 4*), except as set forth in this paragraph (f)(4)(v)(A). Asset A is depreciable property. In Year 2, P is entitled to a $20x depreciation deduction with respect to Asset A, $18x of which is allocated and apportioned to non-passive category gross income attributable to FDE under §§ 1.861–8 through 1.861–14T and $2x of which is allocated and apportioned to passive category gross income under §§ 1.861–8 through 1.861–14T. If the transfer of Asset A were regarded for Federal income tax purposes, FDE would be entitled to a $50x depreciation deduction, 90% of which would be allocated and apportioned to non-passive category gross income attributable to FDE under §§ 1.861–8 through 1.861–14T and 10% of which would be allocated and apportioned to passive category gross income under §§ 1.861–8 through 1.861–14T. In Year 2, FDE earns $315x of gross income that it reflects on its books and records that, in the absence of paragraph (f)(2)(vi) of this section, would be foreign branch category income. FDE also earns $35x of passive category income in Year 2 from the non-active rental of a portion of Asset A. In Year 3, FDE reflects $420x of gross income on its separate set of books and records by reason of the sale of Asset A (that is, $600x amount realized less Asset A's $180x adjusted basis), $42x of which is passive category income under paragraph (b) of this section.

(B) *Analysis*—(*1*) *Attribution of gross income in Year 2.* The disregarded payment from FDE to P in Year 1 is disregarded for Federal income tax purposes, and does not generate gross income. However, under paragraph (f)(2)(vi)(B)(*1*)(*ii*) of this section, the disregarded payment is allocable to gross income attributable to FDE to the extent of any disregarded cost recovery deduction relating to that payment in Year 2. Under paragraph (f)(3)(iii) of this section, the disregarded cost recovery deduction with respect to Asset A is $30x, which is $50x (the amount that would be allowed as a deduction, and that would give rise to an adjustment described in section 1016(a)(2), with respect to Asset A if the transfer of Asset A to FDE were regarded for Federal income tax purposes, to the extent that the deduction would be allocable to income attributable to a foreign branch), reduced by $20x (the amount allowed as a deduction, and that gives rise to an adjustment described in section 1016(a)(2), with respect to Asset A, to the extent allocable to income attributable to a foreign branch). If regarded, $27x (90% of $30x) of the disregarded cost recovery deduction would be allocated and apportioned to non-passive category gross income attributable to FDE under §§ 1.861–8 through 1.861–14T and $3x (10% of $30x) would be allocated and apportioned to passive category gross income under §§ 1.861–8 through 1.861–14T. Accordingly, under paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*3*) of this section, the $315x of non-passive category gross income that would otherwise be attributed to FDE is reduced to $288x ($315x less $27x), and the non-passive category gross income attributable to P is increased by $27x in Year 2. As a result, in Year 2, P's foreign branch category gross income is $288x, and its general category gross income is increased by $27x. P's passive category gross income is $35x. *See* paragraphs (f)(1)(ii) and (f)(2)(vi)(A) of this section.

(*2*) *Attribution of gross income in Year 3*—(*i*) *Adjusted disregarded basis.* If regarded, the $500x payment from FDE to P would result in FDE holding Asset A with a basis of $500x under section 1012. Accordingly, the tentative disregarded basis (within the meaning of paragraph (f)(3)(x) of this section) with respect to Asset A is $500x. To determine FDE's adjusted disregarded basis with respect to Asset A under paragraph (f)(3)(i) of this section, FDE's tentative disregarded basis is reduced by $30x (the disregarded cost recovery deduction with respect to Asset A), resulting in an adjusted disregarded basis of $470x.

(*ii*) *Adjusted disregarded gain.* Under paragraph (f)(3)(ii) of this section, the adjusted disregarded gain with respect to Asset A is $270x, which is equal to the lesser of $270x (FDE's adjusted disregarded basis in Asset A ($470x) less the adjusted basis of Asset A at the time that Asset A was transferred to FDE ($200x)), and $420x (the gain attributable to the regarded sale or exchange of Asset A).

(*iii*) *Sale of Asset A.* Under paragraph (f)(2)(vi)(A) of this section, the gross income attributable to FDE ($420x) by reason of the sale of Asset A is adjusted downward to the extent that the $500x disregarded payment from FDE to P is allocable to gross income that would be attributable to FDE under paragraphs (f)(2)(i) through (v) of this section. Under paragraph (f)(2)(vi)(B)(*2*)(*ii*) of this section, the $500x payment from FDE to P is allocable to gross income attributable to FDE to the extent of the adjusted disregarded gain with respect to Asset A, which is $270x. The source and separate category of the gross income of FDE to which that amount is allocable is proportionate to the source and separate category of the $420x of gain recognized on the regarded sale of Asset A ($378x of foreign source non-passive category income and $42x of foreign source passive category income). Consequently, under paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*3*) of this section, in Year 3, gross income attributable to P is adjusted upward by $270x (increasing P's foreign source general category gross income by $243x, which bears the same proportion to $270x as the foreign source non-passive gain ($378x) bears to P's overall gain with respect to Asset A ($420x)), and the foreign source gross income attributable to FDE is adjusted downward by $270x (with foreign source foreign branch category gross income reduced by $243x). P also has $42x of foreign source passive category income from the sale of Asset A. *See* paragraphs (f)(1)(ii) and (f)(2)(vi)(A) of this section.

(vi) *Example 6: Disregarded payment for non-depreciable non-inventory property—regarded gain limitation*—(A) *Facts.* The facts are the same as in paragraph (f)(4)(iv)(A) of this section (the facts in *Example 4*), except that in Year 3, FDE sells Asset A to a third party for $340x and reflects $140x of gross income on its separate set of books and records (that is, $340x amount realized less Asset A's $200x adjusted basis), none of which is passive category income.

(B) *Analysis.* The analysis is the same as the analysis in paragraph (f)(4)(iv)(B) of this section (the analysis in *Example 4*), except that in Year 3, the adjusted disregarded gain with respect to Asset A is $140x, which is equal to the lesser of $300x (FDE's adjusted disregarded basis in Asset A ($500x) less the adjusted basis of Asset A at the time that Asset A was transferred to FDE ($200x)), and $140x (the gain attributable to the regarded sale or exchange of Asset A). Accordingly, under paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*3*) of this section, gross income attributable to P is adjusted upward by $140x (increasing P's foreign source general category gross income by $140x) and gross income attributable to FDE is adjusted downward by $140x (decreasing P's foreign source foreign branch category gross income by $140x) in Year 3.

(vii) *Example 7: Disregarded payment for non-depreciable non-inventory property—loss*—(A) *Facts.* The facts are the same as in paragraph (f)(4)(iv)(A) of this section (the facts in *Example 4*), except that in Year 3, FDE sells Asset A to a third party for $175x and reflects a $25x loss on its separate set of books and records (that is, $175x amount realized less Asset A's $200x adjusted basis).

(B) *Analysis.* The analysis is the same as the analysis in paragraph (f)(4)(iv)(B) of this section (the analysis in *Example 4*), except that in Year 3, the adjusted disregarded gain with respect to Asset A is $0x, which is equal to the lesser of $300x (FDE's adjusted disregarded basis in Asset A ($500x) less the adjusted basis of Asset A at the time that Asset A was transferred to FDE ($200x)), and $0x (the gain attributable to the regarded sale or exchange of Asset A). Accordingly, gross income amounts attributable to P and FDE are not adjusted under paragraph (f)(2)(vi)(A) of this section by reason of the transfer of Asset A from P to FDE.

(viii) *Example 8: Disregarded payment for non-depreciable non-inventory property—disregarded gain limitation*—(A) *Facts.* The facts are the same as in paragraph (f)(4)(iv)(A) of this section (the facts in *Example 4*), except that in Year 1, P sells Asset A to FDE for $65x.

(B) *Analysis.* The analysis is the same as the analysis in paragraph (f)(4)(iv)(B) of this section (the analysis in *Example 4*), except that in Year 3, the tentative disregarded basis and the adjusted disregarded basis with respect to Asset A are $65x. Under paragraph (f)(3)(ii)(B) of this section, the adjusted disregarded gain with respect to Asset A is $0x. Accordingly, under paragraph (f)(2)(vi)(A) of this section, gross income amounts attributable to P and FDE are not adjusted under paragraph (f)(2)(vi)(A) of this section by reason of the transfer of Asset A from P to FDE.

(ix) *Example 9: Application of the rules to the sale of inventory from a foreign branch owner to a foreign branch for distribution*—(A) *Facts.* P, a domestic corporation, owns FDE, a disregarded entity that is a foreign branch within the meaning of paragraph (f)(3)(vii) of this section. FDE's functional currency is the U.S. dollar. P manufactures portable electronic devices, which it sells to FDE for $1,500x during a taxable year in a transaction that is disregarded for Federal income tax purposes. In the same taxable year, FDE sells the portable electronic devices to its customers for $1,750x. P uses an overall accrual method of accounting and has $1,300x of cost of goods sold for the taxable year, $1,200x of which were incurred prior to the disregarded sale to FDE and recorded on P's separate set of books and records and $100x of which were incurred after the disregarded sale and recorded on the books and records of FDE. P reports $450x of gross income for the taxable year: $1,750x of gross receipts less cost of goods sold of $1,300x. The $450x of gross income from the sale of portable electronic devices is U.S. source income under section 863(b).

(B) *Analysis*—(*1*) *In general.* The gross receipts from the sale of portable electronic devices ($1,750x), which results in U.S. source gross income of $450x, is recorded on FDE's separate books and records (as adjusted to conform to Federal income tax principles). Therefore, the gross income ($450x) generally would be foreign branch category income under paragraph (f)(2)(i) of this section. However, under paragraph (f)(2)(vi)(A) of this section, the amount of gross income attributable to FDE (and the gross income attributable to P) is adjusted to take the disregarded payment for the portable electronic devices from FDE to P into account. If both FDE and the disregarded payment from FDE to P were recognized for Federal income tax purposes, the amount of the payment ($1,500x) would reduce FDE's gross income. Therefore, under paragraph (f)(2)(vi)(B)(*2*)(*iii*) of this section, the principles of paragraph (f)(2)(vi)(B)(*2*)(*ii*) of this section apply for purposes of determining whether, and to what extent, the disregarded payment is allocable to non-passive category income attributable to FDE for purposes of determining the extent of any adjustment.

(*2*) *Applying the principles of the tangible property rules to sales of inventory.* The principles of paragraph (f)(2)(vi)(B)(*2*)(*ii*) of this section are applied by treating the cost of goods sold with respect to expenses recorded on P's separate set of books and records ($1,200x) similarly to the adjusted basis at the time of the disregarded sale; the gross income ($450x) similarly to gain from the disposition of non-inventory property; and the lesser of the recognized gross income ($450x) and the disregarded payment less the cost of goods sold attributable to expenses reflected on P's separate set of books and records ($1,500x less $1,200x) similarly to disregarded gain ($300x). Accordingly, under paragraph (f)(2)(vi)(A) of this section, general category U.S. source gross income attributable to P is adjusted upward by $300x and the non-passive category U.S. source gross income attributable to FDE is adjusted downward by $300x.

(x) *Example 10: Gross income initially attributable to a foreign branch*—(A) *Facts*—(*1*) *Overview.* P, a domestic corporation, owns FDE, which is a disregarded entity that is a foreign branch within the meaning of paragraph (f)(3)(vii) of this section that has the U.S. dollar as its functional currency. P, which is a foreign branch owner with respect to FDE, also conducts a trade or business in the United States. During a single taxable year, P and FDE engage in the transactions described in paragraphs (f)(4)(x)(A)(*2*) and (*3*) of this section.

(*2*) *Unrelated party transactions.* P, through its U.S. office, accrues and records on its books and records $5,000x of gross income from the performance of accounting services for Customer A, an unrelated party (the Customer A services). The gross income from the Customer A services performed by P is non-passive category income and, under section 861(a)(3), is U.S. source income. Absent the application of paragraph (f)(2)(vi) of this section, the gross income earned by P through its U.S. office would be general category income. FDE accrues and records on its books and records $3,400x of gross income from the performance of web design services for Customer B, an unrelated party (the Customer B services). The gross income from the Customer B services performed by FDE is non-passive category income and, under section 862(a)(3), is foreign source income. Absent the application of paragraph (f)(2)(vi) of this section, the $3,400x of gross income earned by FDE would be foreign branch category income.

(*3*) *Disregarded payments.* FDE provides web design services to P. As compensation for those services, P pays $300x to FDE. The deduction for P's payment to FDE (if regarded) would be allocable to the $5,000x of general category U.S. source gross income earned from P's performance of the Customer A services. P provides accounting services to FDE from P's U.S. office. As compensation for those services, FDE pays $300x to P. The deduction for FDE's payment to P (if regarded) would be allocable to the $3,400x of non-passive category foreign source gross income earned from FDE's performance of the Customer B services.

(B) *Analysis*—(*1*) *Application of multiple disregarded payments rule.* Under paragraph (f)(2)(vi)(F) of this section, paragraph (f)(2)(vi) of this section applies to determine the effects of the disregarded payments described in paragraph (f)(4)(x)(A)(*3*) of this section on gross income initially attributable to FDE before paragraph (f)(2)(vi) of this section is applied to gross income initially attributable to P.

(*2*) *Disregarded payment from FDE to P.* The disregarded payment from FDE to P is disregarded for Federal income tax purposes, and does not generate gross income. However, the disregarded payment is allocable to non-passive category gross income attributable to FDE because a deduction for the payment, if it were regarded, would be allocated to FDE's $3,400x of non-passive category foreign source gross services income under § 1.861–8. Under paragraph (f)(2)(vi)(A) of this section, the amount of non-passive category foreign source gross income attributable to

FDE is adjusted downward, and the amount of general category foreign source gross income attributable to P (in its capacity as a foreign branch owner) is adjusted upward, to take the disregarded payment into account. Thus, $300x of FDE's foreign source gross income relating to the Customer B services is attributable to P for purposes of this section, and $3,100x of that income is attributable to FDE.

(*3*) *Disregarded payment from P to FDE.* The disregarded payment from P to FDE is not recorded on FDE's separate books and records (as adjusted to conform to Federal income tax principles) within the meaning of paragraph (f)(2)(i) of this section because it is disregarded for Federal income tax purposes. However, the disregarded payment is allocable to general category U.S. source gross income attributable to P because a deduction for the payment, if it were regarded, would be allocated to P's $5,000x of general category U.S. source gross services income under § 1.861–8. Accordingly, under paragraph (f)(2)(vi)(A) of this section, the amount of general category U.S. source gross income attributable to P is adjusted downward, and the amount of non-passive category U.S. source gross income attributable to FDE is adjusted upward, to take the disregarded payment into account. Thus, $300x of P's U.S. source gross income from the performance of Customer A services is attributable to FDE for purposes of this section, and $4,700x of that income is attributable to P.

(xi) *Example 11: Ordering rule*—(A) *Facts*—(*1*) *Overview.* P, a domestic corporation, owns FDE1 and FDE2, each of which is a disregarded entity that is a foreign branch within the meaning of paragraph (f)(3)(vii) of this section that has the U.S. dollar as its functional currency. P, which is a foreign branch owner with respect to FDE1 and FDE2, also conducts a trade or business in the United States. During a single taxable year, P, FDE1, and FDE2 engage in the transactions described in paragraphs (f)(4)(xi)(A)(*2*) and (*3*) of this section.

(*2*) *Unrelated party transactions.* FDE1 accrues and records on its books and records $1,000x of gross income from the performance of services for Customer A, an unrelated party (the Customer A services). The gross income from the Customer A services performed by FDE is non-passive category income and, under section 862(a)(3), is foreign source income. Absent the application of paragraph (f)(2)(vi) of this section, the $1,000x of non-passive foreign source gross income earned by FDE1 would be foreign branch category income. FDE2 accrues and records on its books and records $1,100x of gross income from royalties received from Customer B, an unrelated party (the Customer B royalties) on licensed intangible property developed by FDE2 and used by Customer B in the United States. The gross income from the Customer B royalties is non-passive category income and under section 861(a)(4) is U.S. source income. Absent the application of paragraph (f)(2)(vi) of this section, the $1,100x of non-passive category U.S. source gross income earned by FDE2 would be foreign branch category income.

(*3*) *Disregarded payments.* FDE2 provides services to FDE1. As compensation for those services, FDE1 pays $200x to FDE2. The deduction for FDE1's payment to FDE2 (if regarded) would be allocable to the $1,000x of non-passive category foreign source gross income earned from the Customer A services. P provides services to FDE2 from P's U.S. office. As compensation for those services, FDE2 pays $50x to P. The deduction for FDE2's payment to P (if regarded) would be allocable to the non-passive category foreign source gross income attributable to FDE2 (see paragraph (f)(4)(xi)(B)(*1*) of this section) relating to gross income from the Customer A services.

(B) *Analysis*—(*1*) *Disregarded payment from FDE1 to FDE2.* The $1,000x of gross income earned by FDE1 from the Customer A services would, but for paragraph (f)(2)(vi) of this section, be attributable to FDE1 (a foreign branch). Accordingly, under paragraph (f)(2)(vi)(F)(*1*) of this section, adjustments related to disregarded payments from FDE1 to FDE2 are computed before adjustments related to disregarded payments from FDE2 to P (in its capacity as a foreign branch owner). The disregarded payment from FDE1 to FDE2 is not recorded on FDE2's separate books and records (as adjusted to conform to Federal income tax principles) within the meaning of paragraph (f)(2)(i) of this section because it is disregarded for Federal income tax purposes. However, the disregarded payment is allocable to gross income attributable to FDE1 because a deduction for the payment, if it were regarded, would be allocated to FDE1's $1,000x of non-passive category foreign source gross services income under § 1.861–8. Accordingly, under paragraph (f)(2)(vi)(A) of this section, the amount of non-passive category foreign source gross income attributable to FDE1 is adjusted downward, and the amount of non-passive category foreign source gross income attributable to FDE2 is adjusted upward, to take the disregarded payment into account. Thus, $200x of FDE1's non-passive category foreign source gross income from the performance of Customer A services is attributable to FDE2 for purposes of this section, and $800x of that income is attributable to FDE1.

(*2*) *Disregarded payment from FDE2 to P.* The disregarded payment from FDE2 to P is disregarded for Federal income tax purposes, and does not generate gross income. However, the disregarded payment is allocable to gross income attributable to FDE2 because a deduction for the payment, if it were regarded, would be allocated to FDE2's $200x of non-passive category foreign source gross services income under § 1.861–8. Under paragraph (f)(2)(vi)(A) of this section, the amount of non-passive category foreign source gross income attributable to FDE2 is adjusted downward, and the amount of general category foreign source gross income attributable to P is adjusted upward, to take the $50x disregarded payment into account. Thus, $50x of non-passive category foreign source gross income relating to the Customer A services is attributable to P for purposes of this section, $150x of that income is attributable to FDE2, and $800x of that income remains attributable to FDE1. FDE2's $1,100x of U.S. source royalty income is not adjusted under paragraph (f)(2)(vi) of this section and remains foreign branch category income.

(xii) *Example 12: Application of intangible property rules*—(A) *Facts.* P, a domestic corporation that has a calendar taxable year, owns FDE, a disregarded entity that is a foreign branch within the meaning of paragraph (f)(3)(vii) of this section. FDE's functional currency is the U.S. dollar. Asset A, a patent with a useful life ending on December 31, Year 2, was obtained with respect to a discovery that was made by FDE in the course of its trade or business and was used in that trade or business until December 31, Year 1. On December 31, Year 1, FDE remits Asset A to P and receives no consideration. Asset A has an adjusted basis of $0. In Year 2, P uses Asset A to generate general category gross income. P earns $1,000x of general category U.S. source gross income in Year 2, including the income generated by its use of Asset A. If FDE were a domestic corporation, P were a foreign corporation, and Asset A had been transferred in exchange for stock in a transaction described in section 351, such that section 367(d) applied by its terms (but all other facts remained the same), the payment determined under section 367(d) for Year 2 would be $300x. A disregarded payment for the use of Asset A, if it were regarded, would be allocated to FDE's $1,000x of general category U.S. source gross income under § 1.861–8.

(B) *Analysis.* The remittance of Asset A by FDE to P is a transfer of intangible property described in section 367(d)(4) from a foreign branch to its foreign branch owner. The facts in paragraph (f)(4)(xii)(A) of this section do not implicate an exception in paragraph (f)(2)(vi)(D)(*2*) or (*3*) of this section. Therefore, this is a transaction to which paragraph (f)(2)(vi)(D)(*1*) of this section applies. The foreign branch is treated as having sold the transferred property to the foreign branch owner in exchange for annual payments contingent on the productivity or use of the property, the amount of which for Year 2 is determined under the principles of section 367(d) to be $300x. Thus, in Year 2, P is treated as making a $300x disregarded payment to FDE. The payment would be allocable to general category U.S. source income under paragraph (f)(2)(vi)(B)(*1*)(*i*) of this section. Therefore, $300x of P's non-passive category U.S. source gross income is attributable to FDE under paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*3*) of this section. P has $700x of general category U.S. source gross income and $300x of foreign branch category U.S. source gross income in Year 2.

(g) *Section 951A category income*—(1) *In general.* Except as provided in paragraph (g)(2) of this section, the term *section 951A category income* means amounts included (directly or indirectly through a pass-through entity) in gross income of a United States person under section 951A(a).

(2) *Exceptions for passive category income.* Section 951A category income does not include any amounts included under section 951A(a) that are allocable

to passive category income under § 1.904–5(c)(6).

(h) * * *

(2) *Treatment of export financing interest.* Except as provided in paragraph (h)(3) of this section, if a taxpayer (including a financial services entity) receives or accrues export financing interest from an unrelated person, then that interest is not treated as passive category income. Instead, the interest income is treated as foreign branch category income, section 951A category income, general category income, or income in a specified separate category under the rules of this section.

* * * * *

(4) *Examples.* The following examples illustrate the application of paragraph (h)(3) of this section.

(i) *Example 1.* Controlled foreign corporation CFC is a wholly-owned subsidiary of domestic corporation USP. CFC is not a financial services entity and has accumulated cash reserves. USP has uncollected trade and service receivables of foreign obligors. USP sells the receivables at a discount (''factors'') to CFC. The income derived by CFC on the receivables is related person factoring income. The income is also export financing interest. Because the income is related person factoring income, the income is passive category income to CFC.

(ii) *Example 2.* Domestic corporation USS is a wholly-owned subsidiary of domestic corporation USP. USS is not a financial services entity, does not have any foreign qualified business entities, and has accumulated cash reserves. USP has uncollected trade and service receivables of foreign obligors. USP factors the receivables to USS. The income derived by USS on the receivables is related person factoring income. The income is also export financing interest. The income will be passive category income to USS.

(iii) *Example 3.* The facts are the same as in paragraph (h)(4)(ii) of this section (the facts in *Example 2*), except that instead of factoring USP's receivables, USS finances the sales of USP's goods by making loans to the purchasers of USP's goods. The interest derived by USS on these loans is export financing interest and is not related person factoring income. The income will be general category income to USS.

(5) *Income eligible for section 864(d)(7) exception (same country exception) from related person factoring treatment*—(i) *Income other than interest.* If any foreign person receives or accrues income that is described in section 864(d)(7) (income on a trade or service receivable acquired from a related person in the same foreign country as the recipient) and such income would also meet the definition of export financing interest if section 864(d)(1) applied to such income (income on a trade or service receivable acquired from a related person treated as interest), then the income is considered to be export financing interest and is not treated as passive category income. The income is treated as foreign branch category income, section 951A category income, general category income, or income in a specified separate category under the rules of this section.

(ii) *Interest income.* If export financing interest is received or accrued by any foreign person and that income would otherwise be treated as related person factoring income of a controlled foreign corporation under section 864(d)(6) if section 864(d)(7) did not apply, section 904(d)(2)(B)(iii)(I) applies and the interest is not treated as passive category income. The income is treated as general category income in the hands of the controlled foreign corporation.

(iii) *Examples.* The following examples illustrate the application of this paragraph (h)(5):

(A) *Example 1.* CFC1, a controlled foreign corporation, is a wholly-owned subsidiary of domestic corporation USP. CFC2, a controlled foreign corporation, is a wholly-owned subsidiary of CFC1. CFC1 and CFC2 are incorporated in Country M. In Year 1, USP sells tractors to CFC2, which CFC2 sells to X, an unrelated foreign corporation organized in Country M. The tractors are to be used in Country M. CFC2 uses a substantial part of its assets in its trade or business located in Country M. CFC2 has uncollected trade receivables from X that it factors to CFC1. The income is not related person factoring income because it is described in section 864(d)(7) (income eligible for the same country exception) and is tested income. If section 864(d)(1) applied, the income CFC1 derived from the receivables would meet the definition of export financing interest. The income, therefore, is considered to be export financing interest and is general category income to CFC1 and may be section 951A category income to USP.

(B) *Example 2.* CFC1, a controlled foreign corporation, is a wholly-owned subsidiary of domestic corporation, USP. CFC2, a controlled foreign corporation, is a wholly-owned subsidiary of CFC1. CFC1 and CFC2 are incorporated in Country M. In Year 1, USP sells tractors to CFC2, which CFC2 sells to X, a foreign partnership that is organized in Country M and is related to CFC1 and CFC2. CFC1 makes a loan to X to finance the tractor sales. The interest earned by CFC1 from financing the sales is described in section 864(d)(7) and is export financing interest and is tested income. Therefore, the income is general category income to CFC1 and may be section 951A category income to USP.

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(k) *Separate category under section 904(d)(6) or 865(h) for items resourced under treaties*—(1) *Section 904(d)(6)*—(i) *In general.* Except as provided in paragraph (k)(1)(iv)(A) of this section, sections 904(a), (b), (c), (d), (f), and (g) and sections 907 and 960 are applied separately to any item of income that, without regard to a treaty obligation of the United States, would be treated as derived from sources within the United States, but under a treaty obligation of the United States such item of income would be treated as arising from sources outside the United States, and the taxpayer chooses the benefits of such treaty obligation.

(ii) *Aggregation of items of income in each other separate category.* For purposes of applying the general rule of paragraph (k)(1) of this section, items of income in each other separate category of income that are resourced under each applicable treaty are aggregated in a single separate category for income in that separate category that is resourced under that treaty. For example, all items of passive category income that would otherwise be treated as derived from sources within the United States but which the taxpayer chooses to treat as arising from sources outside the United States pursuant to a provision of a bilateral U.S. income tax treaty are treated as income in a separate category for passive category income resourced under the particular treaty, and the high-tax kickout grouping rules of paragraph (c) of this section are applied separately to the groups of passive income included in that separate category. Any items of resourced high-taxed passive income are assigned to a separate category for general (or other) category income resourced under a tax treaty. Items of income described in paragraph (k)(1) of this section are not combined with other income that is foreign source income under the Code, even if the other income arises from sources within the jurisdiction with which the United States has a bilateral income tax treaty (''treaty jurisdiction'') and is included in the same separate category to which the resourced income would be assigned without regard to section 904(d)(6). Items of income described in paragraph (k)(1) of this section are also not combined with other items of resourced income that are subject to a separate limitation by reason of a Code provision other than section 904(d)(6).

(iii) *Related taxes.* Foreign taxes, including foreign taxes paid to a foreign jurisdiction other than the treaty jurisdiction on an item of resourced income, are allocated to each separate category described in paragraph (k)(1)(ii) of this section in accordance with § 1.904–6.

(iv) *Coordination with certain income tax treaty provisions*—(A) *Exception for* *special relief from double taxation for individual residents of treaty jurisdictions.* Section 904(d)(6)(A) and paragraph (k)(1) of this section do not apply to any item of income deemed to be from foreign sources by reason of the relief from double taxation rules in any U.S. income tax treaty that is solely applicable to U.S. citizens who are residents of the other Contracting State.

(B) *U.S. competent authority assistance.* For purposes of applying paragraph (k)(1) of this section, if, under the mutual agreement procedure provisions of an applicable income tax treaty, the U.S. competent authority agrees to allow a taxpayer to treat an item of income as foreign source income, where such item of income would otherwise be treated as derived from sources within the United States, then the taxpayer is considered to have chosen the benefits of such treaty obligation to treat the item as foreign source income.

(v) *Coordination with other Code provisions.* Section 904(d)(6)(A) and paragraph (k)(1) of this section do not apply to any item of income to which any of section 245(a)(10), 865(h), or 904(h)(10) applies. *See also* paragraph (l) of this section.

(2) *Section 865(h).* If any gain, as defined in section 865(h)(2)(A)(i), would be treated as derived from sources within the United States under section 865, but pursuant to a treaty obligation of the United States such gain would be treated as arising from sources outside the United States, and the taxpayer chooses the benefits of such treaty obligation, then that gain will be treated as foreign source income. However, sections 904(a), (b), (c), (d), (f), and (g) and sections 907 and 960 are applied separately to amounts described in the preceding sentence with respect to each treaty under which the taxpayer has claimed benefits and, within each treaty, to each separate category of income. The principles of the rules in paragraphs (k)(1)(ii) through (iv) of this section apply to gains, and foreign taxes on gains, that are subject to a separate limitation under section 865(h).

(l) *Priority rule.* Income that meets the definitions of a specified separate category and another category of income described in section 904(d)(1) is subject to the separate limitation described in paragraph (m) of this section and is not treated as general category income, foreign branch category income, passive category income, or section 951A category income.

(m) *Income treated as allocable to a specified separate category.* If section 904(a), (b), and (c) are applied separately to any category of income under the Internal Revenue Code (for example, under section 245(a)(10), 865(h), 901(j), 904(d)(6), or 904(h)(10)), that category of income is treated for all purposes of the Internal Revenue Code as if it were a separate category listed in section 904(d)(1). For purposes of this section, a separate category that is treated as if it were listed in section 904(d)(1) by reason of the first sentence in this paragraph (m) is referred to as a *specified separate category.*

(n) *Income from partnerships and other pass-through entities*—(1) *Distributive shares of partnership income*—(i) *In general.* Except as provided in paragraph (n)(1)(ii) of this section, a partner's distributive share of partnership income is characterized as passive category income to the extent that the distributive share is a share of income earned or accrued by the partnership in the passive category. A partner's distributive share of partnership income that is not described in the first sentence of this paragraph (n) is treated as foreign branch category income, general category income, or income in a specified separate category under the rules of this section. The principles of the rules in this paragraph (n)(1)(i) also apply to characterize a person's share of income from any other pass-through entity.

(ii) *Less than 10 percent partners partnership interests*—(A) *In general.* Except as provided in paragraph (n)(1)(ii)(B) of this section, if any limited partner owns less than 10 percent of the value in a partnership, the partner's distributive share of partnership income from the partnership is passive income to the partner (subject to the exception for high-taxed income under section 904(d)(2)(B)(iii)(II) and paragraph (c) of this section), and the partner's distributive share of partnership deductions from the partnership is allocated and apportioned under the principles of § 1.861–8 only to the partner's passive income from that partnership. See also § 1.861–9(e)(4) for rules for apportioning partnership interest expense.

(B) *Exception for partnership interest held in the ordinary course of business.* If a partnership interest described in paragraph (n)(1)(ii)(A) of this section is held in the ordinary course of a partner's active trade or business, the rules of paragraph (n)(1)(i) of this section apply for purposes of characterizing the partner's distributive share of the partnership income. A partnership interest is considered to be held in the ordinary course of a partner's active trade or business if the partner (or a member of the partner's affiliated group of corporations (within the meaning of section 1504(a) and without regard to section 1504(b)(3))) engages (other than through a less than 10 percent interest in a partnership) in the same or a related trade or business as the partnership.

(2) *Income from the sale of a partnership interest*—(i) *In general.* To the extent a partner recognizes gain on the sale of a partnership interest, that income shall be treated as passive income to the partner, subject to the exception for high-taxed income under section 904(d)(2)(B)(iii)(II) and paragraph (c) of this section.

(ii) *Exception for sale by 25-percent owner.* Except as provided in paragraph (f)(2)(iv) of this section, in the case of a sale of an interest in a partnership by a partner that is a 25-percent owner of the partnership, determined by applying section 954(c)(4)(B) and substituting ''partner'' for ''controlled foreign corporation'' every place it appears, for purposes of determining the separate category to which the income recognized on the sale of the partnership interest is assigned such partner is treated as selling the proportionate share of the assets of the partnership attributable to such interest.

(3) *Value of a partnership interest.* For purposes of paragraphs (n)(1) and (2) of this section, a partner will be considered as owning 10 percent of the value of a partnership for a particular year if the partner, together with any person that bears a relationship to the partner described in section 267(b) or 707, owns 10 percent of the capital and profits interest of the partnership. For purposes of this paragraph (n)(3), value will be determined at the end of the partnership's taxable year.

(4) *Example.* The following example illustrates the application of this paragraph (n).

(i) *Facts.* PRS is a domestic partnership. PRS has two general partners, A and B. A and B each have a greater than 10% interest in PRS. PRS also has two limited partners, C and D. C has a 50% interest in the partnership and D has a 9% interest. D's partnership interest is not held in the ordinary course of business. A, B, C and D are all United States persons. In Year 1, PRS has $100x of general category non-subpart F income on which it pays no foreign tax.

(ii) *Analysis.* Under paragraph (n)(1)(i) of this section, A's, B's, and C's distributive shares of PRS's income are not passive category income. Under paragraph (n)(1)(ii)(A) of this section, because D is a limited partner with a less than 10% interest in PRS, D's distributive share of PRS's income is passive category income.

(o) *Separate category of section 78 gross up.* The amount included in income under section 78 by reason of taxes deemed paid under section 960 is assigned to the separate category to which the taxes are allocated under § 1.904–6(b).

(p) *Separate category of foreign currency gain or loss.* Foreign currency gain or loss recognized under section 986(c) with respect to a distribution of previously taxed earnings and profits (as described in section 959 or 1293(c)) is assigned to the separate category or categories of the previously taxed earnings and profits from which the distribution is made. See § 1.987–6(b) for rules on assigning section 987 gain or loss on a remittance from a section 987 QBU to a separate category or categories.

(q) *Applicability dates.* This section applies for taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 21.** Section 1.904–5 is amended by:

■ 1. Revising paragraphs (a), (b), and (c)(1).

■ 2. Revising the third and fourth sentences and adding a sentence to the end of paragraph (c)(2)(i).

■ 3. Removing the language ''noncontrolled section 902 corporation'' and adding the language ''noncontrolled 10-percent owned foreign corporation'' in its place in the heading and text of paragraph (c)(2)(iii).

■ 4. Revising paragraphs (c)(2)(v) and (c)(3).

■ 5. In paragraph (c)(4)(i):

■ i. Revising the first sentence.

■ ii. Removing the language ''paragraph'' and adding the language ''paragraph (c)(4)'' in its place in the second sentence.

■ 6. Revising paragraph (c)(4)(iii).

■ 7. Removing paragraph (c)(4)(iv).

■ 8. Adding paragraphs (c)(5), (6), and (7).

■ 9. Revising paragraphs (d)(1), (2), and (3) and (e)(2).

■ 10. Removing and reserving paragraph (f)(1).

■ 11. Removing paragraph (f)(3).

■ 12. In paragraph (g):

■ i. Removing the language ''section 904(d)(3) and this section'' and adding the language ''paragraph (c) of this section'' in its place in the first sentence.

■ ii. Removing the language ''United States corporation'' and adding the language ''domestic corporation'' wherever it appears.

■ iii. Removing the last sentence.

■ 13. Revising paragraph (h).

■ 14. In paragraph (i)(1):

■ i. Removing the language ''paragraphs (i)(2), (3), and (4)'' and adding the language ''paragraphs (i)(2) and (3)'' in its place in the first sentence.

■ ii. In the second sentence:

■ A. Removing the language ''noncontrolled section 902 corporation'' and adding the language ''noncontrolled 10-percent owned foreign corporation''.

■ B. Removing the language ''paragraph (i)(4)'' and adding the language ''paragraph (i)(3)'' in its place.

■ iii. Revising the sixth and seventh sentences.

■ 15. Revising paragraph (i)(2) and (3).

■ 16. Removing and reserving paragraph (i)(4).

■ 17. Revising paragraph (i)(5).

■ 18. Removing the last sentence of paragraph (j).

■ 19. Adding the language ''under § 1.904–4'' after the language ''characterized'' in the first sentence of paragraph (k)(1).

■ 20. Revising paragraphs (k)(2)(iii) and (l).

■ 21. In paragraph (m)(1):

■ i. Removing the language ''noncontrolled section 902 corporations'' and adding the language ''noncontrolled 10-percent owned foreign corporations'' in its place and removing the language ''noncontrolled section 902 corporation'' and adding the language ''noncontrolled 10-percent owned foreign corporation'' in its place.

■ ii. Removing the language ''or amount treated as a dividend, including'' and adding the language ''which, for purposes of this paragraph (m), includes'' in its place in the third sentence.

■ iii. Removing the language ''951(a)(1)(A),'' and adding the language ''951(a)(1)(A), 951A(a),'' in its place in the fourth sentence.

■ 22. Revising paragraphs (m)(2)(ii), (m)(3), and (m)(4)(i).

■ 23. Removing paragraph (m)(4)(iii).

■ 24. Revising the heading of paragraph (m)(5), the first sentence of paragraph (m)(5)(i), and paragraph (m)(5)(ii).

■ 25. Removing the language ''section 902(a) and section 960(a)(1)'' and adding the language ''section 960'' in its place in paragraph (m)(6).

■ 26. In paragraph (m)(7)(i):

■ i. Removing the language ''904(g)(6)'' and ''904(g)'' from the first sentence and adding the language ''904(h)(6)'' and ''904(h)'' in its place, respectively.

■ ii. Removing the language ''(d) and (f)'' from the second sentence and adding the language ''(d), (f), and (g)'' in its place and removing the language ''902,''.

■ 27. Revising paragraph (m)(7)(ii).

■ 28. In paragraph (n):

■ i. Removing the language ''noncontrolled section 902 corporation'' and adding the language ''noncontrolled 10-percent owned foreign corporation'' in its place, and by removing the language ''section 904(d)(1)'' and adding ''§ 1.904–4'' in its place in the first sentence.

■ ii. Revising the last sentence.

■ 29. Revising paragraph (o).

The additions and revisions read as follows:

§ 1.904–5 Look-through rules as applied to controlled foreign corporations and other entities.

(a) *Scope and definitions*—(1) *Look-through rules under section 904(d)(3) to passive category income.* Paragraph (c) of this section provides rules for determining the extent to which dividends, interest, rents, and royalties received or accrued by certain eligible persons, and inclusions under sections 951(a)(1) and 951A(a), are treated as passive category income. Paragraph (g) of this section provides rules applying the principles of paragraph (c) of this section to foreign source interest, rents, and royalties paid by a domestic corporation to a related corporation. Paragraph (h) of this section provides rules for assigning a partnership payment to a partner described in section 707 to the passive category. Paragraph (i) of this section provides rules applying the principles of this section to assign distributions and payments from certain related entities to the passive category or to treat the distributions and payments as not in the passive category.

(2) *Other look-through rules under section 904(d).* Under section 904(d)(4) and paragraph (c)(4)(iii) of this section, certain dividends from noncontrolled 10-percent owned foreign corporations are treated as income in a separate category. Under section 904(d)(3)(H) and paragraph (j) of this section, certain inclusions under section 1293 are treated as income in a separate category. Paragraph (i) of this section provides rules applying the principles of this section to assign distributions from certain related entities to separate categories.

(3) *Other rules provided in this section.* Paragraph (b) of this section provides operative rules for this section. Paragraph (d) of this section provides rules addressing exceptions to passive category income for certain purposes in the case of controlled foreign corporations that meet the requirements of section 954(b)(3)(A) (de minimis rule) or section 954(b)(4) (high-tax exception). Paragraph (e) of this section provides rules for characterizing a controlled foreign corporation's foreign base company income and gross insurance income when section 954(b)(3)(B) (full inclusion rule) applies. Paragraph (f) of

this section modifies the look-through rules for certain types of income. Paragraph (k) of this section provides ordering rules for applying the look-through rules. Paragraph (l) of this section provides examples illustrating the application of certain rules in this section. Paragraphs (m) and (n) of this section provide rules related to the resourcing rules described in section 904(h).

(4) *Definitions.* For purposes of this section, the following definitions apply:

(i) The term *controlled foreign corporation* has the meaning given such term by section 957 (taking into account the special rule for certain captive insurance companies contained in section 953(c)).

(ii) The term *look-through rules* means the rules described in this section that assign income to a separate category based on the separate category of the income to which it is allocable.

(iii) The term *noncontrolled 10-percent owned foreign corporation* has the meaning provided in section 904(d)(2)(E)(i).

(iv) The term *pass-through entity* means a partnership, S corporation, or any other person (whether domestic or foreign) other than a corporation to the extent that the income or deductions of the person are included in the income of one or more direct or indirect owners or beneficiaries of the person. For example, if a domestic trust is subject to Federal income tax on a portion of its income and its owners are subject to tax on the remaining portion, the domestic trust is treated as a domestic pass-through entity with respect to such remaining portion.

(v) The term *separate category* means, as the context requires, any category of income described in section 904(d)(1)(A), (B), (C), or (D), any specified separate category of income as defined in § 1.904–4(m), or any category of earnings and profits to which income described in such provisions is attributable.

(vi) The term *United States shareholder* has the meaning given such term by section 951(b) (taking into account the special rule for certain captive insurance companies contained in section 953(c)), except that for purposes of this section, a United States shareholder includes any member of the controlled group of the United States shareholder. For purposes of this paragraph (a)(4)(vi), the controlled group is any member of the affiliated group within the meaning of section 1504(a)(1) except that ''more than 50 percent'' is substituted for ''at least 80 percent'' wherever it appears in section 1504(a)(2). When used in reference to a noncontrolled 10-percent owned foreign corporation described in section 904(d)(2)(E)(i)(II), the term *United States shareholder* also means a taxpayer that meets the stock ownership requirements described in section 904(d)(2)(E)(i)(II).

(b) *Operative rules*—(1) *Assignment of income not assigned under the look-through rules.* Except as provided by the look-through rules, dividends, interest, rents, and royalties received or accrued by a taxpayer from a controlled foreign corporation in which the taxpayer is a United States shareholder are excluded from passive category income. Income excluded from the passive category under this paragraph (b)(1) is assigned to another separate category (other than the passive category) under the rules in § 1.904–4.

(2) *Priority and ordering of look-through rules.* Except as provided in this paragraph (b)(2), to the extent the look-through rules assign income to a separate category, the income is assigned to that separate category rather than the separate category to which the income would have been assigned under § 1.904–4 (not taking into account § 1.904–4(l)). See paragraph (k) of this section for ordering rules for applying the look-through rules. However, passive income that is financial services income is assigned to a separate category under the rules in § 1.904–4(e)(1), (f)(1), and (l), regardless of whether the look-through rules otherwise would have assigned such income to the passive category.

(c) * * * (1) *Scope.* Subject to the exceptions in paragraph (f) of this section, paragraphs (c)(2) through (6) (other than paragraph (c)(4)(iii) of this section) of this section provide look-through rules with respect to interest, rents, royalties, dividends, and inclusions under sections 951(a)(1) and 951A(a) that are received or accrued from a controlled foreign corporation in which the taxpayer is a United States shareholder. Paragraph (c)(4)(iii) of this section provides a look-through rule for dividends received from a noncontrolled 10-percent owned foreign corporation by a domestic corporation that is a United States shareholder in the foreign corporation.

(2) * * * (i) * * * Related person interest is treated as passive category income to the extent it is allocable to passive category income of the controlled foreign corporation. If related person interest is received or accrued from a controlled foreign corporation by two or more persons, the amount of interest received or accrued by each person that is allocable to passive category income is determined by multiplying the amount of related person interest allocable to passive category income by a fraction. * * * Solely for purposes of assigning interest income to a separate category under section 904(d)(3) and the look-through rule in this paragraph (c)(2), the rules in paragraph (c)(2)(ii) of this section for allocating and apportioning interest expense of a controlled foreign corporation apply for purposes of characterizing interest income in the hands of the recipient, even if a deduction for the interest expense is deferred or disallowed to the controlled foreign corporation.

* * * * *

(v) *Examples.* The following examples illustrate the application of this paragraph (c)(2).

(A) *Example 1*—(*1*) CFC, a controlled foreign corporation, is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns $200x of foreign personal holding company income that is passive category income. CFC also earns $100x of foreign base company sales income that is general category income. CFC has $2,000x of passive category assets and $2,000x of general category assets. In Year 1, CFC makes a $150x interest payment to USP with respect to a $1,500x loan from USP. CFC also pays $100x of interest to an unrelated person on a $1,000x loan from that person. CFC has no other expenses. CFC uses the asset method to apportion interest expense.

(*2*) Under paragraph (c)(2)(ii)(C) of this section, the $150x related person interest payment is allocable to CFC's passive category foreign personal holding company income. Therefore, the $150x interest payment is passive category income to USP. Because the entire related person interest payment is allocated to passive category income under paragraph (c)(2)(ii)(C) of this section, none of the related person interest payment is apportioned to general category income under paragraph (c)(2)(ii)(D) of this section. Under paragraph (c)(2)(iv)(B) of this section, the entire amount of the related person debt is allocable to passive category assets ($1,500x = $1,500x × $150x/$150x). Under paragraph (c)(2)(ii)(E) of this section, $20x of the interest expense paid to an unrelated person is apportioned to passive category income ($20x = $100x × ($2,000x − $1,500x)/($4,000x − $1,500x)), and $80x of the interest expense paid to an unrelated person is apportioned to general category income ($80x = $100x × $2,000x/($4,000x − $1,500x)).

(B) *Example 2.* The facts are the same as in paragraph (c)(2)(v)(A) of this section (the facts in *Example 1*), except that CFC uses the modified gross income method to apportion interest expense. Under paragraph (c)(2)(ii)(E) of this section, the unrelated person interest expense is apportioned based on gross income. Therefore, $33x of interest expense paid to an unrelated person is apportioned to CFC's passive category income ($33x = $100x × ($200x − $150x)/($300x − $150x)) and $67x of interest expense paid to an unrelated person is apportioned to CFC's general category income ($67x = $100x × $100x/($300x − $150x)).

(C) *Example 3*—(*1*) The facts are the same as in paragraph (c)(2)(v)(A) of this section (the facts in *Example 1*), except that CFC has an additional $50x of third person interest expense that is directly allocated to income from a specific property that produces only passive category income. The principal amount of indebtedness to which the interest relates is $500x. CFC also has $50x of additional non-interest expenses that are not definitely related expenses and that are apportioned on an asset basis.

(*2*) Under paragraph (c)(2)(ii)(B) of this section, the $50x of directly allocated third person interest is first allocated to reduce the passive category income of CFC. Under paragraph (c)(2)(ii)(C) of this section, the $150x of related person interest is allocated to the remaining $150x of passive category income. Under paragraph (c)(2)(iv)(B) of this section, all of the related person debt is allocated to passive category assets ($1,500x = $1,500x × $150x/$150x).

(*3*) Under paragraph (c)(2)(ii)(E) of this section, the non-interest expenses that are not definitely related are apportioned on the basis of the asset values reduced by the allocated related person debt. Therefore, $10x of these expenses are apportioned to the passive category ($50x × ($2,000x − $1,500x)/($4,000x − $1,500x)) and $40x are apportioned to the general category ($50x × $2,000x/($4,000x − $1,500x)).

(*4*) In order to apportion third person interest (that was not directly allocated third person interest) between the categories of assets, the value of assets in a separate category must also be reduced under the principles of § 1.861–8 by the indebtedness relating to the specifically allocated interest. Therefore, under paragraph (c)(2)(iv)(B) of this section, the value of assets in the passive category for purposes of apportioning the additional third person interest = 0 ($2,000x minus $500x (the principal amount of the debt, the interest payment on which is directly allocated to specific interest-producing properties) minus $1,500x (the related person debt allocated to passive category assets)). Under paragraph (c)(2)(ii)(E) of this section, all $100x of the non-definitely related third person interest expense is apportioned to the general category ($100x = $100x × $2,000x/($4,000x − $500x − $1,500x)).

(D) *Example 4*—(*1*) CFC, a controlled foreign corporation, is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns $100x of foreign personal holding company income that is passive category income. CFC also earns $100x of foreign base company sales income that is general category income. CFC has $1,000x of general category assets and $1,000x of passive category assets. In Year 1, CFC makes a $150x interest payment to USP on a $1,500x loan from USP and has $20x of general and administrative expenses (G & A) that under the principles of §§ 1.861–8 through 1.861–14T is treated as directly allocable to all of CFC's gross income. CFC also makes a $25x interest payment to an unrelated person on a $250x loan from the unrelated person. CFC has no other expenses. CFC uses the asset method to apportion interest expense. CFC uses the modified gross income method to apportion G & A.

(*2*) Under paragraph (c)(2)(iv)(B) of this section, related person debt allocated to passive category assets equals $1,000x ($1,000x = $1,500x × $100x/$150x).Under paragraph (c)(2)(ii)(C) of this section, $100x of the interest payment to USP is allocable to CFC's passive category foreign personal holding company income. Under paragraph (c)(2)(ii)(D) of this section, the additional $50x of related person interest expense is apportioned to CFC's general category income ($50x = $50x × $1,000x/$1,000x).

(*3*) Under paragraph (c)(2)(ii)(E) of this section, none of the $25x of interest expense paid to an unrelated person is apportioned to passive category income ($0 = $25x × ($1,000x − $1,000x)/($2,000x − $1,000x)). All $25x of the interest expense paid to an unrelated person is apportioned to general category income ($25x = $25x × $1,000x/($2,000x − $1,000x)). Under paragraph (c)(2)(ii)(E) of this section, none of the G & A is allocable to CFC's passive category foreign personal holding company income ($0 = $20x × ($100x − $100x)/($200x − $100x)). All $20x of the G & A is apportioned to CFC's general category income ($20x = $20x × $100x/($200x − $100x)).

(E) *Example 5.* The facts are the same as in paragraph (c)(2)(v)(D) of this section (the facts in *Example 4*), except that CFC uses the modified gross income method to apportion interest expense. As in paragraph (c)(2)(v)(D) of this section (*Example 4*), $100x of the interest payment to USP is allocated to passive category income under paragraph (c)(2)(ii)(C) of this section. Under paragraph (c)(2)(ii)(D) of this section, the additional $50x of related person interest expense is apportioned to general category income ($150x—100x × $100x/$100x). Under paragraph (c)(2)(ii)(E) of this section, none of the unrelated person interest expense and none of the G & A is apportioned to passive category income, because after the application of paragraph (c)(2)(ii)(C) of this section, no income remains in the passive category.

(F) *Example 6.* CFC2, a controlled foreign corporation, is a wholly-owned subsidiary of CFC1, a controlled foreign corporation. CFC1 is a wholly-owned subsidiary of USP, a domestic corporation. CFC1 and CFC2 are incorporated in the same country. In Year 1, USP sells tractors to CFC2, which CFC2 sells to X, a foreign corporation that is related to both CFC1 and CFC2 and is organized in the same country as CFC1 and CFC2. CFC1 makes a loan to × to finance the tractor sales. Assume that the interest earned by CFC1 from financing the sales is export financing interest that is neither related person factoring income nor foreign personal holding company income. Under § 1.904–4(h), the export financing interest earned by CFC1 is, therefore, general category income. CFC1 earns no other income. CFC1 makes a $100x interest payment to USP. The $100x of interest paid is not allocable under the look-through rules and paragraph (c)(2)(ii) of this section to passive category income of CFC1. The income is general category income to USP.

(3) *Rents and royalties.* Any rents or royalties received or accrued from a controlled foreign corporation in which the taxpayer is a United States shareholder are treated as passive category income to the extent they are allocable to passive category income of the controlled foreign corporation under the principles of §§ 1.861–8 through 1.861–14T.

(4) * * * (i) * * * Except as provided in paragraph (d)(2) of this section, any dividend paid or accrued out of the earnings and profits of any controlled foreign corporation is treated as passive category income in proportion to the ratio of the portion of earnings and profits attributable to passive category income to the total amount of earnings and profits of the controlled foreign corporation. * * *

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(iii) *Look-through rule for dividends from noncontrolled 10-percent owned foreign corporations*—(A) *In general.* Except as provided in paragraph (c)(4)(iii)(B) of this section, any dividend that is distributed by a noncontrolled 10-percent owned foreign corporation and received or accrued by a domestic corporation that is a United States shareholder of such foreign corporation is treated as income in a separate category in proportion to the ratio of the portion of earnings and profits attributable to income in such category to the total amount of earnings and profits of the noncontrolled 10-percent owned foreign corporation.

(B) *Inadequate substantiation.* A dividend distributed by a noncontrolled 10-percent owned foreign corporation is treated as income in the separate category described in section 904(d)(4)(C)(ii) if the Commissioner determines that the look-through characterization of the dividend cannot reasonably be determined based on the available information.

(5) *Inclusions under section 951(a)(1)(A).* Any amount included in gross income under section 951(a)(1)(A) is treated as passive category income to the extent the amount included is attributable to income received or accrued by the controlled foreign corporation that is passive category income. All other amounts included in gross income under section 951(a)(1)(A) are treated as general category income or income in a specified separate category under the rules in § 1.904–4. For rules concerning a distributive share of partnership income, see § 1.904–4(n). For rules concerning the gross up under section 78, see § 1.904–4(o). For rules concerning inclusions under section

951(a)(1)(B), see paragraph (c)(4)(i) of this section.

(6) *Inclusions under section 951A(a).* Any amount included in gross income under section 951A(a) is treated as passive category income to the extent the amount included is attributable to income received or accrued by the controlled foreign corporation that is passive category income. All other amounts included in gross income under section 951A(a) are treated as section 951A category income or income in a specified separate category under the rules in § 1.904–4. For rules concerning a distributive share of partnership income, see § 1.904–4(n). For rules concerning the gross up under section 78, see § 1.904–4(o).

(7) *Examples.* The following examples illustrate the application of paragraph (c) of this section.

(i) *Example 1*—(A) *Facts.* CFC, a controlled foreign corporation, is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns $100x of net income, $85x of which is general category foreign base company sales income and $15x of which is passive category foreign personal holding company income. No foreign tax is imposed on the income. CFC's income of $100x is subpart F income taxed currently to USP under section 951(a)(1)(A).

(B) *Analysis.* Because $15x of the subpart F inclusion is attributable to passive category income of CFC, under section 904(d)(3)(B) and paragraph (c)(5) of this section $15x of the subpart F inclusion is passive category income to USP. The remaining $85x subpart F inclusion is general category income to USP.

(ii) *Example 2*—(A) *Facts.* CFC1, a controlled foreign corporation, is a wholly-owned subsidiary of USP, a domestic corporation. CFC2 is a controlled foreign corporation wholly owned by CFC1 and is incorporated and operates all of its business in the same country as CFC1. All of CFC2's earnings and profits are attributable to passive category foreign personal holding company income. USP elects to exclude CFC2's income from subpart F income under section 954(b)(4). In Year 1, CFC2 makes a distribution to CFC1 and CFC1 makes a distribution to USP, all of which is attributable to Year 1 earnings and profits. CFC1 has no earnings and profits in Year 1 other than those received from CFC2.

(B) *Analysis*—(*1*) With respect to the dividend from CFC2 to CFC1, such amount is not subpart F income. *See* section 954(c)(3). Under section 904(d)(3)(D) and (E) and paragraphs (c)(4) and (d)(2) of this section the dividend income is not passive category income and therefore under § 1.904–4 it is general category income to CFC1. Under section 951A(c)(2)(A)(i)(IV), such dividend income is not tested income.

(*2*) With respect to the dividend from CFC1 to USP, under section 904(d)(3)(D) and (E) and paragraphs (c)(4) and (d)(2) of this section, such dividend income is not passive category income and therefore under § 1.904–4 is general category income to USP.

(iii) *Example 3*—(A) *Facts.* The facts are the same as in paragraph (c)(7)(ii)(A) of this section (the facts in *Example 2*), except that CFC1 receives interest income from CFC2 instead of dividend income.

(B) *Analysis.* Under section 904(d)(3)(C) and paragraph (c)(2)(i) of this section, the interest income is passive category income to CFC1 because such interest is properly allocable to the passive category income of CFC2. The interest income from CFC2 is subpart F income of CFC1 taxable to USP because such income reduces the subpart F income of CFC2 or such interest is properly allocable to the subpart F income of CFC2. *See* section 954(c)(3) and (6). Under section 904(d)(3)(B) and paragraph (c)(5) of this section, the subpart F inclusion is passive category income to USP. Under section 959(a), the distribution from CFC1 to USP is excluded from USP's gross income.

(iv) *Example 4*—(A) *Facts.* The facts are the same as in paragraph (c)(7)(iii)(A) of this section (the facts in *Example 3*), except that USP elects to exclude CFC1's interest income from subpart F income under section 954(b)(4).

(B) *Analysis.* Under section 904(d)(3)(D) and (E) and paragraphs (c)(4) and (d)(2) of this section, the distribution from CFC1 to USP is not a passive category dividend and therefore under § 1.904–4 is general category income to USP.

(v) *Example 5*—(A) *Facts.* The facts are the same as in paragraph (c)(7)(iv)(A) of this section (the facts in *Example 4*), except that USP receives interest income from CFC1 instead of dividend income.

(B) *Analysis.* Under section 904(d)(3)(C) and paragraph (c)(2)(i) of this section, the interest income is passive category income to USP because such interest is properly allocable to passive category income of CFC1.

(d) * * * (1) *De minimis amount of subpart F income.* If the sum of a controlled foreign corporation's gross foreign base company income (determined under section 954(a) without regard to section 954(b)(5)) and gross insurance income (determined under section 953(a)) for the taxable year is less than the lesser of 5 percent of gross income or $1,000,000, then none of that income is treated as passive category income. In addition, if the test in the first sentence of this paragraph (d)(1) is satisfied, for purposes of paragraphs (c)(2)(ii)(D) and (E) of this section (apportionment of interest expense to passive income using the asset method), any passive assets are not treated as passive category assets but are treated as assets in the general category or a specified separate category. The determination in the first sentence of this paragraph (d)(1) is made before the application of the exception for certain income subject to a high rate of foreign tax described in paragraph (d)(2) of this section.

(2) *Exception for certain income subject to high foreign tax.* Except as provided in § 1.904–4(c)(7)(iii) (relating to reductions in tax upon distribution), for purposes of the dividend look-through rule of paragraph (c)(4)(i) of this section, an item of net income that would otherwise be passive category income (after application of the priority rules of § 1.904–4(l)) and that is received or accrued by a controlled foreign corporation is not treated as passive category income, and the earnings and profits attributable to such income is not treated as passive category earnings and profits, if the taxpayer establishes to the satisfaction of the Secretary under section 954(b)(4) that the income was subject to an effective rate of income tax imposed by a foreign country greater than 90 percent of the maximum rate of tax specified in section 11 (with reference to section 15, if applicable). Such income is treated as general category income or income in a specified separate category under the rules in § 1.904–4. The first sentence of this paragraph (d)(2) has no effect on amounts (other than dividends) paid or accrued by a controlled foreign corporation to a United States shareholder of such controlled foreign corporation to the extent those amounts are allocable to passive category income of the controlled foreign corporation.

(3) *Example.* The following example illustrates the application of this paragraph (d).

(i) *Facts.* CFC, a controlled foreign corporation, is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns $100x of gross income, $4x of which is interest that is foreign personal holding company income and $96x of which is gross manufacturing income that is not subpart F income. CFC has no other earnings for Year 1. CFC has no expenses and pays no foreign taxes.

(ii) *Analysis.* Under the de minimis rule of section 954(b)(3)(A) and § 1.954–1(b)(1)(i), none of CFC's income is treated as foreign base company income. All of CFC's income, therefore, is treated as general category income and tested income. In Year 1, USP has a GILTI inclusion amount with respect to CFC. Such amount is section 951A category income to USP.

(e) * * *

(2) *Example.* The following example illustrates the application of this paragraph (e).

(i) *Facts.* Controlled foreign corporation CFC is a wholly-owned subsidiary of USP, a domestic corporation. CFC earns $100x, $75x of which is foreign personal holding company income and $25x of which is non-subpart F services income. CFC's gross and net income are equal.

(ii) *Analysis.* Under the 70 percent full inclusion rule of section 954(b)(3)(B), the entire $100x is foreign base company income currently taxable to USP under section 951. Because $75x of the $100x section 951 inclusion is attributable to CFC's passive category income, $75x of the inclusion is passive category income to USP. The remaining $25x of the inclusion is treated as general category income to USP.

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(h) *Application of look-through rules to payments from a partnership or other pass-through entity.* Payments to a partner described in section 707 (*e.g.,* payments to a partner not acting in capacity as a partner) are characterized as passive category income to the extent that the payment is attributable under the principles of § 1.861–8 and this section to passive category income of the partnership, if the payments are interest, rents, or royalties that would be characterized under the controlled foreign corporation look-through rules of paragraph (c) of this section if the partnership were a foreign corporation, and the partner who receives the payment owns 10 percent or more of the value of the partnership (as determined under § 1.904–4(n)(3)). A payment by a partnership to a member of the controlled group (as defined in paragraph (a)(4)(vi) of this section) of the partner is characterized under the look-through rules of this paragraph (h) if the payment would be a section 707 payment entitled to look-through treatment if it were made to the partner. The rules in this paragraph (h) do not apply with respect to interest to the extent the interest income is assigned to a separate category under the downstream partnership loan rules described in § 1.861–9(e)(8). The principles of the rules in this paragraph (h) apply to characterize a payment from any other pass-through entity.

(i) * * * (1) * * * For purposes of this paragraph (i)(1), indirect ownership of stock is determined under section 318. In the case of a partnership or other pass-through entity, indirect ownership and value is determined under the rules in paragraph (i)(2) of this section.

(2) *Indirect ownership and value of a partnership interest.* A person is considered as owning, directly or indirectly, more than 50 percent of the value of a partnership if the person, together with any other person that bears a relationship to the first person that is described in section 267(b) or 707, owns more than 50 percent of the capital and profits interests of the partnership. For purposes of this paragraph (i)(2), value will be determined at the end of the partnership's taxable year. The principles of this paragraph (i)(2) apply with respect to a person that owns a pass-through entity other than a partnership.

(3) *Special rule for dividends between certain foreign corporations.* Solely for purposes of dividend payments between controlled foreign corporations, noncontrolled 10-percent owned foreign corporations, or a controlled foreign corporation and a noncontrolled 10-percent owned foreign corporation, the two foreign corporations are considered related look-through entities if the same person is a United States shareholder of both foreign corporations.

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(5) *Examples.* The following examples illustrate the application of this paragraph (i):

(i) *Example 1.* USP, a domestic corporation, owns all of the stock of CFC1, a controlled foreign corporation. CFC1 owns 40% of the stock of CFC2, a Country X corporation that is a controlled foreign corporation. The remaining 60% of the stock of CFC2 is owned by V, a domestic corporation, unrelated to USP. The percentages of value and voting power of CFC2 owned by CFC1 and V correspond to their percentages of stock ownership. CFC2 owns 40% (by vote and value) of the stock of CFC3, a Country Z corporation that is a controlled foreign corporation. The remaining 60% of CFC3 is owned by unrelated United States persons. CFC3 earns exclusively general category income that is neither subpart F income nor tested income. In Year 1, CFC3 makes an interest payment of $100x to CFC2. Look-through principles do not apply because CFC2 and CFC3 are not related look-through entities under paragraph (i)(1) of this section (because CFC2 does not own more than 50% of the voting power or value of CFC3). The interest is passive category income to CFC2 and is subpart F income of CFC2 that is taxable to USP and V. Under paragraph (c)(5) of this section, USP and V's subpart F inclusion with respect to CFC2 is passive category income.

(ii) *Example 2.* The facts are the same as in paragraph (i)(5)(i) of this section (the facts in *Example 1*), except that instead of a $100x interest payment, CFC3 pays a $50x dividend to CFC2 in Year 1. USP and V each own, directly or indirectly, more than 10% of the voting power of all classes of stock of both CFC2 and CFC3, and, therefore, CFC2 and CFC3 have the same United States shareholders. Pursuant to paragraph (i)(3) of this section, because CFC2 and CFC3 have a common United States shareholder, for purposes of applying this section to the dividend from CFC2 to CFC3, CFC2 and CFC3 are treated as related look-through entities. Therefore, look-through principles apply. Because CFC3 has no passive category income or earnings and profits, the dividend income is characterized as general category income to CFC2. The dividend is subpart F income of CFC2 that is taxable to USP and V. Under paragraph (c)(5) of this section, the subpart F inclusions of USP and V are not passive category income to USP and V and therefore under § 1.904–4 the subpart F inclusions are general category income to USP and V.

(iii) *Example 3.* The facts are the same as in paragraph (i)(5)(i) of this section (the facts in *Example 1*), except that CFC3 pays both a $100x interest payment and a $50x dividend to CFC2, and CFC2 owns 80% (by vote and value) of CFC3. Under paragraph (i)(1) of this section, CFC2 and CFC3 are related look-through entities, because CFC2 owns more than 50% (by vote and value) of CFC3. Therefore, look-through principles apply to both the interest and dividend income paid or accrued by CFC3 to CFC2, and CFC2 treats both types of income as general category income because CFC3 does not have any passive category earnings. Under paragraph (c)(5) of this section and § 1.904–4, the resulting subpart F inclusions are general category income to USP and V.

(iv) *Example 4.* USP, a domestic corporation, owns 50% of the voting stock of CFC1, a controlled foreign corporation. CFC1 owns 10% of the voting stock of CFC2, a controlled foreign corporation. The remaining 50% of the stock of CFC1 is owned by X. The remaining 90% of the stock of CFC2 is owned by Y. X and Y are each United States shareholders of CFC2 but are not related to USP, CFC1, or each other. In Year 1, CFC2 pays a $100x dividend to CFC1. Under paragraph (i)(3) of this section because no person is a United States shareholder of both CFC1 and CFC2 (USP and X each own only 5% of CFC2), CFC1 and CFC2 are not related look-through entities. Because CFC2 is not a related person to CFC1 within the meaning of section 954(d)(3), section 954(c)(3) and (c)(6) are inapplicable, and the dividend is subpart F income of CFC1 that is taxable to USP and X. Therefore, under section 904(d)(2)(B)(i) and § 1.904–4(b)(2)(i)(A), because the dividend income is foreign personal holding company income, it is passive category income to CFC1.

(v) *Example 5.* The facts are the same as in paragraph (i)(5)(iv) of this section (the facts in *Example 4*), except that X owns 10% of the voting stock of CFC2 and Y owns only 80% of the voting stock of CFC2. Because CFC2 is not a related person to CFC1 within the meaning of section 954(d)(3), the dividend is subpart F income of CFC1 that is taxable to USP and X. In addition, because X is a United States shareholder of both CFC1 and CFC2, CFC2 and CFC1 are related look-through entities under paragraph (i)(3) of this section, the dividend income is general category income to CFC1 and the subpart F inclusion is general category income to USP and X.

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(k) * * *

(2) * * *

(iii) Inclusions under sections 951(a)(1)(A) and 951A(a) and distributive shares of partnership income;

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(l) *Examples.* The following examples illustrate the application of this section.

(1) *Example 1*—(i) *Facts.* CFC1 and CFC2, controlled foreign corporations, are wholly-owned subsidiaries of USP, a domestic corporation. CFC1 and CFC2 are incorporated in two different foreign countries and CFC2 is a financial services entity. In Year 1, CFC1 earns $100x of gross income that is passive category foreign personal holding company

income. CFC1's only expense is a $50x interest payment to CFC2. CFC1's $50x of pre-tax income is subject to $20x of foreign income tax, and USP elects to exclude CFC1's $30x of net income from subpart F income under section 954(b)(4).

(ii) *Analysis.* The $50x of interest is foreign personal holding company income in CFC2's hands because section 954(c)(3)(A)(i) (same country exception for interest payments) and section 954(c)(6) do not apply, because the interest payment is allocable to and reduces CFC1's subpart F income. The $50x of interest income is also passive category income to CFC2 because CFC1 and CFC2 are related look-through entities within the meaning of paragraph (i)(1) of this section and, therefore the look-through rules of paragraph (c)(2)(i) of this section apply to characterize the interest payment. However, because CFC2 is a financial services entity, under § 1.904–4(e)(1) and paragraph (b)(2) of this section, the income is treated as financial services income and therefore as general category income in CFC2's hands. Thus, with respect to CFC2, under § 1.904–4(d) and paragraph (c)(5) of this section, USP includes in its gross income a $50x general category inclusion under section 951(a)(1)(A) attributable to the general category foreign personal holding company income.

(2) *Example 2*—(i) *Facts.* USP, a domestic corporation, owns 75% of USS, a domestic corporation. USP and USS are not financial services entities. In Year 1, USS's earnings consist of $100x of foreign source passive income. USS makes a $100x foreign source royalty payment to USP.

(ii) *Analysis.* Under paragraph (g) of this section, the royalty payment to USP is subject to the look-through rules of paragraph (c)(3) of this section and is characterized as passive category income the extent that it is allocable to such income in USS's hands.

(3) *Example 3*—(i) *Facts.* USP, a domestic corporation, owns 100% of the stock of CFC1, a controlled foreign corporation, and CFC1 owns 100% of the stock of CFC2, a controlled foreign corporation. CFC1 has $100x of passive foreign personal holding company income from unrelated persons and $100x of general category income. CFC1 also has $50x of interest income from CFC2. CFC1 pays CFC2 $100x of interest.

(ii) *Analysis.* Under paragraph (k)(2) of this section, the $100x interest payment from CFC1 to CFC2 is reduced for limitation purposes to the extent of the $50x interest payment from CFC2 to CFC1 before application of the rules in paragraph (c)(2)(ii) of this section. Therefore, the interest payment from CFC2 to CFC1 is disregarded. CFC1 is treated as if it paid $50x of interest to CFC2, all of which is allocable to CFC1's passive category foreign personal holding company income under paragraph (c)(2)(ii)(C) of this section. Therefore, under paragraph (c)(2)(i) of this section, the $50x interest payment from CFC1 to CFC2 is passive category income.

(4) *Example 4*—(i) *Facts.* USP, a domestic corporation, owns 100% of the stock of CFC1, a controlled foreign corporation. CFC1 owns 100% of the stock of CFC2, a controlled foreign corporation, and 100% of the stock of CFC3, a controlled foreign corporation. In Year 1, CFC2 pays CFC1 $5x of interest, CFC1 pays CFC3 $10x of interest, and CFC3 pays CFC2 $20x of interest.

(ii) *Analysis.* Under paragraph (k)(2) of this section, the interest payments from CFC1 to CFC3 must be offset by the amount of interest that CFC1 is considered as receiving indirectly from CFC3 and the interest payment from CFC3 to CFC2 is offset by the amount of the interest payment that CFC3 is considered as receiving indirectly from CFC2. The $10x payment by CFC1 to CFC3 is reduced by $5x, the amount of the interest payment from CFC2 to CFC1 that is treated as being paid indirectly by CFC3 to CFC1. Similarly, the $20x interest payment from CFC3 to CFC2 is reduced by $5x, the amount of the interest payment from CFC1 to CFC3 that is treated as being paid indirectly by CFC2 to CFC3. Therefore, under paragraph (k)(2) of this section, CFC2 is treated as having made no interest payment to CFC1, CFC1 is treated as having paid $5x of interest to CFC3, and CFC3 is treated as having paid $15x to CFC2.

(5) *Example 5*—(i) *Facts.* USP, a domestic corporation, owns 100% of the stock of CFC1, a controlled foreign corporation, and CFC1 owns 100% of the stock of CFC2, a controlled foreign corporation. In Year 1, CFC1 earns $100x of passive category foreign personal holding company income and $100x of general category non-subpart F sales income from unrelated persons and $100x of general category non-subpart F interest income from a related person. CFC1 pays $150x of interest to CFC2. CFC2 earns $200x of general category sales income from unrelated persons and the $150x interest payment from CFC1. CFC2 pays CFC1 $100x of interest. USP does not have an inclusion under section 951A.

(ii) *Analysis*—(A) Under paragraph (k)(2) of this section, the $100x interest payment from CFC2 to CFC1 reduces the $150x interest payment from CFC1 to CFC2. CFC1 is treated as though it paid $50x of interest to CFC2. CFC2 is treated as though it made no interest payment to CFC1.

(B) Under paragraph (k)(2)(ii) of this section, the remaining $50x interest payment from CFC1 to CFC2 is then characterized. The interest payment is first allocable under the rules of paragraph (c)(2)(ii)(C) of this section to CFC1's passive category income. Therefore, under paragraph (c)(2)(i) of this section, the $50x interest payment to CFC2 is passive category income. The interest income is foreign personal holding company income in CFC2's hands. CFC2, therefore, has $50x of passive category subpart F income and $200x of general category non-subpart F income.

(C) Under paragraph (k)(2)(iii) of this section, inclusions under section 951(a)(1)(A) are characterized next. USP has an inclusion under section 951(a)(1)(A) with respect to CFC1 of $50x that is attributable to passive category income of CFC1 and is treated as passive category income to USP. USP has an inclusion under section 951(a)(1)(A) with respect to CFC2 of $50x that is attributable to passive category income of CFC2 and is treated as passive category income to USP.

(6) *Example 6*—(i) *Facts.* USP, a domestic corporation, owns 100% of the stock of CFC1, a controlled foreign corporation, and CFC1 owns 100% of the stock of CFC2, a controlled foreign corporation. USP also owns 100% of the stock of CFC3, a controlled foreign corporation. CFC1, CFC2, and CFC3 are all incorporated in different foreign countries. In Year 1, CFC1 earns $100x of passive category foreign personal holding company income and $200x of general category non-subpart F income from unrelated persons. CFC1 also receives a $150x distribution from CFC2. CFC1 pays $100x of interest to CFC2 and $100x of interest to CFC3. CFC3 earns $300x of general category non-subpart F income and the $100x of interest received from CFC1. CFC3 pays a $100x royalty to CFC2. The royalty is directly allocable to CFC3's general category income and the royalty is not subpart F income to CFC2. CFC2 earns the $100x interest payment received from CFC1 and the $100x royalty received from CFC3. USP does not have an inclusion under section 951A.

(ii) *Analysis*—(A) Under paragraph (k)(2)(i) of this section, the royalty paid by CFC3 to CFC2 is characterized first. With respect to CFC2, the royalty is general category non-subpart F income.

(B) Under paragraph (k)(2)(ii) of this section, the interest payments from CFC1 to CFC2 and CFC3 are characterized next. Under paragraph (c)(2)(ii)(C) of this section, the interest payments are first allocable to CFC1's passive category income. Therefore, under paragraph (c)(2)(i) of this section, $50x of the interest payment to CFC2 is passive category income and $50x of the interest payment to CFC3 is passive category income. The remaining $50x paid to CFC2 is general category income and the remaining $50x paid to CFC3 is general category income. Because $100x of the interest income received or accrued from CFC1 is properly allocable to income of CFC1 which is not subpart F income, under section 954(c)(6) the general category interest income is not treated as foreign personal holding company income to CFC2 and CFC3. The remaining $100x of interest income received or accrued from CFC1 is passive category subpart F foreign personal holding company income to both recipients. Therefore, CFC3 and CFC2 each have $50x of passive category subpart F foreign personal holding company income related to the interest received from CFC1.

(C) Under paragraph (k)(2)(iii) of this section, USP's $50x inclusion under section 951(a)(1)(A) with respect to CFC2 is characterized next. Under paragraph (c)(5) of this section, USP's inclusion under section 951(a)(1)(A) is attributable to the passive category portion of the interest income received by CFC2 from CFC1 and is passive category income to USP. Under paragraph (k)(2)(iii) of this section, USP's $50x inclusion under section 951(a)(1)(A) with respect to CFC3 is also characterized next. Under paragraph (c)(5) of this section, USP's inclusion under section 951(a)(1)(A) is attributable to the passive category portion of the interest income received by CFC3 from CFC2 and is passive category income to USP.

(D) Under paragraph (k)(2)(iv) of this section, the $150x distribution from CFC2 to CFC1 is characterized next. The first $50x of the distribution is out of passive category earnings and profits described in section 959(c)(2). The remaining $100x of the distribution is a dividend that is not attributable to CFC2's passive category income, so under paragraph (c)(4)(i) of this section it is general category income to CFC1 in its entirety. Because $100x of the dividend received or accrued from CFC2 is attributable to income of CFC2 which is not subpart F income, under section 954(c)(6) such dividend income is not treated as foreign personal holding company income of CFC1.

(7) *Example 7*—(i) *Facts.* USP, a domestic corporation, owns 100% of the stock of CFC1, a controlled foreign corporation, and CFC1 owns 100% of the stock of CFC2, a controlled foreign corporation. USP also owns 100% of the stock of CFC3, a controlled foreign corporation. CFC1, CFC2, and CFC3 are all incorporated in different foreign countries. In Year 1, CFC2 earns $100x of general category income that is not subpart F income and distributes the entire amount to CFC1 as a dividend. CFC1 earns $100x of passive category foreign personal holding company income and the $100x dividend from CFC2. CFC1 pays $100x of interest to CFC3. CFC3 earns $200x of general category income that is foreign base company income and the $100x of interest income from CFC1. USP does not have an inclusion under section 951A.

(ii) *Analysis.* This transaction does not involve circular payments and, therefore, the ordering rules of paragraph (k)(2) of this section do not apply. Instead, pursuant to paragraph (k)(1) of this section, income received is characterized first. CFC2's earnings and, thus, the dividend from CFC2 to CFC1 are characterized first. Under paragraph (c)(4)(i) of this section, CFC1 includes the $100x dividend from CFC2 in gross income as general category income because none of CFC2's earnings are passive category income. CFC1 thus has $100x of passive category foreign personal holding company income and $100x of general category income that is excluded from subpart F income under section 954(c)(6)(A). The interest payment from CFC1 to CFC3 is then characterized as $100x passive category income under paragraph (c)(2)(ii)(C) of this section because it is allocable to passive foreign personal holding company income of CFC1. For Year 1, CFC3 thus has $200x of general category income that is subpart F income, and $100x of passive category foreign personal holding company income. For Year 1, under § 1.904–4(d) and paragraph (c)(5) of this section, USP includes in its gross income an inclusion under section 951(a)(1)(A) with respect to CFC3, $200x of which is general category income and $100x of which is passive category income.

(m) * * *

(2) * * *

(ii) *Interest payments from noncontrolled 10-percent owned foreign corporations.* If interest is received or accrued by a shareholder from a noncontrolled 10-percent owned foreign corporation (where the shareholder is a domestic corporation that is a United States shareholder of such noncontrolled 10-percent owned foreign corporation), the rules of paragraph (m)(2)(i) of this section apply in determining the portion of the interest payment that is from sources within the United States, except that the related party interest rules of paragraph (c)(2)(ii)(C) of this section do not apply.

(3) *Examples.* The following examples illustrate the application of this paragraph (m).

(i) *Example 1*—(A) *Facts.* Controlled foreign corporation CFC is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC pays USP $300x of interest. CFC has no other expenses. In Year 1, CFC has $3,000x of assets that generate $650x of foreign source general category income and a $1,000x loan to an unrelated foreign person that generates $20x of foreign source passive category interest income. CFC also has a $4,000x loan to an unrelated United States person that generates $70x of U.S. source passive category interest income and $4,000x of assets that generate $100x of U.S. source general category income. CFC uses the asset method to allocate interest expense. The following chart summarizes CFC's assets and income:

TABLE 1 TO PARAGRAPH (m)(3)(i)(A)

	Foreign	U.S.	Totals
Assets:			
Passive	1,000x	4,000x	5,000x
General	3,000x	4,000x	7,000x
Total	4,000x	8,000x	12,000x
Income:			
Passive	20x	70x	90x
General	650x	100x	750x
Total	670x	170x	840x

(B) *Analysis.* Under paragraph (c)(2)(ii)(C) of this section, $90x of the related person interest payment is allocable to CFC's passive category income. Under paragraph (m)(2) of this section, $70x of USP's $90x of passive category interest income is from sources within the United States and $20x is from foreign sources. Under paragraph (c)(2)(ii)(D) of this section, the remaining $210x of the related person interest payment is allocated to general category income. Under paragraph (m)(2) of this section, $120x of the remaining $210x of USP's interest income is treated as general category income from sources within the United States ($120x = $210x × $4,000x/$7,000x) and $90x is treated as general category income from foreign sources ($90x = $210x × $3,000x/$7,000x).

(ii) *Example 2.* The facts are the same as in paragraph (m)(3)(i) of this section (the facts in *Example 1*), except that CFC uses the modified gross income method to allocate interest expense. The first $90x of related person interest expense is allocated to passive category income in the same manner as in paragraph (m)(3)(i) of this section (*Example 1*), $70x to U.S. sources and $20x to foreign sources. Under paragraph (c)(2)(ii)(D) of this section, the remaining $210x of the related person interest expense is allocated to CFC's general category income. Under paragraph (m)(2) of this section, $28x of the remaining $210x of USP's interest income is treated as general category income from U.S. sources ($28x = $210x × $100x/$750x) and $182x is treated as general category income from foreign sources ($182x = $210x × $650x/$750x).

(4) * * * (i) *Rule.* Any dividend or distribution treated as a dividend under this paragraph (m) (including an amount included in gross income under section 951(a)(1)(B)) that is received or accrued by a United States shareholder from a controlled foreign corporation, or any dividend that is received or accrued by a domestic corporation from a noncontrolled 10-percent owned foreign corporation with respect to which the shareholder is a United States shareholder, are treated as income in a separate category derived from sources within the United States in proportion to the ratio of the portion of the earnings and profits of the controlled foreign corporation or noncontrolled 10-percent owned foreign corporation in the corresponding separate category from U.S. sources to the total amount of earnings and profits of the controlled foreign corporation or noncontrolled 10-percent owned foreign corporation in that separate category.

* * * * *

(5) *Treatment of inclusions under sections 951(a)(1)(A), 951A and 1293*—(i) * * * Any amount included in the gross income of a United States shareholder of a controlled foreign corporation under section 951(a)(1)(A), 951A, or in the gross income of a domestic corporation that is a United States shareholder of a noncontrolled 10-percent owned foreign corporation described in section 904(d)(2)(E)(i)(II) that is a qualified electing fund under section 1293 is treated as income subject to a separate category that is derived from sources within the United States to the extent the amount is attributable to income of the controlled foreign corporation or qualified electing fund, respectively, in the corresponding category of income from sources within the United States. * * *

(ii) *Example.* The following example illustrates the application of this paragraph (m)(5).

(A) *Facts.* Controlled foreign corporation CFC is a wholly-owned subsidiary of domestic corporation, USP. In Year 1, CFC earns $100x of subpart F foreign personal holding company income that is passive category income. Of this amount, $40x is derived from sources within the United States. CFC also earns $50x of subpart F general category income. None of this income is from sources within the United States. Assume that CFC pays no foreign taxes and has no expenses.

(B) *Analysis.* USP must include $150x in gross income under section 951(a). Of this amount, $60x is foreign source passive category income to USP, $40x is U.S. source passive category income to USP, and $50x is foreign source general category income to USP.

* * * * *

(7) * * *

(ii) *Example.* The following example illustrates the application of this paragraph (m)(7).

(A) *Facts.* Controlled foreign corporation CFC is incorporated in Country A and is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns $80x of general category foreign base company sales income in Country A and $40x of passive category U.S. source interest income. CFC incurs $20x of expenses attributable to its sales business. CFC pays USP $40x of interest that is allocated to CFC's U.S. source passive category income under paragraph (c)(2)(ii)(C) of this section and so is U.S. source passive category income to USP under paragraphs (c)(2)(i) and (m)(2) of this section. Assume that earnings and profits equal net income. All of CFC's net income of $60x is subpart F income includible in USP's gross income under section 951(a)(1). For Year 1, USP also has $100x of foreign source passive category income derived from investments in Country B. Pursuant to section 904(h)(3) and paragraph (m)(2) of this section, the $40x interest payment from CFC is U.S. source income to USP because it is attributable to U.S. source interest income of CFC. The United States–Country A income tax treaty, however, treats all interest payments by residents of Country A as Country A sourced and USP elects to apply the treaty.

(B) *Analysis.* Pursuant to section 904(h)(10) and this paragraph (m)(7), the entire interest payment will be treated as foreign source income to USP. USP thus has $60x of foreign source general category income, $40x of foreign source Country A treaty category passive income from CFC, and $100x of foreign source passive category income.

(n) * * * Section 904(d)(3), (d)(4), and (h) and this section are then applied for purposes of characterizing and sourcing income received, accrued, or included by a United States shareholder of the foreign corporation that is attributable or allocable to income or earnings and profits of the foreign corporation.

(o) *Applicability dates.* This section is applicable for taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 22.** Section 1.904–6 is amended by:

■ 1. In paragraph (a)(1)(i):

■ i. Revising the first sentence and adding two sentences after the fourth sentence.

■ ii. Removing the language ''(unless it is a withholding tax that is not the final tax payable on the income as described in § 1.904–4(d))'' and adding the language ''(as defined in section 901(k)(1)(B))'' in its place in the new seventh sentence.

■ 3. Revising paragraph (a)(1)(iv).

■ 4. Adding paragraphs (a)(2) and (3).

■ 5. Revising paragraph (b).

■ 6. Removing and reserving paragraph (c).

■ 7. Adding paragraph (d).

The revisions and additions read as follows:

§ 1.904–6 Allocation and apportionment of taxes.

(a) * * * (1) * * * (i) * * * The amount of foreign taxes paid or accrued with respect to a separate category (as defined in § 1.904–5(a)(4)(v)) of income (including U.S. source income within the separate category) includes only those taxes that are related to income in that separate category. * * * Income included in the foreign tax base is calculated under foreign law, but characterized as income in a separate category under Federal income tax principles. For example, a foreign tax imposed on an amount realized on the disposition of controlled foreign corporation stock that is characterized as a capital gain under foreign law but as a dividend under section 1248 is generally assigned to the general category, not the passive category. * * *

* * * * *

(iv) *Base and timing differences.* If, under the law of a foreign country or possession of the United States, a tax is imposed on a type of item that does not constitute income under Federal income tax principles (a *base difference*), such as gifts or life insurance proceeds, that tax is treated as imposed with respect to income in the separate category described in section 904(d)(2)(H)(i). If, under the law of a foreign country or possession of the United States, a tax is imposed on an item of income that constitutes income under Federal income tax principles but is not recognized for Federal income tax purposes in the current year (a *timing difference*), that tax is allocated and apportioned to the appropriate separate category or categories to which the tax would be allocated and apportioned if the income were recognized under Federal income tax principles in the year in which the tax was imposed. If the amount of an item of income as computed for foreign tax purposes is positive but is greater than the amount of income that is currently recognized for Federal income tax purposes, for example, due to a difference in depreciation conventions or the timing of recognition of gross income, or because of a permanent difference between U.S. and foreign tax law in the amount of deductions that are allowed to reduce gross income, the tax is allocated or apportioned to the separate category to which the income is assigned, and no portion of the tax is attributable to a base difference. In addition, a tax imposed on a distribution that is excluded from gross income under section 959(a) or section 959(b) is treated as attributable to a timing difference (and not a base difference) and is treated as tax imposed on the earnings and profits from which the distribution was paid.

(2) *Special rules for foreign branches*—(i) *In general.* Except as provided in this paragraph (a)(2), any foreign tax reflected on the books and records of a foreign branch under the principles of § 1.987–2(b) is allocated and apportioned under the rules of paragraph (a)(1) of this section.

(ii) *Disregarded reattribution transactions*—(A) *Foreign branch to foreign branch owner.* In the case of a disregarded payment from a foreign branch to a foreign branch owner that is treated as a disregarded reattribution transaction that results in gross income being attributed to the foreign branch owner under § 1.904–4(f)(2)(vi), any foreign tax imposed solely by reason of that transaction, such as a withholding tax imposed on a disregarded payment, is allocated and apportioned to the reattributed gross income.

(B) *Foreign branch owner to foreign branch.* In the case of a disregarded payment from a foreign branch owner to a foreign branch that is treated as a disregarded reattribution transaction that results in gross income being attributed to the foreign branch under § 1.904–4(f)(2)(vi), any foreign tax imposed solely by reason of that transaction is allocated and apportioned to the reattributed gross income. In the case of a foreign branch owner that is a partnership, a foreign tax imposed solely by reason of a disregarded reattribution transaction that results in general category income being attributed to a foreign branch is allocated and apportioned to the partnership's general category income that is attributable to the foreign branch (as described in paragraph (b)(4)(ii) of this section).

(iii) *Other disregarded payments*—(A) *Foreign branch to foreign branch owner.* In the case of a disregarded payment from a foreign branch to a foreign branch owner that is not a disregarded reattribution transaction, foreign tax imposed solely by reason of that disregarded payment is allocated and apportioned to a separate category under paragraph (a)(1) of this section based on the nature of the item (determined under Federal income tax principles) that is included in the foreign tax base. For example, if a remittance of an appreciated asset results in gain recognition under foreign law, the tax imposed on that gain is treated as attributable to a timing difference with respect to recognition of the gain, and is allocated and apportioned to the separate category to which gain on a sale of that asset would have been assigned if it were recognized for Federal income tax purposes. However, a gross basis withholding tax on a remittance is attributable to a timing difference in taxation of the income out of which the remittance is made, and is allocated and apportioned to the separate category or categories to which a section 987 gain or loss would be assigned under § 1.987–6(b).

(B) *Foreign branch owner to foreign branch.* In the case of a disregarded payment from a foreign branch owner that is a United States person to a foreign branch that is neither a disregarded reattribution transaction nor described in § 1.904–4(f)(2)(vi)(C)(*4*), any foreign tax imposed solely by reason of the receipt of that disregarded payment is allocated and apportioned to the foreign branch category. In the case of a foreign branch owner that is a partnership, a foreign tax imposed solely by reason of the receipt of a disregarded payment by a foreign branch is allocated and apportioned to the partnership's general category income that is attributable to the foreign branch (as described in paragraph (b)(4)(ii) of this section).

(iv) *Definitions.* The following definitions apply for purposes of this paragraph (a)(2):

(A) *Disregarded reattribution transaction.* The term *disregarded reattribution transaction* means a disregarded payment or a transfer described in § 1.904–4(f)(2)(vi)(D) to the extent that it results in an adjustment to the gross income attributable to the foreign branch under § 1.904–4(f)(2)(vi)(A).

(B) The terms *disregarded payment, foreign branch, foreign branch owner,* and *remittance* have the same meaning given to those terms in § 1.904–4(f)(3).

(3) *Taxes imposed on high-taxed income.* For rules on the treatment of taxes imposed on high-taxed income, see § 1.904–4(c).

(b) *Allocation and apportionment of deemed paid taxes and certain creditable foreign tax expenditures*—(1) *Taxes deemed paid under section 960(a) or (d).* If a domestic corporation that is a United States shareholder includes any amount in gross income under section 951(a)(1)(A) or 951A(a), any foreign tax deemed paid with respect to such amount under section 960(a) or (d) is allocated to the separate category to which the inclusion is assigned.

(2) *Taxes deemed paid under section 960(b)(1).* If a domestic corporation that is a United States shareholder receives a distribution of previously taxed earnings and profits from a first-tier corporation that is excluded from the domestic corporation's income under section 959(a) and § 1.959–1, any foreign tax deemed paid under section 960(b)(1) with respect to such distribution is allocated to the same separate category as the annual PTEP account and PTEP group (as defined in § 1.960–3(c)) from which the distribution is made.

(3) *Taxes deemed paid under section 960(b)(2).* If a controlled foreign corporation receives a distribution of previously taxed earnings and profits from an immediately lower-tier corporation that is excluded from such controlled foreign corporation's gross income under section 959(b) and § 1.959–2, any foreign tax deemed paid under section 960(b)(2) with respect to such distribution is allocated to the same separate category as the annual PTEP account and PTEP group (as defined in § 1.960–3(c)) from which the distribution is made. *See also* § 1.960–3(c)(2).

(4) *Creditable foreign tax expenditures*—(i) *In general.* Except as provided in paragraph (b)(4)(ii) of this section, creditable foreign tax expenditures (CFTEs) allocated to a partner under § 1.704–1(b)(4)(viii)(*a*) are allocated for purposes of this section to the same separate category as the separate category to which the taxes were allocated in the hands of the partnership under the rules of paragraph (a) of this section.

(ii) *Foreign branch category.* CFTEs allocated to a partner in a partnership under § 1.704–1(b)(4)(viii)(*a*) are allocated and apportioned to the foreign branch category of the partner to the extent that:

(A) The CFTEs are allocated and apportioned by the partnership under the rules of paragraph (a) of this section to the general category;

(B) In the hands of the partnership, the CFTEs are related to general category income attributable to a foreign branch (as described in § 1.904–4(f)(2)) under the principles of paragraph (a) of this section; and

(C) The partner's distributive share of the income described in paragraph (b)(4)(ii)(B) of this section is foreign branch category income of the partner under § 1.904–4(f)(1)(i)(B).

* * * * *

(d) *Applicability dates.* This section is applicable for taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 23.** Section 1.904(b)–3 is added to read as follows:

§ 1.904(b)–3 Disregard of certain dividends and deductions under section 904(b)(4).

(a) *Disregard of certain dividends and deductions*—(1) *In general.* For purposes of section 904(a), in the case of a domestic corporation which is a United States shareholder with respect to a specified 10-percent owned foreign corporation (as defined in section 245A(b)), the domestic corporation's foreign source taxable income in a separate category and entire taxable income is determined without regard to the following items:

(i) Any dividend for which a deduction is allowed under section 245A;

(ii) Deductions properly allocable or apportioned to gross income in the section 245A subgroup as determined under paragraphs (b) and (c)(1) of this section; and

(iii) Deductions properly allocable or apportioned to stock of specified 10-percent owned foreign corporations in the section 245A subgroup as determined under paragraphs (b) and (c) of this section.

(2) *Deductions properly allocable or apportioned to the residual grouping.* Deductions that are properly allocable or apportioned to gross income or stock in the section 245A subgroup of the residual grouping (consisting of U.S. source income) are disregarded solely for purposes of determining entire taxable income under section 904(a).

(b) *Determining properly allocable or apportioned deductions.* The amount of deductions properly allocable or apportioned to gross income or stock described in paragraphs (a)(1)(ii) and (iii) of this section is determined by subdividing the United States shareholder's gross income and assets in each separate category described in § 1.904–5(a)(4)(v) into a section 245A subgroup and a non-section 245A subgroup. Gross income and assets in the residual grouping for U.S. source income are also subdivided into a section 245A subgroup and a non-section 245A subgroup. Each section 245A subgroup is treated as a statutory grouping under § 1.861–8(a)(4). Deductions properly allocable or apportioned to dividends or stock described in paragraphs (a)(1)(ii) and (iii) of this section only include those deductions that are allocated and apportioned under §§ 1.861–8 through 1.861–14T and 1.861–17 to the section

245A subgroups. The deduction allowed under section 245A(a) for dividends is allocated and apportioned solely among the section 245A subgroups on the basis of the relative amounts of gross income from such dividends in each section 245A subgroup.

(c) *Income and assets in the 245A subgroups*—(1) *In general.* For purposes of applying the allocation and apportionment rules under §§ 1.861–8 through 1.861–14T and 1.861–17 to the deductions of a United States shareholder, the only gross income included in a section 245A subgroup is dividend income for which a deduction is allowed under section 245A. The only asset included in a section 245A subgroup is the portion of the value of stock of each specified 10-percent owned foreign corporation that is assigned to the section 245A subgroup determined under paragraph (c)(2) of this section.

(2) *Assigning stock to a subgroup.* The value of stock of a specified 10-percent owned foreign corporation is characterized as an asset in a separate category described in § 1.904–5(a)(4)(v) or the residual grouping for U.S. source income under the rules of § 1.861–12(c). If the specified 10-percent owned foreign corporation is not a controlled foreign corporation, all of the value of its stock (other than the portion of stock assigned to the statutory groupings for gross section 245(a)(5) income under §§ 1.861–12(c)(4) and 1.861–13) in each separate category and in the residual grouping for U.S. source income is assigned to the section 245A subgroup in such separate category or residual grouping. If the specified 10-percent owned foreign corporation is a controlled foreign corporation, a portion of the value of stock in each separate category and in the residual grouping for U.S. source income is subdivided between a section 245A and non-section 245A subgroup under § 1.861–13(a)(5).

(d) *Coordination with OFL and ODL rules*—(1) *In general.* Section 904(b)(4) and this section apply before the operation of the overall foreign loss rules in section 904(f) and the overall domestic loss rules in section 904(g). *See* § 1.904(g)–3(c).

(2) [Reserved]

(e) *Example.* The following example illustrates the application of this section.

(1) *Facts*—(i) *Income and assets of USP.* USP is a domestic corporation. USP owns a factory in the United States with a tax book value of $27,000x. USP also directly owns all of the stock of each of the following three controlled foreign corporations: CFC1, CFC2, and CFC3. USP's tax book value in each of CFC1, CFC2, and CFC3 is $10,000x. USP incurs $1,500x of interest expense and earns $1,600x of U.S. source gross income. Under section 951A and the section 951A regulations (as defined in § 1.951A–1(a)(1)), USP's GILTI inclusion amount is $2,200x. USP's deduction under section 250 is $1,100x (''section 250 deduction''), all of which is by reason of section 250(a)(1)(B)(i). No portion of USP's section 250 deduction is reduced by reason of section 250(a)(2)(B). None of the CFCs makes any distributions.

(ii) *Characterization of CFC stock.* After application of § 1.861–13(a), USP determined that $8,000x of the stock of each of CFC1, CFC2, and CFC3 is assigned to the section 951A category (''section 951A category stock'') in the non-section 245A subgroup and the remaining $2,000x of the stock of each of CFC1, CFC2, and CFC3 is assigned to the general category (''general category stock'') in the section 245A subgroup. Additionally, under § 1.861–8(d)(2)(ii)(C)(*2*), $4,000x of the stock of each of CFC1, CFC2, and CFC3 that is section 951A category stock is an exempt asset. Accordingly, with respect to the stock of its controlled foreign corporations in the aggregate, USP has $12,000x of section 951A category stock in a non-section 245A subgroup; $6,000x of general category stock in a section 245A subgroup; and $12,000x of stock that is an exempt asset.

(iii) *Apportioning of expenses.* Taking into account USP's factory and its stock in CFC1, CFC2, and CFC3, the tax book value of USP's assets for purposes of apportioning expenses is $45,000x (excluding the $12,000x of exempt assets). Under § 1.861–9T(g), USP's $1,500 of interest expense is apportioned as follows: $400x ($1,500x × $12,000x/ $45,000x) to section 951A category income, $200x ($1,500x × $6,000x/$45,000x) to general category income, and the remaining $900x ($1,500 × $27,000x/$45,000x) to the residual U.S. source grouping. Under § 1.861–8(e)(14), all of USP's section 250 deduction is allocated and apportioned to section 951A category income.

(2) *Analysis*—(i) *USP's pre-credit U.S. tax.* USP's worldwide taxable income is $1,200x, which equals its GILTI inclusion amount of $2,200x plus its U.S. source gross income of $1,600x, less its deduction under section 250 of $1,100 and its interest expense of $1,500x. For purposes of applying section 904(a), before taking into account any foreign tax credit under section 901, USP's Federal income tax liability is 21% of $1,200x, or $252x.

(ii) *Application of section 904(b)(4).* Under section 904(d)(1), USP applies section 904(a) separately to each separate category of income.

(A) *General category income.* Before application of section 904(b)(4) and the rules in this section, USP's foreign source taxable income in the general category is a loss of $200x, which equals $0 (USP's foreign source general category income) less $200x (interest expense apportioned to general category income), and USP's worldwide taxable income is $1,200. Under paragraph (d) of this section, the rules in section 904(f) and (g) apply after section 904(b)(4) and the rules in this section. Under paragraphs (b) and (c)(1) of this section, USP has no deductions properly allocable or apportioned to gross income in the section 245A subgroup because USP has no dividend income in the general category for which a deduction is allowed under section 245A. Under paragraphs (b) and (c) of this section, USP has $200x of deductions for interest expense that are properly allocable or apportioned to stock of specified 10-percent owned foreign corporations in the section 245A subgroup because USP's only general category assets are the general category stock of CFC1, CFC2, and CFC3, all of which are in the section 245A subgroup. Therefore, under paragraph (a) of this section, USP's foreign source taxable income in the general category and its worldwide taxable income are determined without regard to the $200x of deductions for interest expense. Accordingly, USP's foreign source taxable income in the general category is $0 and its worldwide taxable income is $1,400x, and therefore, there is no separate limitation loss for purposes of section 904(f). Under section 904(a) and (d)(1) USP's foreign tax credit limitation for the general category is $0.

(B) *Section 951A category income.* Before application of section 904(b)(4) and the rules in this section, USP's foreign source taxable income in the section 951A category is $700x, which equals $2,200x (USP's GILTI inclusion amount) less $1,100x (USP's section 250 deduction) less $400x (interest apportioned to section 951A category income). Under paragraphs (b) and (c)(1) of this section, USP has no deductions properly allocable and apportioned to gross income in a section 245A subgroup of the section 951A category. Under paragraphs (b) and (c) of this section, USP has no deductions properly allocable and apportioned to stock of specified 10-percent owned foreign corporations in a section 245A subgroup of section 951A category stock because no portion of section 951A category stock is assigned to a section 245A subgroup. *See* § 1.861–13(a)(5)(v). Therefore, under paragraph (a) of this section no adjustment is made to USP's foreign source taxable income in the section 951A category. However, the adjustments to USP's worldwide taxable income described in paragraph (e)(2)(ii)(A) of this section apply for purposes of calculating USP's foreign tax credit limitation for the section 951A category. Accordingly, USP's foreign source taxable income in the section 951A category is $700x and its worldwide taxable income is $1,400x. Under section 904(a) and (d)(1), USP's foreign tax credit limitation for the section 951A category is $126x ($252x × $700x/$1,400x).

(f) *Applicability date.* This section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

■ **Par. 24.** § 1.904(f)–12 is amended by adding reserved paragraph (i) and paragraph (j) to read as follows:

§ 1.904(f)–12 Transition rules.

* * * * *

(j) *Recapture in years beginning after December 31, 2017, of separate limitation losses, overall foreign losses, and overall domestic losses incurred in* *years beginning before January 1, 2018*—(1) *Definitions*—(i) The term *pre-2018 separate categories* means the separate categories of income described in section 904(d) and any specified separate categories of income, as applicable to taxable years beginning before January 1, 2018.

(ii) The term *post-2017 separate categories* means the separate categories of income described in section 904(d) and any specified separate categories of income, as applicable to taxable years beginning after December 31, 2017.

(iii) The term *specified separate category* has the meaning set forth in § 1.904–4(m)).

(2) *Allocation of separate limitation loss or overall foreign loss account incurred in a pre-2018 separate category*—(i) *Allocation to the same category.* To the extent that a taxpayer has a balance in any separate limitation loss or overall foreign loss account in a pre-2018 separate category at the end of the taxpayer's last taxable year beginning before January 1, 2018, the amount of such balance is allocated on the first day of the taxpayer's next taxable year to the same post-2017 separate category as the pre-2018 separate category of the separate limitation loss or overall foreign loss account.

(ii) *Exception for general category separate limitation loss or overall foreign loss account*—(A) *In general.* To the extent a taxpayer has a balance in any separate limitation loss or overall foreign loss account in the pre-2018 separate category for general category income at the end of the taxpayer's last taxable year beginning before January 1, 2018, a taxpayer may choose to allocate any such balance to the taxpayer's post-2017 separate category for foreign branch category income to the extent the balance in the loss account would have been allocated to the taxpayer's post-2017 separate category for foreign branch category income if that separate category applied in the year or years the losses giving rise to the account were incurred. Any remaining portion of the balance in the separate limitation loss or overall foreign loss account is allocated to the taxpayer's post-2017 separate category for general category income.

(B) *Safe harbor.* In lieu of applying paragraph (j)(2)(ii)(A) of this section, the taxpayer may choose to recapture the balance in any loss account described in paragraph (j)(2)(ii)(A) of this section from the first available income in the taxpayer's post-2017 separate category for general category income or foreign branch category income. If the sum of taxpayer's general category income and foreign branch category income for a taxable year subject to recharacterization exceeds the amount of the loss account described in paragraph (j)(2)(ii)(A) of this section that is to be recaptured, then the amount of general category income and foreign branch category income that will be recharacterized under the relevant recapture provisions is determined on a proportionate basis. The recapture under this paragraph (j)(2)(ii)(B) of any loss account described in paragraph (j)(2)(ii)(A) of this section is made before the recapture of any amount by which the balance of the loss account is increased after the end of the taxpayer's last taxable year beginning before January 1, 2018.

(C) *Rules regarding the exception.* A taxpayer applying the exception described in paragraph (j)(2)(ii)(A) or (B) of this section must apply the exception to all balances in any separate limitation loss or overall foreign loss account in a pre-2018 separate category for general category income at the end of the taxpayer's last taxable year beginning before January 1, 2018. A taxpayer may apply the exception on a timely filed original return (including extensions) or an amended return. A taxpayer that applies the exception on an amended return must make appropriate adjustments to eliminate any double benefit arising from application of the exception to years that are not open for assessment.

(3) *Recapture of separate limitation loss or overall domestic loss that reduced pre-2018 separate category income*—(i) *Recapture as income in the same separate category.* To the extent that at the end of the taxpayer's last taxable year beginning before January 1, 2018, a taxpayer has a balance in any separate limitation loss or overall domestic loss account which offset pre-2018 separate category income, such loss is recaptured in subsequent taxable years as income in the same post-2017 separate category as the pre-2018 separate category of income that was offset by the loss.

(ii) *Exception for separate limitation loss or overall domestic loss that reduced general category income*—(A) *In general.* To the extent that a taxpayer's separate limitation loss or overall domestic loss account offset pre-2018 separate category income that was general category income, a taxpayer may choose to recapture the balance in the loss account at the end of the taxpayer's last taxable year beginning before January 1, 2018, in subsequent taxable years as income in the post-2017 separate category for foreign branch category income to the extent the balance in the loss account would have offset foreign branch category income had that separate category applied in the year or years the losses were incurred. Any remaining portion of the balance in the loss account is recaptured as income in the taxpayer's post-2017 separate category for general category income.

(B) *Safe harbor.* In lieu of applying paragraph (j)(3)(ii)(A) of this section, a taxpayer that had unused foreign income taxes in a pre-2018 taxable year that were allocated to the foreign branch category under § 1.904–2(j)(1)(iii)(A) or (B) may choose to recapture the balance in any loss account described in paragraph (j)(3)(ii)(A) of this section in subsequent taxable years ratably as income in the taxpayer's post-2017 separate categories for general category and foreign branch category income, based on the proportion in which any unused foreign taxes in the pre-2018 separate category for general category income are allocated under § 1.904–2(j)(1)(iii)(A) or (B).

(C) *Rules regarding the exception.* A taxpayer applying the exception described in paragraph (j)(2)(ii)(A) or (B) of this section must apply the exception to the recapture of all balances at the end of the taxpayer's last taxable year beginning before January 1, 2018 in any separate limitation loss or overall domestic loss account which offset pre-2018 separate category income that was general category income. A taxpayer may apply the exception on a timely filed original return (including extensions) or an amended return. A taxpayer that applies the exception on an amended return must make appropriate adjustments to eliminate any double benefit arising from application of the exception to years that are not open for assessment.

(4) *Treatment of foreign losses that are part of net operating losses incurred in pre-2018 taxable years which are carried forward to post-2017 taxable years*—(i) *Treatment as a loss in the same separate category.* A foreign loss that is part of a net operating loss incurred in a taxable year beginning before January 1, 2018, which is carried forward, pursuant to section 172, to a taxable year beginning after December 31, 2017, will be carried forward under the rules of § 1.904(g)–3(b)(2). For purposes of applying the rules of § 1.904(g)–3(b)(2), the portion of a net operating loss carryforward that is attributable to a foreign loss from a pre-2018 separate category will be treated as a loss attributable to the same post-2017 separate category as the pre-2018 separate category.

(ii) *Exception for general category foreign losses that are part of net operating losses*—(A) *In general.* A taxpayer may choose to treat the portion of a net operating loss carryforward that is attributable to a foreign loss from the pre-2018 separate category for general category income as attributable to the post-2017 separate category for foreign branch category income to the extent the net operating loss would have been attributable to the taxpayer's post-2017 separate category for foreign branch category income had that separate category applied in the year or years the net operating loss arose. Any remaining portion of the net operating loss carryforward is treated as attributable to the taxpayer's post-2017 separate category for general category income.

(B) *Safe harbor.* In lieu of applying paragraph (j)(4)(ii)(A) of this section, for the post-2017 taxable year in which a net operating loss carryforward described in paragraph (j)(4)(ii)(A) of this section is used, the taxpayer may choose to treat the net operating loss carryforward as attributable to the taxpayer's post-2017 separate categories for general category income and foreign branch category income to the extent of any general category income and foreign branch category income, respectively, that is available in the carryforward year to be offset by the net operating loss carryforward. To the extent the net operating loss carryforward offsets any other income in the carryforward year, it is treated as attributable to the taxpayer's post-2017 separate category for general category income. If the sum of taxpayer's general category income and foreign branch income in the carryforward year exceeds the amount of the net operating loss carryforward, then the amount of each type of separate income that is offset by the net operating loss carryforward, and therefore the separate category treatment of the net operating loss carryforward, is be determined on a proportionate basis. A general category net operating loss to which the exception is applied is absorbed before any general category net operating loss that is incurred after the end of the taxpayer's last taxable year beginning before January 1, 2018.

(C) *Rules regarding the exception.* A taxpayer applying the exception described in paragraph (j)(4)(ii)(A) or (B) of this section must apply the exception to all of its net operating losses that are attributable to a foreign loss from the pre-2018 separate category for general category income. A taxpayer may apply the exception on a timely filed original return (including extensions) or an amended return. A taxpayer that applies the exception on an amended return must make appropriate adjustments to eliminate any double benefit arising from application of the exception to years that are not open for assessment.

(5) *Coordination rule with respect to exceptions.* A taxpayer that applies any exception described in § 1.904–2(j)(1)(iii) or paragraph (j)(2)(ii), (j)(3)(ii), or (j)(4)(ii) of this section must apply all such exceptions and cannot apply any of the general rules described in § 1.904–2(j)(1)(ii) or paragraph (j)(2)(i), (j)(3)(i), or (j)(4)(i) of this section. However, in applying each such exception, the taxpayer may choose to apply the safe harbor provision regardless of whether the safe harbor is applied for purposes of any other exception.

(6) *Applicability date.* This paragraph (j) applies to taxable years beginning after December 31, 2017.

■ **Par. 25.** Section 1.904(g)–0 is amended by:

■ 1. Adding an entry for § 1.904(g)–3(i) and removing and reserving the entry for § 1.904(g)–3(j).

■ 2. Revising the entry for § 1.904(g)–3(k) and adding an entry for § 1.904(g)–3(l).

The revisions and additions read as follows:

§ 1.904(g)–0 Outline of regulation provisions.

* * * * *

§ 1.904(g)–3 *Ordering rules for the allocation of net operating losses, net capital losses, U.S. source losses, and separate limitation losses, and for the recapture of separate limitation losses, overall foreign losses, and overall domestic losses.*

* * * * *

(i) Step Eight: Dispositions under section 904(f)(3) in which gain would not otherwise be recognized.

(j) [Reserved]

(k) Examples.

(l) Applicability date.

■ **Par. 26.** Section 1.904(g)–3 is amended by:

■ 1. Removing the language ''paragraphs (b) through (i)'' and adding the language ''paragraphs (b) through (j)'' in its place in paragraph (a).

■ 2. Adding a sentence at the end of paragraph (c).

■ 3. Revising paragraph (f).

■ 4. Adding paragraph (i).

■ 5. Removing and reserving paragraph (j) and revising paragraph (k).

■ 6. Adding paragraph (l).

The revisions and additions read as follows:

§ 1.904(g)–3 Ordering rules for the allocation of net operating losses, net capital losses, U.S. source losses, and separate limitation losses, and for the recapture of separate limitation losses, overall foreign losses, and overall domestic losses.

* * * * *

(c) * * * The taxpayer also takes into account any adjustments required under section 904(b)(4) and § 1.904(b)–3.

* * * * *

(f) *Step Five: Recapture of overall foreign loss accounts.* If the taxpayer's separate limitation income for the taxable year (reduced by any losses carried over under paragraph (b) of this section) exceeds the sum of the taxpayer's U.S. source loss and separate limitation losses for the year, so that the taxpayer has separate limitation income remaining after the application of paragraphs (d)(1) and (e) of this section, then the taxpayer recaptures prior year overall foreign losses, if any, in accordance with § 1.904(f)–2, and reduces overall foreign loss accounts in accordance with § 1.904(f)–2. The recapture in this paragraph (f) includes amounts determined under § 1.904(f)–2(c) and (d)(3) but not § 1.904(f)–2(d)(4), which is covered in paragraph (i) of this section.

* * * * *

(i) *Step Eight: Dispositions under section 904(f)(3) in which gain would not otherwise be recognized.* The taxpayer determines the amount of gain that would otherwise not be recognized but that must be recognized in accordance with § 1.904(f)–2(d)(4) (not exceeding the taxpayer's applicable overall foreign loss account) and then applies § 1.904(f)–2(a) and (b) to recapture and reduce its overall foreign loss accounts in an amount equal to the gain recognized. To the extent this recognition of gain in a taxable year reduces the amount of a current year net operating loss or increases the amount of a net operating loss carryover to that taxable year, paragraphs (b) through (e) of this section are applied to determine the allocation of any additional net operating loss deduction and other deductions or losses and the applicable increases in the taxpayer's overall foreign loss, separate limitation loss, and overall domestic loss accounts, but only after the applicable overall foreign loss account has been recaptured as provided in this paragraph (i).

* * * * *

(k) *Examples.* The following examples illustrate the rules of this section. Unless otherwise noted, all corporations use the calendar year as the U.S. taxable year.

(1) *Example 1*—(i) *Facts*—(A) USC is a domestic corporation with foreign branch operations in Country X. For Year 1, USC had the following taxable income and losses after application of section 904(f) and (g) to income and loss in Year 1:

TABLE 1 TO PARAGRAPH (k)(1)(i)(A)

Foreign branch	Passive	US
$400x	$200x	$110x

(B) For Year 2, USC has a net operating loss of ($500x), determined as follows:

TABLE 2 TO PARAGRAPH (k)(1)(i)(B)

Foreign branch	Passive	US
($300x)	$0	($200x)

(ii) *Analysis*—(A) *Net operating loss allocation.* Because USC's taxable income for Year 1 exceeds its total net operating loss for Year 2, the full net operating loss is carried back. Under paragraph (b) of this section (Step 1), each component of the net operating loss is carried back and combined with its same category in Year 1. See paragraph (b)(2) of this section. After allocation of the net operating loss, USC has the following taxable income and losses for Year 1:

TABLE 3 TO PARAGRAPH (k)(1)(ii)(A)

Foreign branch	Passive	US
$100x	$200x	($90x)

(B) *Loss allocation.* Under paragraph (e) of this section (Step 4), the ($90x) of U.S. loss is allocated proportionately to reduce the foreign branch category and passive category income. Accordingly, $30x ($90x × $100x/$300x) of the U.S. loss is allocated to foreign branch category income and $60x ($90x × $200x/$300x) of the U.S. loss is allocated to passive category income, with a corresponding creation or increase to USC's overall domestic loss accounts.

(2) *Example 2*—(i) *Facts*—(A) USC is a domestic corporation with foreign branch operations in Country X. As of January 1, Year 1, USC has no loss accounts subject to recapture. For Year 1, USC has a net operating loss of ($1,400x), determined as follows:

TABLE 4 TO PARAGRAPH (k)(2)(i)(A)

Foreign branch	Passive	US
($400x)	($200x)	($800x)

(B) For Year 2, USC has the following taxable income and losses:

TABLE 5 TO PARAGRAPH (k)(2)(i)(B)

Foreign branch	Passive	US
$500x	($100x)	$1200x

(ii) *Analysis*—(A) *Net operating loss allocation.* Under paragraph (b) of this section (Step 1), because USC's total taxable income for Year 2 of $1600x ($1,200x + $500x − $100x) exceeds the total Year 1 net operating loss, the full $1,400x net operating loss is carried forward. Under paragraph (b)(2) of this section, each component of the net operating loss is carried forward and combined with its same category in Year 2. After allocation of the net operating loss, USC has the following taxable income and losses:

TABLE 6 TO PARAGRAPH (k)(2)(ii)(A)

Foreign branch	Passive	US
$100x	($300x)	$400x

(B) *Loss allocation.* Under paragraph (d) of this section (Step 3), $100x of the passive category loss offsets the $100x of foreign branch category income, resulting in a passive category separate limitation loss account with respect to foreign branch category income, and the other $200x of passive category loss offsets $200x of the U.S. source taxable income, resulting in the creation of an overall foreign loss account in the passive category.

(3) *Example 3*—(i) *Facts.* Assume the same facts as in paragraph (k)(2)(i) of this section (the facts in *Example 2*), except that in Year 2, USC had the following taxable income and losses:

TABLE 7 TO PARAGRAPH (k)(3)(i)

Foreign branch	Passive	US
$200x	($100x)	$1200x

(ii) *Analysis*—(A) *Net operating loss allocation.* Under paragraph (b) of this section (Step 1), because the total net operating loss for Year 1 of ($1,400x) exceeds total taxable income for Year 2 of $1,300x ($1,200x + $200x − $100x), USC has a partial net operating loss carryover to Year 2 of $1,300x. Under paragraph (b)(3)(i) of this section, first, the $800x U.S. source component of the net operating loss is allocated to U.S. income for Year 2. The tentative foreign branch category carryover under paragraph (b)(3)(ii) of this section ($200x) does not exceed the remaining net operating loss carryover amount ($500x). Therefore, $200x of the foreign branch category component of the net operating loss is next allocated to the foreign branch category income for Year 2. Under paragraph (b)(3)(iii) of this section, the remaining $300x of net operating loss carryover ($1300x − $800x − $200x) is carried over proportionally from the remaining net operating loss components in the foreign branch category ($200x, or $400x total foreign branch category loss − $200x foreign branch category loss already allocated) and passive category ($200x). Therefore, $150x ($300x × $200x/$400x) of the remaining net operating loss carryover is carried over from the foreign branch category for Year 1 and combined with the foreign branch category income for Year 2, and $150x ($300x × $200x/$400x) of the remaining net operating loss carryover is carried over from the passive category for Year 1 and combined with the passive category loss for Year 2. After allocation of the net operating loss carryover from Year 1 to the appropriate categories for Year 2, USC has the following taxable income and losses:

TABLE 8 TO PARAGRAPH (k)(3)(ii)(A)

Foreign branch	Passive	US
($150x)	($250x)	$400x

(B) *Loss allocation.* Under paragraph (d) of this section (Step 3), the losses in the foreign branch and passive categories fully offset the U.S. source income, resulting in the creation of foreign branch category and passive category overall foreign loss accounts.

(4) *Example 4*—(i) *Facts.* Assume the same facts as in paragraph (k)(2)(i) of this section (the facts in *Example 2*), except that in Year 2, USC has the following taxable income and losses:

TABLE 9 TO PARAGRAPH (k)(4)(i)

Foreign branch	Passive	US
$200x	$200x	($200x)

(ii) *Analysis*—(A) *Net operating loss allocation.* Under paragraph (b) of this section (Step 1), because the total net operating loss of ($1400x) exceeds total taxable income for Year 2 of $200x ($200x + $200x − $200x), USC has a partial net operating loss carryover to Year 2 of $200x. Because USC has no U.S. source income in Year 2, under paragraph (b)(3)(i) of this section no portion of the U.S. source component of the net operating loss is initially carried into Year 2. Because the total tentative carryover under paragraph (b)(3)(ii) of this section of $400x ($200x in each of the foreign branch and passive categories) exceeds the net operating loss carryover amount, the tentative carryover from each separate category is reduced proportionately by $100x ($200x × $200x/$400x). Accordingly, $100x ($200x − $100x) of the foreign branch category component of the net operating loss is carried forward and $100x ($200x − $100x) of the passive category component of the net operating loss is carried forward and combined with income in the same respective categories for Year 2. After allocation of the net operating loss carryover from Year 1, USC has the following taxable income and losses:

TABLE 10 TO PARAGRAPH (k)(4)(ii)(A)

Foreign branch	Passive	US
$100x	$100x	($200x)

(B) *Loss allocation.* Under paragraph (e) of this section (Step 4), the $200x U.S. source loss offsets the remaining $100x of foreign branch category income and $100x of passive category income, resulting in the creation of overall domestic loss accounts with respect to the foreign branch and passive categories.

(5) *Example 5*—(i) *Facts.* Assume the same facts as in paragraph (k)(2)(i) of this section (the facts in *Example 2*), except that in Year 2, USC has the following taxable income and losses:

TABLE 11 TO PARAGRAPH (k)(5)(i)

Foreign branch	Passive	US
$800x	($100x)	$100x

(ii) *Analysis*—(A) *Net operating loss allocation.* Under paragraph (b) of this section (Step 1), because USC's total net operating loss in Year 1 of ($1,400x) exceeds its total taxable income for Year 2 of $800x ($100x + $800x − $100x), USC has a partial net operating loss carryover to Year 2 of $800x. Under paragraph (b)(3)(i) of this section, $100x of the U.S. source component of the net operating loss is allocated to U.S. income for Year 2. The tentative foreign branch category carryover under paragraph (b)(3)(ii) of this section does not exceed the remaining net operating loss carryover amount. Therefore, $400x of the foreign branch category component of the net operating loss is allocated to reduce foreign branch category income in Year 2. Under paragraph (b)(3)(iii) of this section, of the remaining $300x of net operating loss carryover ($800x − $100x − $400x), $200x is carried forward from the passive category component of the net operating loss and combined with the passive category loss for Year 2. Under paragraph (b)(3)(iv) of this section, the remaining $100x ($300x − $200x) of net operating loss carryover is carried forward from the U.S. source component of the net operating loss and combined with the U.S. source income (and the previously allocated U.S. source component of the net operating loss) for Year 2. After allocation of the net operating loss carryover from Year 1, USC has the following taxable income and losses:

TABLE 12 TO PARAGRAPH (k)(5)(ii)(A)

Foreign branch	Passive	US
$400x	($300x)	($100x)

(B) *Loss allocation*—(*1*) Under paragraph (d) of this section (Step 3), the $300x passive category loss offsets the $300x of income in the foreign branch category, resulting in the creation of a passive category separate limitation loss account with respect to the foreign branch category.

(*2*) Under paragraph (e) of this section (Step 4), the $100x U.S. source loss offsets the remaining $100x of the foreign branch category income, resulting in the creation of an overall domestic loss account with respect to the foreign branch category.

(6) *Example 6*—(i) *Facts*—(A) USC is a domestic corporation with foreign branch operations in Country X. USC has no net operating losses and does not make an election to recapture more than the required amount of overall foreign losses. As of January 1, Year 1, USC has a ($200x) foreign branch category overall foreign loss (OFL) account and a ($200x) foreign branch category separate limitation loss (SLL) account with respect to the passive category. For Year 1, USC has $400x of passive category income that is fully offset by a ($400x) domestic loss in that taxable year, giving rise to the creation of an overall domestic loss (ODL) account with respect to the passive category. As of January 1, Year 2, USC has the following balances in its OFL, SLL, and ODL accounts:

TABLE 13 TO PARAGRAPH (k)(6)(i)(A)

Foreign branch		US
OFL	SLL (passive)	ODL (passive)
$200x	$200x	$400x

(B) In Year 2, USC has the following taxable income and losses:

TABLE 14 TO PARAGRAPH (k)(6)(i)(B)

Foreign branch	Passive	US
$400x	($100x)	$600x

(ii) *Analysis*—(A) *Loss allocation.* Under paragraph (d) of this section (Step 3), the $100x of passive category loss offsets $100x of the foreign branch category income, creating a passive category SLL account of $100x with respect to the foreign branch category. Because there is an offsetting foreign branch category SLL account of $200x with respect to the passive category from a prior taxable year, the two accounts are netted against each other so that all that remains is a $100x foreign branch category SLL account with respect to the passive category.

(B) *OFL account recapture.* Under paragraph (f) of this section (Step 5), 50% of the remaining $300x, or $150x, of income in the foreign branch category is subject to recharacterization as U.S. source income as a recapture of part of the OFL account in the foreign branch category.

(C) *SLL account recapture.* Under paragraph (g) of this section (Step 6), $100x of the remaining $150x of income in the foreign branch category is recharacterized as passive category income as a recapture of the foreign branch category SLL account with respect to the passive category.

(D) *ODL account recapture.* Under paragraph (h) of this section (Step 7), 50% of the $600, or $300, of U.S. source income is subject to recharacterization as foreign source passive category income as a recapture of a part of the ODL account with respect to the passive category. None of the $150x of foreign branch category income that was recharacterized as U.S. source income under paragraph (f) of this section (Step 5) is included here as income subject to recharacterization in connection with recapture of the ODL account.

(E) *Results*—(*1*) After the allocation of loss and recapture of loss accounts, USC has the following taxable income and losses for Year 2:

TABLE 15 TO PARAGRAPH (k)(6)(ii)(E)(*1*)

Foreign branch	Passive	US
$50x	$400x	$450x

(*2*) As of January 1, Year 3, USC has the following balances in its OFL, SLL and ODL accounts:

TABLE 16 TO PARAGRAPH (k)(6)(ii)(E)(*2*)

Foreign branch		Passive	US
OFL	SLL (passive)	SLL (foreign branch)	ODL (passive)
$50x	$0	$0	$100x

(l) *Applicability date.* This section applies to taxable years ending on or after December 16, 2019.

§ 1.904(i)–1 [Amended]

■ **Par. 27.** Section 1.904(i)–1 is amended by removing the language ''§ 1.904–5(a)(1)'' and adding in its place the language ''§ 1.904–5(a)(4)(v)'' in the first sentence of paragraph (a)(1)(i).

■ **Par. 28.** Section 1.905–2 is amended by adding a sentence after the fourth sentence of paragraph (a)(2) to read as follows:

§ 1.905–2 Conditions of allowance of credit.

(a) * * *

(2) * * * If the receipt or the return is in a foreign language, a certified translation thereof must be furnished by the taxpayer. * * *

* * * * *

■ **Par. 29.** Section 1.905–3 is added to read as follows:

§ 1.905–3 Adjustments to U.S. tax liability as a result of a foreign tax redetermination.

(a) *Foreign tax redetermination.* The term *foreign tax redetermination* means a change in the liability for a foreign income tax, as defined in § 1.960–1(b)(5), or certain other changes described in this paragraph (a) that may affect a taxpayer's foreign tax credit. In the case of a taxpayer that claims the credit in the year the taxes are paid, a foreign tax redetermination occurs if any portion of the tax paid is subsequently refunded. In the case of a taxpayer that claims the credit in the year the taxes accrue, a foreign tax redetermination occurs if taxes that when paid or later adjusted differ from amounts accrued by the taxpayer and claimed as a credit or added to PTEP group taxes (as defined in § 1.960–3(d)(1)). A foreign tax redetermination includes corrections and other adjustments to accrued amounts to reflect the final foreign tax liability, including additional payments of tax that accrue after the close of the taxable year to which the tax relates and, for foreign income taxes taken into account when accrued but translated into dollars on the date of payment, a payment of accrued tax if the value of the foreign currency relative to the dollar has changed between the date or taxable year of accrual and the date of payment. A foreign tax redetermination occurs if any tax claimed as a credit or added to PTEP group taxes is refunded in whole or in part, regardless of whether such tax was paid within the meaning of § 1.901–2(e) at the time the tax was claimed as a credit or added to PTEP group taxes. A foreign tax redetermination also includes accrued foreign income taxes that are not paid on or before the date that is 24 months after the close of the taxable year of the section 901 taxpayer (as defined in § 1.986(a)–1(a)(1)) to which such taxes relate, as well as a subsequent payment of any such accrued but unpaid taxes. If accrued foreign income taxes are not paid on or before the date that is 24 months after the close of the taxable year to which they relate, the resulting foreign tax redetermination is accounted for as if the unpaid portion of the foreign income taxes were refunded on such date. Foreign income taxes that first accrue after the date 24 months after the close of the taxable year to which such taxes relate may not be claimed as a credit or added to PTEP group taxes until paid. See section 905(b) and § 1.461–4(g)(6)(iii)(B), which require the taxpayer to establish the amount of tax that was properly accrued.

(b) *Redetermination of U.S. tax liability*—(1) *Foreign income taxes other than taxes deemed paid under section 960*—(i) *In general.* This paragraph (b)(1) applies to foreign income taxes claimed as a credit under section 901 other than foreign income taxes deemed paid under section 960. If a foreign tax redetermination occurs with respect to foreign income tax claimed as a credit under section 901 (other than a tax deemed paid under section 960), then a redetermination of U.S. tax liability is required for the taxable year in which the tax was claimed as a credit and any year to which unused foreign taxes from such year were carried under section 904(c). In the case of a taxpayer that claims the credit in the year the taxes are paid, the redetermination of U.S. tax liability is made by reducing the tax paid in such year by the amount refunded. In the case of a taxpayer that claims the credit in the year the taxes accrue, the redetermination of U.S. tax liability is made by treating the redetermined amount of foreign tax as the amount of tax that accrued in the year to which the redetermined tax relates. However, a redetermination of U.S. tax liability is not required (and a taxpayer need not notify the IRS) if the foreign income taxes are taken into account when accrued but translated into dollars on the date of payment, the difference between the dollar value of the accrued foreign income tax and the dollar value of the foreign income tax paid is solely attributable to fluctuations in the value of the foreign currency relative to the dollar between the date or taxable year of accrual and the date of payment, and the net dollar amount of the currency fluctuations attributable to the foreign tax redeterminations with respect to each and every foreign country is less than the lesser of $10,000 or two percent of the total dollar amount of the foreign income tax initially accrued with respect to that foreign country for the taxable year. In such case, if no redetermination of U.S. tax liability is made, an appropriate adjustment is made to the taxpayer's U.S. tax liability in the taxable year during which the foreign tax redeterminations occur.

(ii) *Examples.* The following examples illustrate the application of this paragraph (b)(1) and § 1.986(a)–1. In all examples, assume that USC is a domestic corporation that uses the calendar year as its taxable year both for Federal income tax purposes and for foreign tax purposes and that it is doing business through a foreign branch operating in Country X, which is a qualified business unit (within the meaning of section 989 and § 1.989(a)–1) (QBU) the functional currency of which is the ''u.'' Except as otherwise provided, the ''u'' is not an inflationary currency within the meaning of § 1.986(a)–1(a)(2)(iii). USC is an accrual basis taxpayer.

(A) *Example 1: Contested tax*—(*1*) *Facts.* In Year 1, USC earned 500u of foreign source foreign branch category income through its foreign branch in Country X and accrued and paid 50u of Country X foreign income tax on its earnings. The average exchange rate for Year 1 used to translate the foreign income taxes into dollars was $1x:1u. *See* § 1.986(a)–1(a)(1). On its Year 1 income tax return, USC claimed a foreign tax credit under section 901 of $50x (50u translated at the average exchange rate for Year 1, that is, $1x:1u). In Year 4, Country X assessed an additional 20u of tax with respect to USC's Year 1 earnings. USC did not pay or accrue the additional 20u of tax and contested the assessment. After exhausting all effective and practical remedies to reduce, over time, its liability for foreign tax, USC settled the contest with Country X in Year 6, paying 10u of additional tax on September 1, Year 6, when the spot rate was $1.10x:1u.

(*2*) *Analysis.* USC's payment in Year 6 of the 10u of additional tax accrued with respect to Year 1 is a foreign tax redetermination under paragraph (a) of this section. Under paragraph (b)(1)(i) of this section, the additional tax is taken into account in Year 1, the year to which the redetermined tax relates, irrespective of when the tax is paid. Under § 1.986(a)–1(a)(2)(i), because the tax was paid more than 24 months after the close of the year to which the redetermined tax relates, the 10u of tax is translated into dollars at the spot rate on the date of payment in Year 6 (10u at $1.10x:1u = $11x). If USC timely notifies the IRS, it may claim an increased foreign tax credit for Year 1. USC must also make corresponding adjustments in determining its taxable income and net unrecognized section 987 gain or loss in Year 1. See §§ 1.987–3(c)(2)(v) and 1.987–4(d)(7).

(B) *Example 2: Refund of tax improperly claimed as a credit*—(*1*) *Facts.* USC holds a note issued by FC, an unrelated foreign corporation in Country Y. In Year 1, FC owed USC 500u of interest on the loan. The statutory rate of withholding on interest paid to a nonresident of Country Y is 20%. On December 1, Year 1, when the spot rate was $1x:1u, FC withheld and remitted to Country Y 100u of tax and paid 400u to USC Effective for Year 1, USC elected under § 1.986(a)–1(a)(2)(iv) to translate its taxes denominated in nonfunctional currency into dollars at the spot rate on the date the taxes are paid. Under the United States—Country Y Income Tax Treaty (Treaty), USC was entitled to a reduced 15% rate of withholding that would result in a withholding tax of 75u. However, USC improperly claimed a foreign tax credit under section 901 for 100u = $100x on its Year 1 Federal income tax return. (See § 1.901–2(e)(2)(i) and (e)(5), providing that an amount is not tax paid to the extent it exceeds the taxpayer's liability for tax or is reasonably certain to be refunded.) In Year 4, USC filed a refund claim with Country Y for 25u, the difference between the amount actually withheld at the 20% statutory rate of tax and the amount owed by USC at the 15% Treaty rate. On March 15, Year 6, when the spot rate was $1.10x:1u, USC received a refund from Country Y of 25u. USC converted the 25u into dollars on the same day.

(*2*) *Analysis.* Notwithstanding that the 25u of refundable tax did not constitute an amount of tax paid within the meaning of § 1.901–2(e) at the time USC improperly claimed it as a credit, the 25u refund in Year 6 is a foreign tax redetermination under paragraph (a) of this section. Under paragraph (b)(1)(i) of this section, USC must redetermine its U.S. tax liability for Year 1, the taxable year to which the redetermined tax relates. Under § 1.986(a)–1(c), the refund is translated at the exchange rate that was used to translate such amount when originally claimed as a credit. Accordingly, if not previously adjusted by USC or the Internal Revenue Service, USC must file an amended return for Year 1, reducing the amount of foreign tax credit claimed for Year 1 by $25x (25u translated at the spot rate on December 1, Year 1; that is, $1x:1u). Under § 1.986(a)–1(e)(1), USC's basis in the 25u is the same dollar value of the refund as determined under § 1.986(a)–1(c), or $25x. When USC converted the 25u to $27.50x (translated at the spot rate on March 15, Year 6, that is, $1.10x:1u), it realized an exchange gain (within the meaning of § 1.988–1(e)) equal to $2.50x ($27.50x − $25x basis).

(C) *Example 3: Change in functional currency*—(*1*) *Facts.* In Year 1, USC earned 500u of foreign source foreign branch category income through its foreign branch in Country X and accrued 100u of Country X foreign income tax on its earnings. The average exchange rate for Year 1 used to translate the foreign income taxes into dollars was $1x:1u. *See* § 1.986(a)–1(a)(1). On its Federal income tax return for Year 1, USC claimed a foreign tax credit under section 901 of $100x (100u translated at the average exchange rate for Year 1, that is, $1x:1u). As of Year 2, the foreign branch changed its functional currency from the ''u'' to the dollar, and pursuant to § 1.985–5(d)(2), USC's foreign branch terminated and USC recognized section 987 gain or loss on December 31, Year 1 (the date of change). The rate of exchange, as determined under § 1.985–5(c), used to calculate the U.S. dollar basis in the foreign branch's property on the date of the change was $1.10x:1u, the spot rate on December 31, Year 1. On June 15, Year 3, when the spot rate was $1.30x:1u, USC's foreign branch received a refund from Country X of 10u. The foreign branch converted the 10u into $13x on the same day.

(*2*) *Analysis.* The 10u refund in Year 3 is a foreign tax redetermination under paragraph (a) of this section. Under paragraph (b)(1)(i) of this section, USC must redetermine its U.S. tax liability for Year 1, the taxable year to which the redetermined tax relates. Under § 1.986(a)–1(c), the refund is translated at the exchange rate that was used to translate such amount when originally claimed as a credit. Accordingly, USC must file an amended return, reducing the amount of foreign tax credit claimed for Year 1 by $10x (10u translated at the average exchange rate for Year 1, that is $1x:1u). USC must also make corresponding adjustments in determining its taxable income and net unrecognized section 987 gain or loss in Year 1. See §§ 1.987–3(c)(2)(v) and 1.987–4(d)(8). Because the foreign branch changed its functional currency to the dollar in Year 2, the 10u it receives is a refund of nonfunctional currency tax that is denominated in a currency that was the functional currency of the foreign branch at the time USC originally claimed a credit for that foreign income tax. Under §§ 1.985–5(d)(2) and 1.987–4(d), in Year 1 USC must recognize an additional $1x of section 987 gain (or $1x less of section 987 loss) by reason of the 10u being treated as an asset of the foreign branch at the time of the foreign branch's termination. Under § 1.986(a)–1(e)(2), USC's basis in the 10u refund is $11x, which is determined by using the exchange rate used under § 1.985–5(c) when the foreign branch changed its functional currency in Year 2 ($1.10x:1u). When the foreign branch converted the 10u to $13x (translated at the spot rate on June 15, Year 3, which is $1.30x:1u), it realized an exchange gain (within the meaning of § 1.988–1(e)) equal to $2x ($13x − $11x (10u translated at $1.10x:1u)).

(D) *Example 4: Inflationary currency*—(*1*) *Facts.* In Year 1, USC earned 500u of foreign source foreign branch category income through its foreign branch in Country X and accrued 100u of Country X foreign income tax on its earnings. The average exchange rate for Year 1 used to translate the foreign income taxes into dollars was $1x:1u. *See* § 1.986(a)–1(a)(1). On its Federal income tax return for Year 1, USC claimed a foreign tax credit under section 901 of $100x (100u translated at the average exchange rate for Year 1, that is, $1x:1u). USC paid the 100u of tax on April 15, Year 3, when the spot rate was $1x:2u. In Year 3, but not in Year 1, the u was an inflationary currency within the meaning of § 1.986(a)–1(a)(2)(iii).

(*2*) *Analysis.* Under § 1.986(a)–1(a)(2)(iii), because the u was an inflationary currency in the year the taxes were paid, USC must translate the 100u of Year 1 tax into dollars using the spot rate on the date of payment of the foreign taxes. Under paragraph (a) of this section, because the translated value of USC's Year 1 taxes when paid, that is, $50x (100u translated at the spot rate on April 15, Year 3, that is, $1x:2u), differs from the amount claimed as credits, that is, $100x (100u translated at the average exchange rate for Year 1, that is, $1x:1u), a foreign tax redetermination has occurred. Under paragraph (b)(1)(i) of this section, because the $50x foreign tax redetermination resulting from the currency fluctuation exceeds 2% of the $100x initially accrued, USC must redetermine its U.S. tax liability for Year 1, the taxable year to which the redetermined tax relates. Accordingly, USC must notify the IRS, reducing the amount of foreign tax credit claimed for Year 1 by $50x (the excess of the translated value of the Year 1 taxes when accrued, that is, $100x, over the translated value of the Year 1 taxes when paid, that is, $50x).

(E) *Example 5: Two-year rule*—(*1*) *Facts.* In Year 1, USC earned 500u of foreign source foreign branch category income through its foreign branch in Country X and accrued 100u of Country X foreign income tax on its earnings. The average exchange rate used to translate the foreign income taxes into dollars for Year 1 was $1x:1u. See § 1.986(a)–1(a)(1). On its Federal income tax return for Year 1, USC claimed a foreign tax credit under section 901 of $100x (100u translated at the average exchange rate for Year 1, that is, $1x:1u). USC did not pay the Year 1 foreign income taxes until March 15, Year 6, when the spot rate was $0.8x:1u.

(*2*) *Analysis*—(*i*) *Result in Year 3.* USC's failure to pay the tax by the end of Year 3 results in a foreign tax redetermination under paragraph (a) of this section. Because the taxes were not paid on or before the date 24 months after the close of the taxable year to which the tax relates, USC must account for the redetermination as if the unpaid 100u of accrued taxes were refunded on the last day of Year 3. Under paragraph (b)(1)(i) of this section, USC must redetermine its U.S. tax liability for Year 1, the taxable year to which the redetermined tax relates. Under § 1.986(a)–1(c), the deemed refund is translated at the exchange rate that was used to translate such amount when originally claimed as a credit. Accordingly, USC must notify the IRS, reducing the amount of foreign tax credit claimed for Year 1 by $100x (100u translated at the average exchange rate for Year 1, that is, $1x:1u). USC must also make corresponding adjustments in determining its taxable income and net unrecognized section 987 gain or loss in Year 1. See §§ 1.987–3(c)(2)(v) and 1.987–4(d)(8).

(*ii*) *Result in Year 6.* USC's payment of the Year 1 tax liability of 100u on March 15, Year 6, results in a second foreign tax redetermination under paragraph (a) of this section. Under paragraph (b)(1)(i) of this section, the additional tax is taken into account in Year 1, the year to which the redetermined tax relates, irrespective of when the tax is paid. Under § 1.986(a)–1(a)(2)(i), because the tax was paid more than 24 months after the close of the year to which the tax relates, USC must translate the 100u of tax at the spot rate on the date of payment of the foreign taxes in Year 6. If USC timely notifies the IRS, it may claim an increased foreign tax credit for Year 1. USC must also make corresponding adjustments in determining its taxable income and net unrecognized section 987 gain or loss in Year 1. See §§ 1.987–3(c)(2)(v) and 1.987–4(d)(7).

(F) *Example 6: Cash basis taxpayer that pays additional foreign tax*—(*1*) *Facts.* Individual A, a U.S. citizen resident in Country X, is a cash basis taxpayer who has not made an election under section 905(a) to claim the foreign tax credit in the year the taxes accrue. A uses the calendar year as the taxable year for both U.S. and Country X tax purposes. In Year 2, A pays 100u of foreign income taxes to Country X with respect to Year 1. The exchange rate used to translate the foreign income taxes into dollars was $1x:1u, the spot rate on the date A paid the taxes in Year 2. *See* section 986(a)(2)(A) and § 1.986(a)–1(b). On A's Year 2 Federal income tax return, A claims a foreign tax credit under section 901 of $100x. In Year 4, Country X assesses an additional 20u of tax with respect to A's Year 1 income. A does not pay the additional 20u of tax and contests the assessment. After exhausting all effective and practical remedies to reduce, over time, A's liability for foreign tax, A settles the contest with Country X in Year 6, paying 10u of additional tax on September 1, Year 6, when the spot rate is $1.10x:1u.

(*2*) *Analysis.* Because A is a cash basis taxpayer that claims the foreign tax credit in the year the taxes are paid, A's payment in Year 6 of 10u of additional tax owed with respect to Year 1 is not a foreign tax redetermination requiring a redetermination of U.S. tax liability under paragraph (b)(1) of this section. Rather, A is eligible to claim the additional tax as a credit in Year 6, the year in which the tax is paid. Under § 1.986(a)–1(b), the 10u of tax is translated into dollars at the spot rate on the date of payment in Year 6 (10u at $1.10x:1u = $11x).

(G) *Example 7: Cash basis taxpayer that receives a refund of foreign tax*—(*1*) *Facts.*

The facts are the same as paragraph (b)(1)(ii)(F) of this section (the facts in *Example 6*) except that instead of being assessed additional tax in Year 4, A receives a refund in Year 4 of 10u with respect to A's Year 1 tax that was claimed as a credit in Year 2.

(*2*) *Analysis.* Under paragraphs (a) and (b)(1) of this section, A must redetermine its U.S. tax liability for Year 2 and any year to which unused foreign taxes were carried from Year 2. Under § 1.986(a)–1(c), the amount of A's foreign tax credit for Year 2 is reduced by $10x, the 10u refund translated at the exchange rate used to translate the tax when claimed as a credit. Under § 1.986(a)–1(e)(1), A's basis in the 10u is $10x.

(2) and (3) [Reserved]

(c) *Foreign income tax imposed on foreign refund.* If a redetermination of foreign income tax for a taxable year or years results from a refund to the section 901 taxpayer of foreign income taxes paid to a foreign country or possession of the United States and the foreign country or possession imposed foreign income tax on such refund, then, in accordance with section 905(c)(5), the amount of the refund is considered to be reduced by the amount of any foreign income tax described in section 901 imposed by the foreign country or possession of the United States with respect to such refund. In such case, no other credit under section 901, and no deduction under section 164, is allowed for any taxable year with respect to such tax imposed on such refund.

(d) *Applicability dates.* This section applies to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019.

§ 1.905–3T [Removed]

■ **Par. 30.** Section 1.905–3T is removed.

§ 1.951A–2 [Amended]

■ **Par. 31.** Section 1.951A–2 is amended by removing the language "§ 1.904–5(a)" and adding in its place the language "§ 1.904–5(a)(4)(v)" in the first sentence of paragraph (c)(3).

§ 1.952–1 [Amended]

■ **Par. 32.** Section 1.952–1 is amended by removing the language "§ 1.904–5(a)(1)" and adding in its place the language "§ 1.904–5(a)(4)(v)" in paragraph (e)(1)(i), the first sentence of paragraph (e)(5), and the first sentence of paragraph (f)(2)(ii).

■ **Par. 33.** Section 1.954–1 is amended by:

■ 1. Removing the language "§ 1.904–5(a)(1)" and adding in its place the language "§ 1.904–5(a)(4)(v)" in the introductory text of paragraph (c)(1)(iii)(A).

■ 2. In paragraph (d)(3)(i):

■ i. Removing the language "section 960" and adding in its place the language "section 960(a) and § 1.960–2(b)(1)" in the first sentence.

■ ii. Removing the language "section 960" and adding in its place the language "section 960(a)" in the second sentence.

■ iii. Removing the last sentence.

■ 3. Removing the language "section 960" and adding in its place the language "section 960(a) and § 1.960–2(b)(1)" in paragraph (d)(3)(ii).

■ 4. Adding paragraph (d)(3)(iii).

■ 5. Removing paragraph (g)(4).

■ 6. Adding paragraph (h).

The additions read as follows:

§ 1.954–1 Foreign base company income.

* * * * *

(d) * * *

(3) * * *

(iii) *Effect of potential and actual changes in taxes paid or accrued.* Except as otherwise provided in this paragraph (d)(3)(iii), the amount of foreign income taxes paid or accrued with respect to a net item of income, determined in the manner provided in this paragraph (d), does not take into account any potential reduction in foreign income taxes that may occur by reason of a future distribution to shareholders of all or part of such income. However, to the extent the foreign income taxes paid or accrued by the controlled foreign corporation are reasonably certain to be returned by the foreign jurisdiction imposing such taxes to a shareholder, directly or indirectly, through any means (including, but not limited to, a refund, credit, payment, discharge of an obligation, or any other method) on a subsequent distribution to such shareholder, the foreign income taxes are not treated as paid or accrued for purposes of this paragraph (d)(3).

* * * * *

(h) *Applicability dates*—(1) *Paragraph (d)(3) of this section.* Paragraph (d)(3) of this section applies to taxable years of a controlled foreign corporation ending on or after December 4, 2018.

(2) *Paragraph (g) of this section.* Paragraph (g) of this section applies to taxable years of a controlled foreign corporation beginning on or after July 23, 2002.

■ **Par. 34.** Section 1.960–1 is revised to read as follows:

§ 1.960–1 Overview, definitions, and computational rules for determining foreign income taxes deemed paid under section 960(a), (b), and (d).

(a) *Overview*—(1) *Scope of §§ 1.960–1 through 1.960–3.* This section and §§ 1.960–2 and 1.960–3 provide rules to associate foreign income taxes of a controlled foreign corporation with the income that a domestic corporation that is a United States shareholder of the controlled foreign corporation takes into account in determining a subpart F inclusion or GILTI inclusion amount of the domestic corporation, as well as to associate foreign income taxes of a controlled foreign corporation with distributions of previously taxed earnings and profits. This section and §§ 1.960–2 and 1.960–3 provide the exclusive rules for determining the foreign income taxes deemed paid by a domestic corporation under section 960. Therefore, only foreign income taxes of a controlled foreign corporation that are associated under these rules with a subpart F inclusion or GILTI inclusion amount of a domestic corporation that is a United States shareholder of the controlled foreign corporation, or with previously taxed earnings and profits, are eligible to be deemed paid. This section provides definitions and computational rules for determining foreign income taxes deemed paid under section 960(a), (b), and (d). Section 1.960–2 provides rules for computing the amount of foreign income taxes deemed paid by a domestic corporation that is a United States shareholder of a controlled foreign corporation under section 960(a) and (d). Section 1.960–3 provides rules for computing the amount of foreign income taxes deemed paid by a domestic corporation that is a United States shareholder of a controlled foreign corporation, or by a controlled foreign corporation, under section 960(b). This section and §§ 1.960–2 and 1.960–3 also apply for purposes of any provision that treats a taxpayer as a domestic corporation that is deemed to pay foreign income taxes or treats a foreign corporation as a controlled foreign corporation for purposes of section 960. See, for example, sections 962(a)(2) and 1293(f).

(2) *Scope of this section.* Paragraph (b) of this section provides definitions for purposes of this section and §§ 1.960–2 and 1.960–3. Paragraph (c) of this section provides computational rules to coordinate the various calculations under this section and §§ 1.960–2 and 1.960–3. Paragraph (d) of this section provides rules for computing the income in an income group within a section 904 category, and for associating foreign income taxes with an income group. Paragraph (e) of this section provides a rule for the treatment of taxes associated with the residual income group. Paragraph (f) of this section provides an example illustrating the application of this section.

(b) *Definitions.* The following definitions apply for purposes of this section and §§ 1.960–2 and 1.960–3.

(1) *Annual PTEP account.* The term *annual PTEP account* has the meaning set forth in § 1.960–3(c)(1).

(2) *Controlled foreign corporation.* The term *controlled foreign corporation* means a foreign corporation described in section 957(a).

(3) *Current taxable year.* The term *current taxable year* means the U.S. taxable year of a controlled foreign corporation that is an inclusion year, or during which the controlled foreign corporation receives a section 959(b) distribution or makes a section 959(a) distribution or a section 959(b) distribution.

(4) *Current year tax.* The term *current year tax* means a foreign income tax paid or accrued by a controlled foreign corporation in a current taxable year (taking into account any adjustments resulting from a foreign tax redetermination (as defined in § 1.905–3(a)). A foreign income tax accrues when all the events have occurred that establish the fact of the liability and the amount of the liability can be determined with reasonable accuracy. *See* §§ 1.446–1(c)(1)(ii)(A) and 1.461–4(g)(6)(iii)(B) (economic performance exception for certain foreign taxes). Withholding taxes described in section 901(k)(1)(B) that are withheld from a payment accrue when the payment is made. A foreign income tax calculated on the basis of net income (or a base in lieu of net income) for a foreign taxable year accrues on the last day of the foreign taxable year. Accordingly, current year taxes include foreign withholding taxes that are withheld from payments made to the controlled foreign corporation during the current taxable year, and foreign income taxes that accrue in the controlled foreign corporation's current taxable year in which or with which its foreign taxable year ends. Additional payments of foreign income taxes resulting from a redetermination of foreign tax liability, including contested taxes that accrue when the contest is resolved, ''relate back'' and are considered to accrue as of the end of the foreign taxable year to which the taxes relate.

(5) *Foreign income tax.* The term *foreign income tax* means each separate levy (as defined in § 1.901–2(d)) that is an income, war profits, and excess profits tax as defined in § 1.901–2(a), and tax included in the term income, war profits, and excess profits tax by reason of section 903 and § 1.903–1(a), that is imposed by a foreign country or a possession of the United States, including any such tax that is deemed paid by a controlled foreign corporation under section 960(b)(2). Income, war profits, and excess profits taxes do not include amounts excluded from the definition of those taxes under section 901. See, for example, section 901(f), (g), and (i). Foreign income tax also does not include taxes paid by a controlled foreign corporation for which a credit is disallowed at the level of the controlled foreign corporation. See, for example, sections 245A(e)(3), 901(k)(1), (l), and (m), 909, and 6038(c)(1)(B). Foreign income tax, however, includes tax that may be deemed paid but for which a credit is reduced or disallowed at the level of the United States shareholder. See, for example, sections 901(e), 901(j), 901(k)(2), 908, 965(g), and 6038(c)(1)(A).

(6) *Foreign taxable year.* The term *foreign taxable year* has the meaning set forth in section 7701(a)(23), applied by substituting ''under foreign law'' for the phrase ''under subtitle A.''

(7) *Foreign taxable income.* The term *foreign taxable income* means the base upon which a current year tax is imposed that comprises the items included in gross income under foreign law and the deductions allowed under foreign law. In the case of a current year tax that is imposed with respect to a taxable period, foreign taxable income includes all of the items taken into account under foreign law with respect to that period. See paragraph (d)(3)(ii)(A) of this section for rules for apportioning current year tax to section 904 categories or income groups on the basis of foreign taxable income.

(8) *GILTI inclusion amount.* The term *GILTI inclusion amount* has the meaning set forth in § 1.951A–1(c)(1) (or, in the case of a member of a consolidated group, § 1.1502–51(b)).

(9) *Gross tested income.* The term *gross tested income* has the meaning set forth in § 1.951A–2(c)(1).

(10) *Inclusion percentage.* The term *inclusion percentage* has the meaning set forth in § 1.960–2(c)(2).

(11) *Inclusion year.* The term *inclusion year* means the U.S. taxable year of a controlled foreign corporation which ends during or with the taxable year of a United States shareholder of the controlled foreign corporation in which the United States shareholder includes an amount in income under section 951(a)(1) or 951A(a) with respect to the controlled foreign corporation.

(12) *Income group.* The term *income group* means a group of income described in paragraph (d)(2)(ii) of this section.

(13) *Partnership CFC.* The term *partnership CFC* means, with respect to a U.S. shareholder partnership, a controlled foreign corporation stock of which is owned (within the meaning of section 958(a)) by the U.S. shareholder partnership.

(14) *Passive category.* The term *passive category* means the separate category of income described in section 904(d)(1)(C) and § 1.904–4(b).

(15) *Previously taxed earnings and profits.* The term *previously taxed earnings and profits* means earnings and profits described in section 959(c)(1) or (2), including earnings and profits described in section 959(c)(2) by reason of section 951A(f)(1) and § 1.951A–5(b)(1).

(16) *PTEP group.* The term *PTEP group* has the meaning set forth in § 1.960–3(c)(2).

(17) *PTEP group taxes.* The term *PTEP group taxes* has the meaning set forth in § 1.960–3(d)(1).

(18) *Recipient controlled foreign corporation.* The term *recipient controlled foreign corporation* has the meaning set forth in § 1.960–3(b)(2).

(19) *Reclassified previously taxed earnings and profits.* The term *reclassified previously taxed earnings and profits* has the meaning set forth in § 1.960–3(c)(4).

(20) *Reclassified PTEP group.* The term *reclassified PTEP group* has the meaning set forth in § 1.960–3(c)(4).

(21) *Residual income group.* The term *residual income group* has the meaning set forth in paragraph (d)(2)(ii)(D) of this section.

(22) *Section 904 category.* The term *section 904 category* means a separate category of income described in § 1.904–5(a)(4)(v).

(23) *Section 951A category.* The term *section 951A category* means the separate category of income described in section 904(d)(1)(A) and § 1.904–4(g).

(24) *Section 959 distribution.* The term *section 959 distribution* means a section 959(a) distribution or a section 959(b) distribution.

(25) *Section 959(a) distribution.* The term *section 959(a) distribution* means a distribution excluded from the gross income of a United States shareholder under section 959(a).

(26) *Section 959(b) distribution.* The term *section 959(b) distribution* means a distribution excluded from the gross income of a controlled foreign corporation for purposes of section 951(a) under section 959(b).

(27) *Section 959(c)(2) PTEP group.* The term *section 959(c)(2) PTEP group* has the meaning set forth in § 1.960–3(c)(4).

(28) *Subpart F inclusion.* The term *subpart F inclusion* has the meaning set forth in § 1.960–2(b)(1).

(29) *Subpart F income.* The term *subpart F income* has the meaning set forth in section 952 and § 1.952–1(a).

(30) *Subpart F income group.* The term *subpart F income group* has the meaning set forth in paragraph (d)(2)(ii)(B)(*1*) of this section.

(31) *Tested foreign income taxes.* The term *tested foreign income taxes* has the meaning set forth in § 1.960–2(c)(3).

(32) *Tested income.* The term *tested income* means the amount with respect to a controlled foreign corporation that is described in section 951A(c)(2)(A) and § 1.951A–2(b)(1).

(33) *Tested income group.* The term *tested income group* has the meaning set forth in paragraph (d)(2)(ii)(C) of this section.

(34) *United States shareholder.* The term *United States shareholder* has the meaning set forth in section 951(b).

(35) *U.S. shareholder partner.* The term *U.S. shareholder partner* means, with respect to a U.S. shareholder partnership and a partnership CFC of the U.S. shareholder partnership, a United States person that is a partner in the U.S. shareholder partnership and that is also a United States shareholder (as defined in section 951(b)) of the partnership CFC.

(36) *U.S. shareholder partnership.* The term *U.S. shareholder partnership* means a domestic partnership (within the meaning of section 7701(a)(4)) that is a United States shareholder of one or more controlled foreign corporations.

(37) *U.S. taxable year.* The term *U.S. taxable year* has the same meaning as that of the term *taxable year* set forth in section 7701(a)(23).

(c) *Computational rules*—(1) *In general.* For purposes of computing foreign income taxes deemed paid by either a domestic corporation that is a United States shareholder with respect to a controlled foreign corporation under § 1.960–2 or § 1.960–3 or by a controlled foreign corporation under § 1.960–3 for the current taxable year, the following rules apply in the following order, beginning with the lowest-tier controlled foreign corporation in a chain with respect to which the domestic corporation is a United States shareholder:

(i) First, items of gross income of the controlled foreign corporation for the current taxable year other than a section 959(b) distribution are assigned to section 904 categories and included in income groups within those section 904 categories under the rules in paragraph (d)(2) of this section. The receipt of a section 959(b) distribution by the controlled foreign corporation is accounted for under § 1.960–3(c)(3).

(ii) Second, deductions (other than for current year taxes) of the controlled foreign corporation for the current taxable year are allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category. See paragraph (d)(3)(i) of this section. Additionally, the functional currency amounts of current year taxes of the controlled foreign corporation for the current taxable year are allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category, and to reduce earnings and profits in any PTEP groups that were increased as provided in paragraph (c)(1)(i) of this section. See paragraph (d)(3)(ii) of this section. For purposes of computing foreign taxes deemed paid, current year taxes allocated and apportioned to income groups and PTEP groups in the section 904 categories are translated into U.S. dollars in accordance with section 986(a). See paragraph (c)(3) of this section.

(iii) Third, current year taxes deemed paid under section 960(a) and (d) by the domestic corporation with respect to income of the controlled foreign corporation are computed under the rules of § 1.960–2. In addition, foreign income taxes deemed paid under section 960(b)(2) with respect to the receipt of a section 959(b) distribution by the controlled foreign corporation are computed under the rules of § 1.960–3(b).

(iv) Fourth, any previously taxed earnings and profits of the controlled foreign corporation resulting from subpart F inclusions and GILTI inclusion amounts with respect to the controlled foreign corporation's current taxable year are separated from other earnings and profits of the controlled foreign corporation and added to an annual PTEP account, and a PTEP group within the PTEP account, under the rules of § 1.960–3(c).

(v) Fifth, paragraphs (c)(1)(i) through (iv) of this section are repeated for each next higher-tier controlled foreign corporation in the chain.

(vi) Sixth, with respect to the highest-tier controlled foreign corporation in a chain that is owned directly (or indirectly through a partnership) by the domestic corporation, foreign income taxes that are deemed paid under section 960(b)(1) in connection with the receipt of a section 959(a) distribution by the domestic corporation are computed under the rules of § 1.960–3(b).

(2) *Inclusion of current year items.* For a current taxable year, the items of income and deductions (including for taxes), and the U.S. dollar amounts of current year taxes, that are included in the computations described in this section and assigned to income groups and PTEP groups for the taxable year are the items that the controlled foreign corporation accrues and takes into account during the current taxable year.

(3) *Functional currency and translation.* The computations described in this paragraph (c) that relate to income and earnings and profits are made in the functional currency of the controlled foreign corporation (as determined under section 985), and references to taxes deemed paid are to U.S. dollar amounts (translated in accordance with section 986(a)).

(d) *Computing income in a section 904 category and an income group within a section 904 category*—(1) *Scope.* This paragraph (d) provides rules for assigning gross income (including gains) of a controlled foreign corporation for the current taxable year to a section 904 category and income group within a section 904 category, and for allocating and apportioning deductions (including losses and current year taxes) and the U.S. dollar amount of current year taxes of the controlled foreign corporation for the current taxable year among the section 904 categories, income groups within a section 904 category, and PTEP groups. For rules regarding maintenance of previously taxed earnings and profits in an annual PTEP account, and assignment of those previously taxed earnings and profits to PTEP groups, see § 1.960–3.

(2) *Assignment of gross income to section 904 categories and income groups within a category*—(i) *Assigning items of gross income to section 904 categories.* Items of gross income of the controlled foreign corporation for the current taxable year are first assigned to a section 904 category of the controlled foreign corporation under §§ 1.904–4 and 1.904–5, and under § 1.960–3(c)(1) in the case of gross income relating to a section 959(b) distribution received by the controlled foreign corporation. Income of a controlled foreign corporation, other than gross income relating to a section 959(b) distribution, cannot be assigned to the section 951A category. *See* § 1.904–4(g).

(ii) *Grouping gross income within a section 904 category*—(A) *In general.* Gross income within a section 904 category is assigned to an income group under the rules of this paragraph (d)(2)(ii), or to a PTEP group under the rules of § 1.960–3(c)(3). Gross income other than a section 959(b) distribution is assigned to a subpart F income group, tested income group, or residual income group.

(B) *Subpart F income groups*—(*1*) *In general.* The term *subpart F income group* means an income group within a section 904 category that consists of income that is described in paragraph (d)(2)(ii)(B)(*2*) of this section. Gross income that is treated as a single item of income under § 1.954–1(c)(1)(iii) is in a separate subpart F income group under paragraph (d)(2)(ii)(B)(*2*)(*i*) of this section. Items of gross income that give rise to income described in paragraph (d)(2)(ii)(B)(*2*)(*ii*) of this section are aggregated and treated as gross income in a separate subpart F income group. Similarly, items of gross income that give rise to income described in each one of paragraphs (d)(2)(ii)(B)(*2*)(*iii*) through (*v*) of this section are aggregated and treated as gross income in a separate subpart F income group.

(*2*) *Income in subpart F income groups.* The income included in subpart F income groups is:

(*i*) Items of foreign base company income treated as a single item of income under § 1.954–1(c)(1)(iii);

(*ii*) Insurance income described in section 952(a)(1);

(*iii*) Income subject to the international boycott factor described in section 952(a)(3);

(*iv*) Income from certain bribes, kickbacks and other payments described in section 952(a)(4); and

(*v*) Income subject to section 901(j) described in section 952(a)(5).

(C) *Tested income groups.* The term *tested income group* means an income group that consists of tested income within a section 904 category. Items of gross tested income in each section 904 category are aggregated and treated as gross income in a separate tested income group.

(D) *Residual income group.* The term *residual income group* means the income group within a section 904 category that consists of income that is not in a subpart F income group, tested income group, or PTEP group.

(E) *Examples.* The following examples illustrate the application of this paragraph (d)(2)(ii).

(*1*) *Example 1: Subpart F income groups*—(*i*) *Facts.* CFC, a controlled foreign corporation, is incorporated in Country X. CFC uses the ''u'' as its functional currency. At all relevant times, 1u = $1x. CFC earns from sources outside of Country X portfolio dividend income of 100,000u, portfolio interest income of 1,500,000u, and 70,000u of royalty income that is not derived from the active conduct of a trade or business. CFC also earns 50,000u from the sale of personal property to a related person for use outside of Country X that gives rise to foreign base company sales income under section 954(d). Finally, CFC earns 45,000u for performing consulting services outside of Country X for related persons that gives rise to foreign base company services income under section 954(e). None of the income is taxed by Country X. The dividend income is subject to a 15 percent third-country withholding tax after application of the applicable income tax treaty. The interest income and the royalty income are subject to no third-country withholding tax. CFC incurs no expenses.

(*ii*) *Analysis.* Under paragraph (d)(2)(i) of this section and § 1.904–4, the interest income, dividend income, and royalty income are passive category income and the sales and consulting income are general category income. Under paragraph (d)(2)(ii)(B) of this section, CFC has a separate subpart F income group within the passive category with respect to the 100,000u of dividend income, which is foreign personal holding company income described in § 1.954–1(c)(1)(iii)(A)(*1*)(*i*) (dividends, interest, rents, royalties and annuities) that falls within a single group of income under § 1.904–4(c)(3)(i) for passive income that is subject to withholding tax of fifteen percent or greater. CFC also has a separate subpart F income group within the passive category with respect to the 1,500,000u of interest income and the 70,000u of royalty income (in total 1,570,000u) which together are foreign personal holding company income described in § 1.954–1(c)(1)(iii)(A)(*1*)(*i*) (dividends, interest, rents, royalties and annuities) that falls within a single group of income under § 1.904–4(c)(3)(iii) for passive income that is subject to no withholding tax or other foreign tax. With respect to its 50,000u of sales income, CFC has a separate subpart F income group with respect to foreign base company sales income described in § 1.954–1(c)(1)(iii)(A)(*2*)(*i*) within the general category. With respect to its 45,000u of services income, CFC has a separate subpart F income group with respect to foreign base company services income described in § 1.954–1(c)(1)(iii)(A)(*2*)(*ii*) within the general category.

(*2*) *Example 2: Tested income groups*—(*i*) *Facts.* CFC, a controlled foreign corporation, is incorporated in Country X. CFC uses the ''u'' as its functional currency. At all relevant times, 1u = $1x. CFC earns 500u from the sale of goods to unrelated parties. CFC also earns 75u for performing consulting services for unrelated parties. All of its income is gross tested income. CFC incurs no deductions.

(*ii*) *Analysis.* Under paragraph (d)(2)(i) of this section and section 904 and § 1.904–4, the sales income and services income are both general category income. Under paragraph (d)(2)(ii)(C) of this section, with respect to the 500u of sales income and 75u services income (in total 575u), CFC has one tested income group within the general category.

(3) *Allocation and apportionment of deductions among section 904 categories, income groups within a section 904 category, and certain PTEP groups*—(i) *In general.* Gross income of the controlled foreign corporation in each income group within each section 904 category is reduced by deductions (including losses) of the controlled foreign corporation for the current taxable year under the rules in this paragraph (d)(3)(i). No deductions of the controlled foreign corporation for the current taxable year other than a deduction for current year taxes imposed solely by reason of the receipt of a section 959(b) distribution are allocated or apportioned to reduce earnings and profits in a PTEP group.

(A) First, the rules of sections 861 through 865 and 904(d) (taking into account the rules of section 954(b)(5) and § 1.954–1(c), and section 951A(c)(2)(A)(ii) and § 1.951A–2(c)(3), as appropriate) apply to allocate and apportion to reduce gross income (or create a loss) in each section 904 category and income group within a section 904 category any deductions of the controlled foreign corporation that are definitely related to less than all of the controlled foreign corporation's gross income as a class. See paragraph (d)(3)(ii) of this section for special rules for allocating and apportioning current year taxes to section 904 categories, income groups, and PTEP groups.

(B) Second, related person interest expense is allocated to and apportioned among the subpart F income groups within the passive category under the principles of §§ 1.904–5(c)(2) and 1.954–1(c)(1)(i).

(C) Third, any remaining deductions are allocated and apportioned to reduce gross income (or create a loss) in the section 904 categories and income groups within each section 904 category under the rules referenced in paragraph (d)(3)(i)(A) of this section.

(ii) *Allocation and apportionment of a current year tax*—(A) *In general.* A current year tax is allocated and apportioned among the section 904 categories under the rules of § 1.904–6(a)(1) based on the portion of the foreign taxable income (as characterized under Federal income tax principles) that is assigned to a particular section 904 category. An amount of the current year tax that is allocated and apportioned to a section 904 category is then allocated and apportioned among the income groups within the section 904 category under the principles of § 1.904–6(a)(1) based on the portion of the foreign taxable income (as characterized under Federal income tax principles) that is assigned to a particular income group. Therefore, the portion of a current year tax that is attributable to a timing difference described in § 1.904–6(a)(1)(iv) is treated as related to the section 904 category and income group within a section 904 category to which the tax would be assigned if the foreign taxable income on which the tax is imposed was recognized under Federal income tax principles in the year in which the tax is paid or accrued. For purposes of determining foreign income taxes deemed paid under the rules in §§ 1.960–2 and 1.960–3, the U.S. dollar amount of a current year tax is assigned to the section 904 categories, income groups, and PTEP groups (to the extent provided in paragraph (d)(3)(ii)(C) of this section) to which the current year tax is allocated and apportioned.

(B) *Foreign taxable income that includes a base difference.* For purposes of allocating and apportioning a current year tax among the income groups within a section 904 category under the rules of this paragraph (d)(3)(ii), the portion of the foreign taxable income that constitutes a base difference described in § 1.904–6(a)(1)(iv) is assigned to a residual income group. An amount of current year tax that is imposed on such portion of the foreign taxable income is therefore allocated and apportioned to the residual income group within a section 904 category.

(C) *Foreign taxable income that includes previously taxed earnings and profits.* For purposes of allocating and apportioning a current year tax under this paragraph (d)(3)(ii), a PTEP group that is increased under § 1.960–3(c)(3) as a result of the receipt of a section 959(b) distribution in the current taxable year of the controlled foreign corporation is treated as an income group within the section 904 category. In such case, under the principles of § 1.904–6(a)(1), the portion of the foreign taxable income that is characterized under Federal income tax principles as a distribution of previously taxed earnings and profits that results in the increase in the PTEP group in the current taxable year is assigned to that PTEP group. If a PTEP group is not treated as an income group under the first sentence of this paragraph (d)(3)(ii)(C), and the principles of § 1.904–6(a)(1) would otherwise apply to assign foreign taxable income to a PTEP group, that foreign taxable income is instead assigned to the income group to which the income that gave rise to the previously taxed earnings and profits would be assigned if the income were recognized by the recipient controlled foreign corporation under Federal income tax principles in the current taxable year. For example, a net basis tax imposed on a controlled foreign corporation's receipt of a section 959(b) distribution by the corporation's country of residence is allocated or apportioned to a PTEP group. Similarly, a withholding tax imposed with respect to a controlled foreign corporation's receipt of a section 959(b) distribution is allocated and apportioned to a PTEP group. In contrast, a withholding tax imposed on a disregarded payment from a disregarded entity to its controlled foreign corporation owner is never treated as related to a PTEP group, even if all of the controlled foreign corporation's earnings are previously taxed earnings and profits, because the payment that gives rise to the foreign taxable income from which the tax was withheld does not constitute a section 959(b) distribution in the current taxable year. That foreign taxable income, however, may be assigned to a subpart F income group or tested income group under paragraph (d)(3)(ii)(A) of this section (applying the principles of § 1.904–6(a)(1)(iv)).

(e) *No deemed paid credit for current year taxes related to residual income group.* Current year taxes paid or accrued by a controlled foreign corporation that are allocated and apportioned under paragraph (d)(3)(ii) of this section to a residual income group cannot be deemed paid under section 960 for any taxable year.

(f) *Example.* The following example illustrates the application of this section and § 1.960–3.

(1) *Facts*—(i) *Income of CFC1 and CFC2.* CFC1, a controlled foreign corporation, conducts business in Country X. CFC1 uses the ''u'' as its functional currency. At all relevant times, 1u=$1x. CFC1 owns all of the stock of CFC2, a controlled foreign corporation. CFC1 and CFC2 both use the calendar year as their U.S. and foreign taxable years. In 2019, CFC1 earns 2,000,000u of gross income that is foreign oil and gas extraction income, within the meaning of section 907(c)(1), and 2,000,000u of interest income from unrelated persons, for both U.S. and Country X tax law purposes. Country X exempts interest income from tax. In 2019, CFC1 also receives a section 959(b) distribution from CFC2 of 4,000,000u of previously taxed earnings and profits attributable to an inclusion under section 965(a) for CFC2's 2017 U.S. taxable year. The inclusion under section 965(a) was income in the general category. There are no PTEP group taxes associated with the previously taxed earnings and profits distributed by CFC2 at the level of CFC2. The section 959(b) distribution is treated as a dividend taxable to CFC1 under Country X law. In 2019, CFC2 earns no gross income and receives no distributions.

(ii) *Pre-tax deductions of CFC1 and CFC2.* For both U.S. and Country X tax purposes, in 2019, CFC1 incurs 1,500,000u of deductible expenses other than current year taxes that are allocable to all gross income. For U.S. tax purposes, under §§ 1.861–8 through 1.861–14T, 750,000u of such deductions are apportioned to each of CFC1's foreign oil and gas extraction income and interest income. Under Country X law, 1,000,000u of deductions are allocated and apportioned to the 4,000,000u treated as a dividend, and 500,000u of deductions are allocated and apportioned to the 2,000,000u of foreign oil and gas extraction income. Under Country X law, no deductions are allocable to the interest income. Country X imposes tax of 900,000u on a base of 4,500,000u (6,000,000u gross income − 1,500,000u deductions) consisting of 3,000,000u (4,000,000u − 1,000,000u) attributable to CFC1's section 959(b) distribution and 1,500,000u (2,000,000u − 500,000u) attributable to CFC1's foreign oil and gas extraction income. In 2019, CFC2 has no expenses (including current year taxes).

(iii) *United States shareholders of CFC1.* All of the stock of CFC1 is owned (within the meaning of section 958(a)) by corporate United States shareholders that use the calendar year as their U.S. taxable year. In 2019, the United States shareholders of CFC1 include in gross income subpart F inclusions in the passive category totaling $1,250,000x with respect to 1,250,000u of subpart F income of CFC1.

(2) *Analysis*—(i) *CFC2.* Under paragraph (c)(1) of this section, the computational rules of paragraph (c)(1) of this section are applied beginning with CFC2. However, CFC2 has no gross income or expenses in 2019 (the ''current taxable year''). Accordingly, the computational rules described in paragraphs (c)(1)(i) through (iv) of this section are not relevant with respect to CFC2. Under paragraph (c)(1)(v) of this section, the rules in paragraph (c)(1)(i) through (iv) of this section are then applied to CFC1.

(ii) *CFC1*—(A) *Step 1.* Under paragraph (c)(1)(i) of this section, CFC1's items of gross income for the current taxable year are assigned to section 904 categories and included in income groups within those section 904 categories. In addition, CFC1's receipt of a section 959(b) distribution is assigned to a PTEP group. Under paragraph (d)(2)(i) of this section and § 1.904–4, the interest income is passive category income and the foreign oil and gas extraction income is general category income. Under paragraph (d)(2)(ii) of this section, the 2,000,000u of interest income is assigned to a subpart F income group (the ''subpart F income group'') within the passive category because it is foreign personal holding company income described in § 1.954–1(c)(1)(iii)(A)(*1*)(*i*) that falls within a single group of income under § 1.904–4(c)(3)(iii) for passive income that is subject to no withholding tax or other foreign tax. The 2,000,000u of foreign oil and gas extraction income is assigned to the residual income group within the general category. Under § 1.960–3(c), the 4,000,000u section 959(b) distribution is assigned to the PTEP group described in § 1.960–3(c)(2)(vii) within the 2017 annual PTEP account (the ''PTEP group'') within the general category.

(B) *Step 2*—(*1*) *Allocation and apportionment of deductions for expenses other than taxes.* Under paragraph (c)(1)(ii) of this section, CFC1's deductions for the current taxable year are allocated and apportioned among the section 904 categories, income groups within a section 904 category, and any PTEP groups that were increased as provided in paragraph (c)(1)(i) of this section. Under paragraph (d)(3)(i) of this section and §§ 1.861–8 through 1.861–14T, 750,000u of deductions are allocated and apportioned to the residual income group within the general category, and 750,000u of deductions are allocated and apportioned to the subpart F income group within the passive category. Therefore, CFC1 has 1,250,000u (2,000,000u − 750,000u) of pre-tax income attributable to the residual income group within the general category and 1,250,000u (2,000,000u − 750,000u) of pre-tax income attributable to the subpart F income group within the passive category. For U.S. tax purposes, no deductions other than current year taxes are allocated and apportioned to the 4,000,000u in CFC1's PTEP group.

(*2*) *Allocation and apportionment of current year taxes.* Under paragraph (c)(1)(ii) of this section, CFC1's current year taxes are allocated and apportioned among the section 904 categories, income groups within a section 904 category, and any PTEP groups that were increased as provided in paragraph (c)(1)(i) of this section. Under paragraphs (d)(3)(i) and (ii) of this section, for purposes of allocating and apportioning taxes to reduce the income in a section 904 category, an income group, or PTEP group, § 1.904–6(a)(1) and (ii) are applied to determine the amount of foreign taxable income, computed under Country X law but characterized under Federal income tax law, in each section 904 category, income group, and PTEP group that is included in the Country X tax base. For Country X purposes, 1,000,000u of deductions are apportioned to CFC1's PTEP group within the general category, 500,000u of deductions are apportioned to the residual income group within the general category, and no deductions are apportioned to the subpart F income group in the passive category. Therefore, for Country X purposes, CFC1 has 3,000,000u of foreign taxable income attributable to the PTEP group within the general category, 1,500,000u of foreign taxable income attributable to the residual income group within the general category, and no income attributable to the subpart F income group within the passive category. Under paragraph (d)(3)(ii) of this section, 600,000u (3,000,000u/4,500,000u × 900,000u) of the 900,000u current year taxes paid by CFC1 are related to the PTEP group within the general category, and 300,000u (1,500,000u/4,500,000u × 900,000u) are related to the residual income group within the general category. No current year taxes are allocated or apportioned to the subpart F income group within the passive category because the interest expense is exempt from Country X tax. Thus, for U.S. tax purposes, CFC1 has 3,400,000u of previously taxed earnings and profits (4,000,000u − 600,000u) in the PTEP group within the general category, 1,250,000u of income in the subpart F income group within the passive category, and 950,000u of income (1,250,000u − 300,000u) in the residual income group within the general category. For purposes of determining foreign taxes deemed paid under section 960, CFC1 has $600,000x of foreign income taxes in the PTEP group within the general category and $300,000x of current year taxes in the residual income group within the general category. Under paragraph (e) of this section, the United States shareholders of CFC1 cannot claim a credit with respect to the $300,000x of taxes on CFC1's income in the residual income group.

(C) *Step 3.* Under paragraph (c)(1)(iii) of this section, the United States shareholders of CFC1 compute current year taxes deemed paid under section 960(a) and (d) and the rules of § 1.960–2. None of the Country X tax is allocated to CFC1's subpart F income group. Therefore, there are no current year taxes deemed paid by CFC1's United States shareholders with respect to their passive category subpart F inclusions. See § 1.960–2(b)(5) and (c)(7) for examples of the application of section 960(a) and (d) and the rules in § 1.960–2. Additionally, under paragraph (c)(1)(iii) of this section, foreign income taxes deemed paid under section 960(b)(2) by CFC1 are determined with respect to the section 959(b) distribution from CFC2 under the rules of § 1.960–3. There are no PTEP group taxes associated with the previously taxed earnings and profits distributed by CFC2 in the hands of CFC2. Therefore, there are no foreign income taxes deemed paid by CFC1 under section 960(b)(2) with respect to the section 959(b) distribution from CFC2. See § 1.960–3(e) for examples of the application of section 960(b) and the rules in § 1.960–3.

(D) *Step 4.* Under paragraph (c)(1)(iv) of this section, previously taxed earnings and profits resulting from subpart F inclusions and GILTI inclusion amounts with respect to CFC1's current taxable year are separated from CFC1's other earnings and profits and added to an annual PTEP account and PTEP group within the PTEP account, under the rules of § 1.960–3(c). The United States shareholders of CFC1 include in gross income subpart F inclusions totaling $1,250,000x with respect to 1,250,000u of subpart F income of CFC1, and the subpart F inclusions are passive category income. Therefore, under § 1.960–3(c)(2), 1,250,000u of previously taxed earnings and profits resulting from the subpart F inclusions is added to CFC1's section 951(a)(1)(A) PTEP within the 2019 annual PTEP account within the passive category.

(E) *Step 5.* Paragraph (c)(1)(v) of this section does not apply because CFC1 is the highest-tier controlled foreign corporation in the chain.

(F) *Step 6.* Paragraph (c)(1)(vi) of this section does not apply because CFC1 did not make a section 959(a) distribution.

■ **Par. 35.** Section 1.960–2 is revised to read as follows:

§ 1.960–2 Foreign income taxes deemed paid under sections 960(a) and (d).

(a) *Scope.* Paragraph (b) of this section provides rules for computing the amount of foreign income taxes deemed paid by a domestic corporation that is a United States shareholder of a controlled foreign corporation under section 960(a). Paragraph (c) of this section provides rules for computing the amount of foreign income taxes deemed paid by a domestic corporation that is a United States shareholder of a controlled foreign corporation under section 960(d).

(b) *Foreign income taxes deemed paid under section 960(a)*—(1) *In general.* If a domestic corporation that is a United States shareholder of a controlled foreign corporation includes in gross income under section 951(a)(1)(A) its pro rata share of the subpart F income of the controlled foreign corporation (a *subpart F inclusion*), the domestic corporation is deemed to have paid the amount of the controlled foreign corporation's foreign income taxes that are properly attributable to the items of income in a subpart F income group of the controlled foreign corporation that give rise to the subpart F inclusion of the domestic corporation that is attributable to the subpart F income group. For each section 904 category, the domestic corporation is deemed to have paid foreign income taxes equal to the sum of the controlled foreign corporation's foreign income taxes that are properly attributable to the items of income in the subpart F income groups to which the subpart F inclusion is attributable. See § 1.904–6(b)(1) for rules on assigning the foreign income tax to a section 904 category. No foreign income taxes are deemed paid under section 960(a) with respect to an inclusion under section 951(a)(1)(B).

(2) *Properly attributable.* The amount of the controlled foreign corporation's foreign income taxes that are properly attributable to the items of income in the subpart F income group of the controlled foreign corporation to which a subpart F inclusion is attributable equals the domestic corporation's proportionate share of the current year taxes of the controlled foreign corporation that are allocated and apportioned under § 1.960–1(d)(3)(ii) to the subpart F income group. No other foreign income taxes are considered properly attributable to an item of income of the controlled foreign corporation.

(3) *Proportionate share*—(i) *In general.* A domestic corporation's proportionate share of the current year taxes of a controlled foreign corporation that are allocated and apportioned under § 1.960–1(d)(3)(ii) to a subpart F income group within a section 904 category of the controlled foreign corporation is equal to the total U.S. dollar amount of current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to the subpart F income group multiplied by a fraction (not to exceed one), the numerator of which is the portion of the domestic corporation's subpart F inclusion that is attributable to the subpart F income group and the denominator of which is the total net income in the subpart F income group, both determined in the

functional currency of the controlled foreign corporation. If the numerator or denominator of the fraction is zero or less than zero, then the proportionate share of the current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to the subpart F income group is zero.

(ii) *Effect of qualified deficits.* Neither an accumulated deficit nor any prior year deficit in the earnings and profits of a controlled foreign corporation reduces its net income in a subpart F income group. Accordingly, any such deficit does not affect the denominator of the fraction described in paragraph (b)(3)(i) of this section. However, the first sentence of this paragraph (b)(3)(ii) does not affect the application of section 952(c)(1)(B) for purposes of determining the domestic corporation's subpart F inclusion. Any reduction to the domestic corporation's subpart F inclusion under section 952(c)(1)(B) is reflected in the numerator of the fraction described in paragraph (b)(3)(i) of this section.

(iii) *Effect of current year E&P limitation or chain deficit.* To the extent that an amount of income in a subpart F income group is excluded from the subpart F income of the controlled foreign corporation under section 952(c)(1)(A) or (C), the net income in the subpart F income group that is the denominator of the fraction described in paragraph (b)(3)(i) of this section is reduced (but not below zero) by the amount excluded. The domestic corporation's subpart F inclusion that is the numerator of the fraction described in paragraph (b)(3)(i) of this section is based on the controlled foreign corporation's subpart F income computed with the application of section 952(c)(1)(A) and (C).

(4) *Domestic partnerships.* For purposes of applying this paragraph (b), in the case of a domestic partnership that is a U.S. shareholder partnership with respect to a partnership CFC, the distributive share of a U.S. shareholder partner of the U.S. shareholder partnership's subpart F inclusion with respect to the partnership CFC is treated as a subpart F inclusion of the U.S. shareholder partner with respect to the partnership CFC.

(5) *Example.* The following example illustrates the application of this paragraph (b).

(i) *Facts.* USP, a domestic corporation, owns 80% of the stock of CFC, a controlled foreign corporation. The remaining portion of the stock of CFC is owned by an unrelated person. USP and CFC both use the calendar year as their U.S. taxable year, and CFC also uses the calendar year as its foreign taxable year. CFC uses the ''u'' as its functional currency. At all relevant times, 1u=$1x. For its U.S. taxable year ending December 31, 2018, after the application of the rules in § 1.960–1(d) the income of CFC after foreign taxes is assigned to the following income groups: 1,000,000u of dividend income in a subpart F income group within the passive category (''subpart F income group 1''); 2,400,000u of gain from commodities transactions in a subpart F income group within the passive category (''subpart F income group 2''); and 1,800,000u of foreign base company services income in a subpart F income group within the general category (''subpart F income group 3''). CFC has current year taxes, translated into U.S. dollars, of $740,000x that are allocated and apportioned as follows: $50,000x to subpart F income group 1; $240,000x to subpart F income group 2; and $450,000x to subpart F income group 3. USP has a subpart F inclusion with respect to CFC of 4,160,000u = $4,160,000x, of which 800,000u is attributable to subpart F income group 1, 1,920,000u to subpart F income group 2, and 1,440,000u to subpart F income group 3.

(ii) *Analysis*—(A) *Passive category.* Under paragraphs (b)(2) and (3) of this section, the amount of CFC's current year taxes that are properly attributable to items of income in subpart F income group 1 to which a subpart F inclusion is attributable equals USP's proportionate share of the current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to subpart F income group 1, which is $40,000x ($50,000x × 800,000u/1,000,000u). Under paragraphs (b)(2) and (3) of this section, the amount of CFC's current year taxes that are properly attributable to items of income in subpart F income group 2 to which a subpart F inclusion is attributable equals USP's proportionate share of the current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to subpart F income group 2, which is $192,000x ($240,000x × 1,920,000u/2,400,000u). Accordingly, under paragraph (b)(1) of this section, USP is deemed to have paid $232,000x ($40,000x + $192,000x) of passive category foreign income taxes of CFC with respect to its $2,720,000x subpart F inclusion in the passive category.

(B) *General category.* Under paragraphs (b)(2) and (3) of this section, the amount of CFC's current year taxes that are properly attributable items of income in subpart F income group 3 to which a subpart F inclusion is attributable equals USP's proportionate share of the foreign income taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to subpart F income group 3, which is $360,000x ($450,000x × 1,440,000u/1,800,000u). CFC has no other subpart F income groups within the general category. Accordingly, under paragraph (b)(1) of this section, USP is deemed to have paid $360,000x of general category foreign income taxes of CFC with respect to its $1,440,000x subpart F inclusion in the general category.

(c) *Foreign income taxes deemed paid under section 960(d)*—(1) *In general.* If a domestic corporation that is a United States shareholder of one or more controlled foreign corporations includes an amount in gross income under section 951A(a) and § 1.951A–1(b), the domestic corporation is deemed to have paid an amount of foreign income taxes equal to 80 percent of the product of its inclusion percentage multiplied by the sum of all tested foreign income taxes in the tested income group within each section 904 category of the controlled foreign corporation or corporations.

(2) *Inclusion percentage.* The term *inclusion percentage* means, with respect to a domestic corporation that is a United States shareholder of one or more controlled foreign corporations, the domestic corporation's GILTI inclusion amount divided by the aggregate amount described in section 951A(c)(1)(A) and § 1.951A–1(c)(2)(i) with respect to the United States shareholder.

(3) *Tested foreign income taxes.* The term *tested foreign income taxes* means, with respect to a domestic corporation that is a United States shareholder of a controlled foreign corporation, the amount of the controlled foreign corporation's foreign income taxes that are properly attributable to tested income taken into account by the domestic corporation under section 951A and § 1.951A–1.

(4) *Properly attributable.* The amount of the controlled foreign corporation's foreign income taxes that are properly attributable to tested income taken into account by the domestic corporation under section 951A(a) and § 1.951A–1(b) equals the domestic corporation's proportionate share of the current year taxes of the controlled foreign corporation that are allocated and apportioned under § 1.960–1(d)(3)(ii) to the tested income group within each section 904 category of the controlled foreign corporation. No other foreign income taxes are considered properly attributable to tested income.

(5) *Proportionate share.* A domestic corporation's proportionate share of current year taxes of a controlled foreign corporation that are allocated and apportioned under § 1.960–1(d)(3)(ii) to a tested income group within a section 904 category of the controlled foreign corporation is the U.S. dollar amount of current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to a tested income group within a section 904 category of the controlled foreign corporation multiplied by a fraction (not to exceed one), the numerator of which is the portion of the tested income of the controlled foreign corporation in the tested income group within the section 904 category that is included in computing the domestic corporation's aggregate amount described in section 951A(c)(1)(A) and § 1.951A–1(c)(2)(i), and the denominator of which is the

income in the tested income group within the section 904 category, both determined in the functional currency of the controlled foreign corporation. If the numerator or denominator of the fraction is zero or less than zero, the domestic corporation's proportionate share of the current year taxes allocated and apportioned under § 1.960–1(d)(3)(ii) to the tested income group is zero.

(6) *Domestic partnerships.* See § 1.951A–1(e) for rules regarding the determination of the GILTI inclusion amount of a U.S. shareholder partner.

(7) *Examples.* The following examples illustrate the application of this paragraph (c).

(i) *Example 1: Directly owned controlled foreign corporation*—(A) *Facts.* USP, a domestic corporation, owns 100% of the stock of a number of controlled foreign corporations, including CFC1. USP and CFC1 each use the calendar year as their U.S. taxable year. CFC1 uses the ''u'' as its functional currency. At all relevant times, 1u=$1x. For its U.S. taxable year ending December 31, 2018, after application of the rules in § 1.960–1(d), the income of CFC1 is assigned to a single income group: 2,000u of income from the sale of goods in a tested income group within the general category (''tested income group''). CFC1 has current year taxes, translated into U.S. dollars, of $400x that are all allocated and apportioned to the tested income group. For its U.S. taxable year ending December 31, 2018, USP has a GILTI inclusion amount determined by reference to all of its controlled foreign corporations, including CFC1, of $6,000x, and an aggregate amount described in section 951A(c)(1)(A) and § 1.951A–1(c)(2)(i) of $10,000x. All of the income in CFC1's tested income group is included in computing USP's aggregate amount described in section 951A(c)(1)(A) and § 1.951A–1(c)(2)(i).

(B) *Analysis.* Under paragraph (c)(5) of this section, USP's proportionate share of the current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to CFC1's tested income group is $400x ($400x × 2,000u/2,000u). Therefore, under paragraph (c)(4) of this section, the amount of current year taxes properly attributable to tested income taken into account by USP under section 951A(a) and § 1.951A–1(b) is $400x. Under paragraph (c)(3) of this section, USP's tested foreign income taxes with respect to CFC1 are $400x. Under paragraph (c)(2) of this section, USP's inclusion percentage is 60% ($6,000x/$10,000x). Accordingly, under paragraph (c)(1) of this section, USP is deemed to have paid $192 of the foreign income taxes of CFC1 (80% × 60% × $400x).

(ii) *Example 2: Controlled foreign corporation owned through domestic partnership*—(A) *Facts*—(*1*) US1, a domestic corporation, owns 95% of PRS, a domestic partnership. The remaining 5% of PRS is owned by US2, a domestic corporation that is unrelated to US1. PRS owns all of the stock of CFC1, a controlled foreign corporation. In addition, US1 owns all of the stock of CFC2, a controlled foreign corporation. US1, US2, PRS, CFC1, and CFC2 all use the calendar year as their taxable year. CFC1 and CFC2 both use the ''u'' as their functional currency. At all relevant times, 1u=$1x. For its U.S. taxable year ending December 31, 2018, after application of the rules in § 1.960–1(d), the income of CFC1 is assigned to a single income group: 300u of income from the sale of goods in a tested income group within the general category (''CFC1's tested income group''). CFC1 has current year taxes, translated into U.S. dollars, of $100x that are all allocated and apportioned to CFC1's tested income group. The income of CFC2 is also assigned to a single income group: 200u of income from the sale of goods in a tested income group within the general category (''CFC2's tested income group''). CFC2 has current year taxes, translated into U.S. dollars, of $20x that are allocated and apportioned to CFC2's tested income group.

(*2*) Under § 1.951A–1(e)(1), for purposes of determining the GILTI inclusion amount of US1 and US2, PRS is not treated as owning (within the meaning of section 958(a)) the stock of CFC1; instead, PRS is treated in the same manner as a foreign partnership for purposes of determining the stock of CFC1 owned by US1 and US2 under section 958(a)(2). Therefore, only US1 is a United States shareholder of CFC1. Taking into account both CFC1 and CFC2, US1 has a GILTI inclusion amount in the general category of $485x, and an aggregate amount described in section 951A(c)(1)(A) and § 1.951A–1(c)(2)(i) within the general category of $485x. 285u (95% × 300u) of the income in CFC1's tested income group and 200u of the income in CFC2's tested income group is included in computing US1's aggregate amount described in section 951A(c)(1)(A) and § 1.951A–1(c)(2)(i) within the general category. Because US2 is not a U.S. shareholder with respect to CFC1, US2 does not take into account CFC1's tested income in determining its GILTI inclusion amount.

(B) *Analysis*—(*1*) *US1*—(*i*) *CFC1.* Under paragraphs (c)(5) and (6) of this section, US1's proportionate share of the current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to CFC1's tested income group is $95x ($100x × 285u/300u). Therefore, under paragraph (c)(4) of this section, the amount of the current year taxes properly attributable to tested income taken into account by US1 under section 951A(a) and § 1.951A–1(b) is $95x. Under paragraph (c)(3) of this section, US1's tested foreign income taxes with respect to CFC1 are $95x. Under paragraph (c)(2) of this section, US1's inclusion percentage is 100% ($485x/$485x). Accordingly, under paragraph (c)(1) of this section, US1 is deemed to have paid $76x of the foreign income taxes of CFC1 (80% × 100% × $95x).

(*ii*) *CFC2.* Under paragraph (c)(5) of this section, US1's proportionate share of the foreign income taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to CFC2's tested income group is $20x ($20x × 200u/200u). Therefore, under paragraph (c)(4) of this section, the amount of foreign income taxes properly attributable to tested income taken into account by US1 under section 951A(a) and § 1.951A–1(b) is $20x. Under paragraph (c)(3) of this section, US1's tested foreign income taxes with respect to CFC2 are $20. Under paragraph (c)(2) of this section, US1's inclusion percentage is 100% ($485x/$485x). Accordingly, under paragraph (c)(1) of this section, US1 is deemed to have paid $16 of the foreign income taxes of CFC2 (80% × 100% × $20x).

(*2*) *US2.* US2 is not a United States shareholder of CFC1 or CFC2. Accordingly, under paragraph (c)(1) of this section, US2 is not deemed to have paid any of the foreign income taxes of CFC1 or CFC2.

■ **Par. 36.** Section 1.960–3 is revised to read as follows:

§ 1.960–3 Foreign income taxes deemed paid under section 960(b).

(a) *Scope.* Paragraph (b) of this section provides rules for computing the amount of foreign income taxes deemed paid by a domestic corporation that is a United States shareholder of a controlled foreign corporation, or by a controlled foreign corporation, under section 960(b). Paragraph (c) of this section provides rules for the establishment and maintenance of PTEP groups within an annual PTEP account. Paragraph (d) of this section defines the term PTEP group taxes. Paragraph (e) of this section provides examples illustrating the application of this section.

(b) *Foreign income taxes deemed paid under section 960(b)*—(1) *Foreign income taxes deemed paid by a domestic corporation with respect to a section 959(a) distribution.* If a controlled foreign corporation makes a distribution to a domestic corporation that is a United States shareholder with respect to the controlled foreign corporation and that distribution is, in whole or in part, a section 959(a) distribution with respect to a PTEP group within a section 904 category, the domestic corporation is deemed to have paid the amount of the foreign corporation's foreign income taxes that are properly attributable to the section 959(a) distribution with respect to the PTEP group and that have not been deemed to have been paid by a domestic corporation under section 960 for the current taxable year or any prior taxable year. See § 1.965–5(c)(1)(iii) for rules disallowing credits in relation to a distribution of certain previously taxed earnings and profits resulting from the application of section 965. For each section 904 category, the domestic corporation is deemed to have paid foreign income taxes equal to the sum of the controlled foreign corporation's foreign income taxes that are properly attributable to section 959(a) distributions with respect to all PTEP groups within the section 904 category. See § 1.904–6(b)(2) for rules on assigning the foreign income tax to a section 904 category.

(2) *Foreign income taxes deemed paid by a controlled foreign corporation with respect to a section 959(b) distribution.* If a controlled foreign corporation (*distributing controlled foreign corporation*) makes a distribution to another controlled foreign corporation (recipient controlled foreign corporation) and the distribution is, in whole or in part, a section 959(b) distribution from a PTEP group within a section 904 category, the recipient controlled foreign corporation is deemed to have paid the amount of the distributing controlled foreign corporation's foreign income taxes that are properly attributable to the section 959(b) distribution from the PTEP group and that have not been deemed to have been paid by a domestic corporation under section 960 for the current taxable year or any prior taxable year. See § 1.904–6(b)(3) for rules on assigning the foreign income tax to a section 904 category.

(3) *Properly attributable.* The amount of foreign income taxes that are properly attributable to a section 959 distribution from a PTEP group within a section 904 category equals the domestic corporation's or recipient controlled foreign corporation's proportionate share of the PTEP group taxes with respect to the PTEP group within the section 904 category. No other foreign income taxes are considered properly attributable to a section 959 distribution.

(4) *Proportionate share.* A domestic corporation's or recipient controlled foreign corporation's proportionate share of the PTEP group taxes with respect to a PTEP group within a section 904 category is equal to the total amount of the PTEP group taxes with respect to the PTEP group multiplied by a fraction (not to exceed one), the numerator of which is the amount of the section 959 distribution from the PTEP group, and the denominator of which is the total amount of previously taxed earnings and profits in the PTEP group, both determined in the functional currency of the controlled foreign corporation. If the numerator or denominator of the fraction is zero or less than zero, then the proportionate share of the PTEP group taxes with respect to the PTEP group is zero.

(5) *Domestic partnerships.* For purposes of applying this paragraph (b), in the case of a domestic partnership that is a U.S. shareholder partnership with respect to a partnership CFC, the distributive share of a U.S. shareholder partner of a U.S. shareholder partnership's section 959(a) distribution from the partnership CFC is treated as a section 959(a) distribution received by the U.S. shareholder partner from the partnership CFC.

(c) *Accounting for previously taxed earnings and profits*—(1) *Establishment of annual PTEP account.* A separate, annual account (*annual PTEP account*) must be established for the previously taxed earnings and profits of the controlled foreign corporation to which inclusions under section 951(a) and GILTI inclusion amounts of United States shareholders of the CFC are attributable. Each account must correspond to the inclusion year of the previously taxed earnings and profits and to the section 904 category to which the inclusions under section 951(a) or GILTI inclusion amounts were assigned at the level of the United States shareholders. Accordingly, a controlled foreign corporation may have an annual PTEP account in the section 951A category or a treaty category (as defined in § 1.861–13(b)(6)), even though income of the controlled foreign corporation that gave rise to the previously taxed earnings and profits cannot initially be assigned to the section 951A category or a treaty category.

(2) *PTEP groups within an annual PTEP account.* The amount in an annual PTEP account is further assigned to one or more of the following groups of previously taxed earnings and profits (each, a *PTEP group*) within the account:

(i) Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 965(a) (''reclassified section 965(a) PTEP'');

(ii) Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 965(b)(4)(A) (''reclassified section 965(b) PTEP'');

(iii) Earnings and profits described in paragraphs (c)(2)(iii)(A) through (C) of this section (which are aggregated into a single PTEP group, ''general section 959(c)(1) PTEP''):

(A) Earnings and profits described in section 959(c)(1)(A) by reason of section 951(a)(1)(B) and not by reason of section 959(a)(2);

(B) Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 951(a)(1)(A) (other than earnings that were initially described in paragraphs (c)(2)(vi) through (ix) of this section); and

(C) Earnings and profits described in section 959(c)(1)(B), including by reason of section 959(a)(3) (before its repeal);

(iv) Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 951A(f)(2) (''reclassified section 951A PTEP'');

(v) Earnings and profits described in paragraphs (c)(2)(v)(A) through (C) of this section (which are aggregated into a single PTEP group, ''reclassified section 245A(d) PTEP''):

(A) Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 245A(e)(2);

(B) Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 959(e); and

(C) Earnings and profits described in section 959(c)(1)(A) that were initially described in section 959(c)(2) by reason of section 964(e)(4);

(vi) Earnings and profits described in section 959(c)(2) by reason of section 965(a) (''section 965(a) PTEP'');

(vii) Earnings and profits described in section 959(c)(2) by reason of section 965(b)(4)(A) (''section 965(b) PTEP'');

(viii) Earnings and profits described in section 959(c)(2) by reason of section 951A(f)(2) (''section 951A PTEP'');

(ix) Earnings and profits described in paragraphs (c)(2)(ix)(A) through (C) of this section (which are aggregated into a single PTEP group, ''section 245A(d) PTEP''):

(A) Earnings and profits described in section 959(c)(2) by reason of section 245A(e)(2);

(B) Earnings and profits described in section 959(c)(2) by reason of section 959(e); and

(C) Earnings and profits described in section 959(c)(2) by reason of section 964(e)(4); and

(x) Earnings and profits described in section 959(c)(2) by reason of section 951(a)(1)(A) not otherwise described in paragraph (c)(2)(vi) through (ix) of this section (''section 951(a)(1)(A) PTEP'').

(3) *Accounting for distributions of previously taxed earnings and profits.* With respect to a recipient controlled foreign corporation that receives a section 959(b) distribution, such distribution amount is added to the annual PTEP account, and PTEP group within the annual PTEP account, that corresponds to the inclusion year and section 904 category of the annual PTEP account, and PTEP group within the annual PTEP account, from which the distributing controlled foreign corporation is treated as making the distribution under section 959. Similarly, with respect to a controlled foreign corporation that makes a section 959 distribution, such distribution amount reduces the annual PTEP

account, and PTEP group within the annual PTEP account, that corresponds to the inclusion year and section 904 category of the annual PTEP account, and PTEP group within the annual PTEP account, from which the controlled foreign corporation is treated as making the distribution under section 959. Earnings and profits in a PTEP group are reduced by the amount of current year taxes that are allocated and apportioned to the PTEP group under § 1.960–1(d)(3)(ii), and the U.S. dollar amount of the taxes are added to an account of PTEP group taxes under the rules in paragraph (d)(1) of this section.

(4) *Accounting for reclassifications of earnings and profits described in section 959(c)(2) to earnings and profits described in section 959(c)(1).* If an amount of previously taxed earnings and profits that is in a PTEP group described in paragraphs (c)(2)(vi) through (x) of this section (each, a section 959(c)(2) PTEP group) is reclassified as previously taxed earnings and profits described in section 959(c)(1) (reclassified previously taxed earnings and profits), the section 959(c)(2) PTEP group is reduced by the functional currency amount of the reclassified previously taxed earnings and profits. This amount is added to the corresponding PTEP group described in paragraph (c)(2)(i), (ii), (iii) (by reason of paragraph (c)(2)(iii)(B) of this section), (iv) or (v) of this section (each, a reclassified PTEP group) in the same section 904 category and same annual PTEP account as the reduced section 959(c)(2) PTEP group.

(d) *PTEP group taxes*—(1) *In general.* The term *PTEP group taxes* means the U.S. dollar amount of foreign income taxes (translated in accordance with section 986(a)) that are paid, accrued, or deemed paid with respect to an amount in each PTEP group within an annual PTEP account. The foreign income taxes that are paid, accrued, or deemed paid with respect to a PTEP group within an annual PTEP account of a controlled foreign corporation are—

(i) The sum of—

(A) The current year taxes paid or accrued by the controlled foreign corporation that are allocated and apportioned to the PTEP group under § 1.960–1(d)(3)(ii);

(B) Foreign income taxes that are deemed paid under section 960(b)(2) and paragraph (b)(2) of this section by the controlled foreign corporation with respect to a section 959(b) distribution received by the controlled foreign corporation, the amount of which is added to the PTEP group under paragraph (c)(3) of this section; and

(C) In the case of a reclassified PTEP group of the controlled foreign corporation, reclassified PTEP group taxes that are attributable to the section 959(c)(2) PTEP group that corresponds to the reclassified PTEP group.

(ii) Reduced by—

(A) Foreign income taxes that were deemed paid under section 960(b)(2) and paragraph (b)(2) of this section by another controlled foreign corporation that received a section 959(b) distribution from the controlled foreign corporation, the amount of which is subtracted from the controlled foreign corporation's PTEP group under paragraph (c)(3) of this section;

(B) Foreign income taxes that were deemed paid under section 960(b)(1) and paragraph (b)(1) of this section by a domestic corporation that is a United States shareholder of the controlled foreign corporation that received a section 959(a) distribution from the controlled foreign corporation, the amount of which is subtracted from the controlled foreign corporation's PTEP group under paragraph (c)(3) of this section; and

(C) In the case of a section 959(c)(2) PTEP group of the controlled foreign corporation, reclassified PTEP group taxes.

(2) *Reclassified PTEP group taxes.* Reclassified PTEP group taxes are foreign income taxes that are initially included in PTEP group taxes with respect to a section 959(c)(2) PTEP group under paragraph (d)(1)(i)(A) or (B) of this section multiplied by a fraction, the numerator of which is the portion of the previously taxed earnings and profits in the section 959(c)(2) PTEP group that become reclassified previously taxed earnings and profits, and the denominator of which is the total previously taxed earnings and profits in the section 959(c)(2) PTEP group.

(3) *Foreign income taxes deemed paid with respect to PTEP groups established for pre-2018 inclusion years.* In the case of foreign income taxes paid or accrued in a taxable year of the controlled foreign corporation that began before January 1, 2018, with respect to an annual PTEP account, and a PTEP group within such account, that was established for an inclusion year that begins before January 1, 2018, the foreign income taxes are treated as PTEP group taxes of a controlled foreign corporation for purposes of this section only if those foreign income taxes were—

(i) Not included in a controlled foreign corporation's post-1986 foreign income taxes (as defined in section 902(c)(2) as in effect on December 21, 2017) used to compute foreign taxes deemed paid under section 902 (as in effect on December 21, 2017) in any taxable year that began before January 1, 2018; and

(ii) Not treated as deemed paid under section 960(a)(3) (as in effect on December 21, 2017) by a domestic corporation that was a United States shareholder of the controlled foreign corporation.

(e) *Examples.* The following examples illustrate the application of this section.

(1) *Example 1: Establishment of PTEP groups and PTEP accounts*—(i) *Facts.* USP, a domestic corporation, owns all of the stock of CFC1, a controlled foreign corporation. CFC1 owns all of the stock of CFC2, a controlled foreign corporation. USP, CFC1, and CFC2 each use the calendar year as their U.S. taxable year. CFC1 and CFC2 use the ''u'' as their functional currency. At all relevant times, 1u = $1x. With respect to CFC2, USP includes in gross income a subpart F inclusion of 1,000,000u = $1,000,000x for the taxable year ending December 31, 2018. The inclusion is with respect to passive category income. In its U.S. taxable year ending December 31, 2019, CFC2 distributes 1,000,000u to CFC1. CFC2 has no earnings and profits except for the 1,000,000u of previously taxed earnings and profits resulting from USP's 2018 taxable year subpart F inclusion. CFC2's country of organization, Country X, imposes a withholding tax on CFC1 of 300,000u on CFC2's distribution to CFC1. Under § 1.960–1(d)(3)(ii), CFC1's 300,000u of current year taxes are allocated and apportioned to the PTEP group within the annual PTEP account within the section 904 category to which the 1,000,000u of previously taxed earnings and profits are assigned.

(ii) *Analysis*—(A) Under paragraph (c)(1) of this section, a separate annual PTEP account in the passive category for the 2018 taxable year is established for CFC2 as a result of USP's subpart F inclusion. Under paragraph (c)(2) of this section, this account contains one PTEP group, section 951(a)(1)(A) PTEP.

(B) Under paragraph (c)(3) of this section, in the 2019 taxable year, the 1,000,000u related to the section 959(b) distribution from CFC2 is added to CFC1's annual PTEP account for the 2018 taxable year in the passive category and to the section 951(a)(1)(A) PTEP within such account. Similarly, CFC2's 2018 taxable year annual PTEP account within the passive category, and the section 951(a)(1)(A) PTEP within such account, is reduced by the amount of the 1,000,000u section 959(b) distribution to CFC1. Additionally, CFC1's annual PTEP account for the 2018 taxable year in the passive category, and the section 951(a)(1)(A) PTEP within such account, is reduced by the 300,000u of withholding tax imposed on CFC1 by Country X. Therefore, CFC1's annual PTEP account for the 2018 taxable year within the passive category and the section 951(a)(1)(A) PTEP within such account is 700,000u.

(C) Under paragraph (d)(1) of this section, the 300,000u of withholding tax is translated into U.S. dollars and $300,000x is added to the PTEP group taxes with respect to CFC1's section 951(a)(1)(A) PTEP within the annual PTEP account for the 2018 taxable year within the passive category.

(2) *Example 2: Foreign income taxes deemed paid under section 960(b)*—(i) *Facts.* USP, a domestic corporation, owns 100% of the stock of CFC1, which in turn owns 60% of the stock of CFC2, which in turn owns 100% of the stock of CFC3. USP, CFC1, CFC2, and CFC3 all use the calendar year as their U.S. taxable year. CFC1, CFC2, and CFC3 all use the ''u'' as their functional currency. At all relevant times, 1u = $1x. On July 1, 2020, CFC2 distributes 600u to CFC1 and the entire distribution is a section 959(b) distribution (''distribution 1''). On October 1, 2020, CFC1 distributes 800u to USP and the entire distribution is a section 959(a) distribution (''distribution 2''). CFC1 and CFC2 make no other distributions in the year ending December 31, 2020, earn no other income, and incur no taxes on distribution 1 or distribution 2. Before taking into account distribution 1, CFC2 has 1,000u of section 951(a)(1)(A) PTEP within an annual PTEP account for the 2016 taxable year within the general category. The previously taxed earnings and profits in CFC2's PTEP group relate to subpart F income of CFC3 that was included by USP in 2016. CFC3 distributed the earnings and profits to CFC2 before the 2020 taxable year and, solely as a result of the distribution of the previously taxed earnings and profits, CFC2 incurred withholding and net basis tax, resulting in $150 of PTEP group taxes with respect to section 951(a)(1)(A) PTEP. Before taking into account distribution 1 and distribution 2, CFC1 has 200u in section 951A PTEP within an annual PTEP account for the 2018 taxable year within the section 951A category. The previously taxed earnings and profits in CFC1's PTEP group relate to the portion of a GILTI inclusion amount that was included by USP in 2018 and allocated to CFC2 under section 951A(f)(2) and § 1.951A–6(b)(2). CFC2 distributed the earnings and profits to CFC1 before the 2020 taxable year and, solely as a result of the distribution of the previously taxed earnings and profits, CFC1 incurred withholding and net basis tax, resulting in $25x of PTEP group taxes with respect to section 951A PTEP.

(ii) *Analysis*—(A) *Foreign income taxes deemed paid by CFC1.* With respect to distribution 1 from CFC2 to CFC1, under paragraph (b)(4) of this section CFC1's proportionate share of PTEP group taxes with respect to CFC2's section 951(a)(1)(A) PTEP within an annual PTEP account for the 2016 taxable year within the general category is $90x ($150x × 600u/1,000u). Under paragraph (b)(3) of this section, the amount of foreign income taxes that are properly attributable to distribution 1 is $90x. Accordingly, under paragraph (b)(2) of this section, CFC1 is deemed to have paid $90x of general category foreign income taxes of CFC2 with respect to its 600u section 959(b) distribution in the general category.

(B) *Adjustments to PTEP accounts of CFC1 and CFC2.* Under paragraph (c)(3) of this section, the 600u related to distribution 1 is added to CFC1's section 951(a)(1)(A) PTEP within an annual PTEP account for the 2016 taxable year within the general category. Similarly, CFC2's section 951(a)(1)(A) PTEP within an annual PTEP account for the 2016 taxable year within the general category is reduced by 600u, the amount of the section 959(b) distribution to CFC1. Additionally, under paragraph (d) of this section, CFC1's PTEP group taxes with respect to its section 951(a)(1)(A) PTEP within an annual PTEP account for the 2016 taxable year within the general category are increased by $90 and CFC2's PTEP group taxes with respect to section 951(a)(1)(A) PTEP within an annual PTEP account for the 2016 taxable year within the general category are reduced by $90x.

(C) *Foreign income taxes deemed paid by USP.* With respect to distribution 2 from CFC1 to USP, because CFC1 has PTEP groups in more than one section 904 category, this section is applied separately to each section 904 category (that is, distribution 2 of 800u is applied separately to the 200u of CFC1's section 951A PTEP and 600u of CFC1's section 951(a)(1)(A) PTEP).

(*1*) *Section 951A category.* Under paragraph (b)(4) of this section, USP's proportionate share of PTEP group taxes with respect to CFC1's section 951A PTEP within an annual PTEP account for the 2018 taxable year within the section 951A category is $25x ($25x × 200u/200u). Under paragraph (b)(3) of this section, the amount of foreign income taxes within the section 951A category that are properly attributable to distribution 2 is $25x. Accordingly, under paragraph (b)(1) of this section USP is deemed to have paid $25x of section 951A category foreign income taxes of CFC1 with respect to its 200u section 959(a) distribution in the section 951A category.

(*2*) *General category.* Under paragraph (b)(4) of this section, USP's proportionate share of PTEP group taxes with respect to CFC1's section 951(a)(1)(A) PTEP within an annual PTEP account for the 2016 taxable year within the general category is $90x ($90x × 600u/600u). Under paragraph (b)(3) of this section, the amount of foreign income taxes that are properly attributable to distribution 2 is $90x. Accordingly, under paragraph (b)(1), USP is deemed to have paid $90x of general category foreign income taxes of CFC1 with respect to its 600u section 959(a) distribution in the general category.

■ **Par. 37.** Section 1.960–4 is amended by:

■ 1. Removing the language ''960(b)(1)'' and adding the language ''960(c)(1)'' in its place wherever it appears.

■ 2. In paragraph (a)(1):

■ i. Removing the language ''he'' and adding the language ''the taxpayer'' in its place.

■ ii. Removing the language ''subparagraph (2) of this paragraph'' and adding the language ''paragraph (a)(2) of this section'' in its place.

■ iii. Adding two sentences at the end.

■ 3. Revising the last sentence of paragraph (d).

■ 4. Revising paragraph (f).

The addition and revisions read as follows:

§ 1.960–4 Additional foreign tax credit in year of receipt of previously taxed earnings and profits.

(a) * * * (1) * * * For purposes of this section, an amount included in gross income under section 951A(a) is treated as an amount included in gross income under section 951(a). The amount of the increase in the foreign tax credit limitation allowed by this section is determined with regard to each separate category of income described in § 1.904–5(a)(4)(v).

* * * * *

(d) * * * For purposes of this paragraph (d), the term ''foreign income taxes'' includes foreign income taxes paid or accrued, foreign income taxes deemed paid or accrued under section 904(c), and foreign income taxes deemed paid under section 960 (or section 902 with respect to taxable years of foreign corporations beginning before January 1, 2018), for the taxable year of inclusion.

* * * * *

(f) *Examples.* The application of this section may be illustrated by the following examples:

(1) *Example 1.* USP, a domestic corporation, owns all of the one class of stock of CFC, a controlled foreign corporation that uses the U.S. dollar as its functional currency. CFC, after paying foreign income taxes of $10x, has earnings and profits for Year 1 of $90x, all of which are attributable to an amount required under section 951(a) to be included in USP's gross income for Year 1 because the income is general category foreign base company services income of CFC. Both corporations use the calendar year as the taxable year. For Year 2 and Year 3, CFC has no earnings and profits attributable to an amount required to be included in USP's gross income under section 951(a); for each such year it makes a distribution of $45x (from its section 951(a)(1)(A) PTEP within the annual PTEP account for Year 1) from which a foreign income tax of $6x is withheld. For each of Year 1, Year 2, and Year 3, USP derives taxable income of $50x from sources within the United States and claims a foreign tax credit under section 901, subject to the limitation under section 904. The U.S. tax payable by USP is determined as follows, assuming a corporate tax rate of 21%:

TABLE 1 TO PARAGRAPH (f)(1)

Year 1		
Taxable income of USP:		
U.S. sources		$50.00x
Sources without the U.S.:		
Amount required to be included in USP's gross income under section 951(a)	$90.00x	
Foreign income taxes deemed paid by USP under section 960(a) and included in USP's gross income under section 78 ($10x × $90x/$90x)	10.00x	100.00x
Total taxable income		150.00x
U.S. tax payable for Year 1:		
U.S. tax before credit ($150x × 21%)		31.50x
Credit: Foreign income taxes of $10x, but not to exceed the limitation of $21x for Year 1 ($100x/$150x × $31.50x)		10.00x
U.S. tax payable		21.50x

TABLE 2 TO PARAGRAPH (f)(1)

Year 2		
Taxable income of USP, consisting of income from U.S. sources		$50.00x
U.S. tax before credit ($50x × 21%)		10.50x
Section 904 limitation for Year 2:		
Limitation for Year 2 before increase under section 960(c)(1) ($10.50x × $0/$50x)		10
Plus: Increase in limitation for Year 2 under sec. 960(c)(1):		
Amount by which Year 1 limitation was increased by reason of inclusion in USP's gross income under section 951(a) for Year 1 ($21x − [($50x × 21%) × $0/$50x])	21.00x	
Less: Foreign income taxes allowed as a credit for Year 1 which were allowable solely by reason of such section 951(a) inclusion ($10x − $0)	10.00x	
Balance	11.00x	
But: Such balance not to exceed foreign income taxes paid by USP for Year 2 with respect to $45x distribution excluded under section 959(a)(1) ($6x tax withheld)	6.00x	6.00x
Limitation for Year 2		6.00x
U.S. tax payable for Year 2:		
U.S. tax before credit ($50x × 21%)		10.50x
Credit: Foreign income taxes of $6x, but not to exceed limitation of $6x for Year 2		6.00x
U.S. tax payable		4.50x

TABLE 3 TO PARAGRAPH (f)(1)

Year 3		
Taxable income of USP, consisting of income from U.S. sources		$50.00x
U.S. tax before credit ($50x × 21%)		10.50x
Section 904 limitation for Year 3:		
Limitation for Year 3 before increase under section 960(c)(1) ($10.50x × $0/$50x)		0
Plus: Increase in limitation for Year 3 under section 960(c)(1):		
Amount by which Year 1 limitation was increased by reason of inclusion in USP's gross income under section 951(a) for Year 1 ($21x − [($50 × 21%) × $0/$50x])	$21.00x	
Less: Foreign income taxes allowed as a credit for Year 1 which were allowable solely by reason of such section 951(a) inclusion ($10x − $0)	10.00x	
Tentative balance	11.00x	
Less: Increase in limitation under section 960(c)(1) for Year 2 by reason of such sec. 951(a) inclusion	6.00x	
Balance	5.00x	
But: Such balance not to exceed foreign income taxes paid by USP for Year 3 with respect to $45x distribution excluded under section 959(a)(1) ($6x tax withheld)	6.00x	5.00x
Limitation for Year 3		5.00x
U.S. tax payable for Year 3:		
U.S. tax before credit ($50x × 21%)		10.50x
Credit: Foreign income taxes of $6, but not to exceed section 904(a) limitation of $5x		5.00x
U.S. tax payable		5.50x

(2) *Example 2.* The facts for Year 1 and Year 2 are the same as in paragraph (f)(1) of this section (the facts in *Example 1*), except that in Year 0, in which USP also claimed a foreign tax credit under section 901, USP pays $11x of foreign income taxes in excess of the general category limitation and such excess is not absorbed as a carryback to the prior year under section 904(c). Therefore, there is no increase under section 960(c)(1) in the limitation for Year 2 since the amount ($21x) by which the Year 1 limitation was increased by reason of the inclusion in USP's gross income for Year 1 under section 951(a), less the foreign income taxes ($21x) allowed as a credit which were allowable solely by reason of such inclusion, is zero. The foreign income taxes so allowed as a credit for Year

1 which were allowable solely by reason of such section 951(a) inclusion consist of the $10 of foreign income taxes deemed paid for Year 1 under section 960(a) and the $11x of foreign income taxes for Year 0 carried over and deemed paid for Year 1 under section 904(c).

■ **Par. 38.** Section 1.960–5 is amended by:

■ 1. In paragraph (a)(1):

■ i. Removing the language ''951(a)'' and adding the language ''951(a) or 951A(a)'' in its place.

■ ii. Removing the comma and adding a semicolon in its place.

■ 2. Revising paragraph (b).

The revision reads as follows:

§ 1.960–5 Credit for taxable year of inclusion binding for taxable year of exclusion.

* * * * *

(b) *Example.* The application of this section may be illustrated by the following example:

(1) *Facts.* USP, a domestic corporation, owns all the one class of stock of CFC, a controlled foreign corporation. Both corporations use the calendar year as the taxable year and the functional currency of CFC is the U.S. dollar. All of CFC's earnings and profits of $80x for Year 1 (after payment of foreign income taxes of $20x on its total income of $100x for such year) are attributable to amounts required under section 951(a) to be included in USP's gross income for Year 1 because such income is general category foreign base company services income of CFC. For Year 1, USP chooses to claim a foreign tax credit for the $20x of foreign income taxes which for such year are paid by CFC and deemed paid by USP under section 960(a) and § 1.960–2(b). In Year 2, CFC distributes the entire $80x of Year 1 previously taxed earnings and profits, from which a foreign income tax of $8x is withheld. Also in Year 2, CFC pays $40x of interest to USP, from which a foreign income tax of $4x is withheld. For Year 2, USP chooses to claim deductions for its creditable foreign income taxes under section 164 rather than a foreign tax credit under section 901.

(2) *Analysis.* Although USP does not choose to claim a foreign tax credit for Year 2, under section 960(c)(4) and paragraph (a) of this section it may not deduct the $8x of foreign income taxes under section 164. USP may, however, deduct under such section the foreign income tax of $4x which is withheld from the interest paid by CFC in Year 2.

■ **Par. 39.** Section 1.960–6 is amended by removing the language ''960(b)(1)'' and adding the language ''960(c)(1)'' in its place in paragraph (a) and revising paragraph (b) to read as follows:

§ 1.960–6 Overpayments resulting from increase in limitation for taxable year of exclusion.

* * * * *

(b) *Example.* The application of this section may be illustrated by the following example:

(1) *Facts.* USP, a domestic corporation, owns all of the one class of stock of CFC, a controlled foreign corporation. Both corporations use the calendar year as the taxable year, and the functional currency of CFC is the U.S. dollar. For Year 1, CFC has total income of $100,000x on which it pays foreign income taxes of $20,000x. All of CFC's earnings and profits for Year 1 of $80,000x are attributable to an amount which is required under section 951(a) to be included in USP's gross income for Year 1 because such income is general category foreign base company services income of CFC. By reason of such income inclusion USP is deemed for Year 1 to have paid under section 960(a), and is required under section 78 to include in gross income for such year, the $20,000x ($20,000x × $80,000x/$80,000x) of foreign income taxes paid by CFC for such year. USP also derives $100,000x of taxable income from sources within the United States for Year 1. For Year 2, USP has $4,000x of taxable income, all of which is derived from sources within the United States. No part of CFC's earnings and profits for Year 2 is attributable to an amount required under section 951(a) or section 951A(a) to be included in USP's gross income. During Year 2, CFC makes one distribution consisting of its $80,000x earnings and profits for Year 1, all of which is excluded under section 959(a)(1) from USP's gross income for Year 2, and from which distribution foreign income taxes of $1,000x are withheld. For Year 1 and Year 2, USP claims the foreign tax credit under section 901, subject to the limitation of section 904.

(2) *Analysis.* The U.S. tax liability of USP is determined as follows for such years, assuming a corporate tax rate of 21%:

TABLE 1 TO PARAGRAPH (b)(2)

Year 1		
Taxable income of USP:		
U.S. sources		$100,000.00x
Sources without the U.S.:		
Amount required to be included in USP's gross income under section 951(a)	$80,000.00x	
Foreign income taxes deemed paid by USP under section 960(a) and included in USP's gross income under section 78 ($20,000x × $80,000x/$80,000x)	20,000.00x	100,000.00x
Total taxable income		200,000.00x
U.S. tax payable for Year 1:		
U.S. tax before credit ([$200,000x × 21%])		42,000.00x
Credit: Foreign income taxes of $20,000x, but not to exceed limitation of $21,000x ($42,000x × $100,000x/$200,000x)		20,000.00x
U.S. tax payable		22,000.00x

TABLE 2 TO PARAGRAPH (b)(2)

Year 2		
Taxable income of USP, consisting of income from U.S. sources		$4,000x
U.S. tax before credit ($4,000x × 21%)		840x
Section 904 limitation for Year 2:		
Limitation for Year 2 before increase under section 960(c)(1) ($840x × $0/$4,000x)		0
Plus: Increase in section 904 limitation for Year 2 under section 960(c)(1):		
Amount by which Year 1 limitation was increased by reason of inclusion in USP's gross income under section 951(a) for Year 1 ($21,000x–[$21,000x × $0/$100,000x])	$21,000x	
Less: Foreign income taxes allowed as a credit for Year 1 which were allowable solely by reason of such section 951(a) inclusion ($20,000x–$0)	20,000x	
Balance	1,000x	

TABLE 2 TO PARAGRAPH (b)(2)—Continued

But: Such balance not to exceed foreign income taxes paid by USP for Year 2 with respect to $80,000x distribution excluded under section 959(a)(1) ($1,000x tax withheld)	1,000x	1,000x
Limitation for Year 2		1,000x
U.S. tax payable for Year 2:		
U.S. tax before credit ($4,000x × 21%)		840x
Credit: Foreign income taxes of $1,000x, but not to exceed limitation of $1,000x for Year 2		1,000x
U.S. tax payable		None
Overpayment of tax for Year 2:		
Increase in limitation under section 960(c)(1) for Year 2		1,000x
Less: Tax imposed for Year 2 under chapter 1 of the Code		840x
Excess treated as overpayment		160x

■ **Par. 40.** Section 1.960–7 is revised to read as follows:

§ 1.960–7 Applicability dates.

Sections 1.960–1 through 1.960–6 apply to each taxable year of a foreign corporation that both begin after December 31, 2017, and ends on or after December 4, 2018, and to each taxable year of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends.

■ **Par. 41.** Section 1.965–5 is amended by adding paragraph (c)(1)(iii) to read as follows:

§ 1.965–5 Allowance of a credit or deduction for foreign income taxes.

* * * * *

(c) * * *

(1) * * *

(iii) *Foreign income taxes deemed paid under section 960(b) (as applicable to taxable years of controlled foreign corporations beginning after December 31, 2017, and to taxable years of United States persons in which or with which such taxable years of foreign corporations end).* Paragraph (c)(1)(i) of this section applies to foreign income taxes deemed paid under section 960(b) (as in effect for a taxable year of a controlled foreign corporation beginning after December 31, 2017, and a taxable year of a United States person in which or with which such controlled foreign corporation's taxable year ends) only if such taxes are deemed paid under § 1.960–3(b)(1) with respect to distributions to a domestic corporation of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits. *See also* § 1.960–3(c)(2)(i), (ii), (vi), or (vii). Foreign income taxes that would have been deemed paid under section 960(a)(1) (as in effect on December 21, 2017) with respect to the portion of a section 965(a) earnings amount that was reduced under § 1.965–1(b)(2) or § 1.965–8(b) are not eligible to be deemed paid under section 960(b) and § 1.960–3(b) or any other section of the Code.

* * * * *

§ 1.965–7 [Amended]

■ **Par. 42.** Section 1.965–7 is amended by removing the language "§ 1.904–5(a)" and adding in its place the language "§ 1.904–5(a)(4)(v)" in the last sentence of paragraph (e)(1)(i).

■ **Par. 43.** Section 1.965–9 is amended by:

■ 1. Removing the language "Sections 1.965–1 through 1.965–8 apply" and adding in its place the language "Except as otherwise provided in this section, §§ 1.965–1 through 1.965–8 apply" in paragraph (a).

■ 2. Adding paragraph (c).

The addition reads as follows:

§ 1.965–9 Applicability dates.

* * * * *

(c) *Applicability date for certain portions of § 1.965–5.* Paragraph (c)(1)(iii) of § 1.965–5 applies to taxable years of foreign corporations that both begin after December 31, 2017, and end on or after December 4, 2018, and with respect to a United States person, to the taxable years in which or with which such taxable years of the foreign corporations end.

§ 1.985–3 [Amended]

■ **Par. 44.** Section 1.985–3 is amended by removing the language "§ 1.904–5(a)(1)" and adding in its place the language "§ 1.904–5(a)(4)(v)" in the second sentence of paragraph (e)(2)(iv).

■ **Par. 45.** Section 1.986(a)–1 is added to read as follows:

§ 1.986(a)–1 Translation of foreign income taxes for purposes of the foreign tax credit.

(a) *Translation of foreign income taxes taken into account when accrued*—(1) *In general.* For purposes of this section, the term *section 901 taxpayer* means the "taxpayer" described in § 1.901–2(f)(1) and so includes a partnership or a specified 10-percent owned foreign corporation (as defined in section 245A(b)) that has legal liability under foreign law for foreign income tax. Except as provided in paragraph (a)(2) of this section, in the case of a section 901 taxpayer that takes foreign income taxes (as defined in section 986(a)(4) (including taxes described in section 903)) into account when accrued, the amount of any foreign income taxes denominated in foreign currency that has been paid or accrued, including additional tax liability denominated in foreign currency, foreign income taxes withheld in foreign currency, or estimated foreign income taxes paid in foreign currency, are translated into dollars using the weighted average exchange rate (as defined in § 1.989(b)–1) (the "average exchange rate") for the section 901 taxpayer's U.S. taxable year (as defined in § 1.960–1(b)(37)) to which such foreign income taxes relate. *See* section 986(a)(1)(A). See section 988 and §§ 1.988–1(a)(2)(ii) and 1.988–2(c) for rules for determining whether and the extent to which there is a foreign currency gain or loss when an accrued functional currency amount of foreign income tax denominated in nonfunctional currency differs from the functional currency amount paid.

(2) *Exceptions*—(i) *Foreign income taxes not paid within 24 months.* Any foreign income taxes denominated in foreign currency that are paid more than 24 months after the close of the section 901 taxpayer's U.S. taxable year to which they relate are translated into dollars using the spot rate on the date of payment of the foreign income taxes. *See* section 986(a)(1)(B)(i) and (a)(2)(A). For purposes of this section and § 1.905–3, the term *spot rate* has the meaning provided in § 1.988–1(d). To the extent any accrued foreign income taxes denominated in foreign currency remain unpaid more than 24 months after the close of the taxable year to which they relate, see § 1.905–3 and paragraph (c) of this section for the required adjustments.

(ii) *Foreign income taxes paid before taxable year begins.* Any foreign income taxes denominated in foreign currency that are paid before the beginning of the section 901 taxpayer's U.S. taxable year to which such taxes relate are translated into dollars using the spot rate on the date of payment of the foreign income taxes. See section 986(a)(1)(B)(ii) and (a)(2)(A).

(iii) *Inflationary currency.* Any foreign income taxes denominated in a foreign currency that is an inflationary currency in the section 901 taxpayer's U.S. taxable year to which the foreign income taxes relate, or in any subsequent taxable year up to and including the taxable year in which the taxes are paid, are translated into dollars using the spot rate on the date of payment of such taxes. For purposes of section 986(a)(1)(C) and this paragraph (a)(2)(iii), the term *inflationary currency* means the currency of a country in which there is cumulative inflation during the base period of at least 30 percent, as determined under the principles of § 1.985–1(b)(2)(ii)(D), where the base period, with respect to any taxable year, is the 36 months ending on the last day of such taxable year (in lieu of the base period described in § 1.985–1(b)(2)(ii)(D), which ends on the last day of the preceding calendar year). Accrued but unpaid foreign income taxes denominated in a foreign currency that is an inflationary currency in the taxable year accrued are translated into dollars at the spot rate on the last day of the section 901 taxpayer's U.S. taxable year to which such taxes relate (provisional year-end rate). However, a U.S. taxpayer that claims a foreign tax credit under section 901 may choose to translate accrued but unpaid foreign income taxes (including foreign income taxes deemed paid under section 960) denominated in a foreign currency that is an inflationary currency into dollars at the spot rate on the date of payment, in lieu of the provisional year-end rate, if such taxes are paid prior to the due date (with extensions) of the original Federal income tax return for the taxable year for which the credit is claimed and such return is timely filed. In all other cases, see § 1.905–3 and paragraph (c) of this section for required adjustments upon payment of accrued foreign income taxes denominated in an inflationary currency.

(iv) *Election to translate foreign income taxes using the spot rate as of date of payment*—(A) *Eligibility to make election.* An individual or corporate taxpayer (including a specified 10-percent owned foreign corporation) that is otherwise required to translate foreign income taxes that are denominated in foreign currency using the average exchange rate may elect to translate foreign income taxes described in this paragraph (a)(2)(iv) into dollars using the spot rate on the date of payment of the foreign income taxes, provided that the liability for such taxes is denominated in nonfunctional currency. For purposes of section 986(a)(1)(D) and this paragraph (a)(2)(iv), whether the currency in which a tax liability attributable to a qualified business unit (within the meaning of section 989(a)) (QBU) is denominated is a nonfunctional currency is determined by reference to the functional currency of the individual or corporate taxpayer and not that of the QBU of the taxpayer. Accrued but unpaid foreign income taxes subject to the election under this paragraph (a)(2)(iv) are translated at the provisional year-end rate. However, a taxpayer that claims a foreign tax credit under section 901 may choose to translate accrued but unpaid foreign income taxes (including foreign taxes deemed paid under section 960 with respect to a specified 10-percent owned foreign corporation that has made an election under this paragraph (a)(2)(iv)) into dollars at the spot rate on the date of payment, in lieu of the provisional year-end rate, if such taxes are paid prior to the due date (with extensions) of the original return for the taxable year for which the credit is claimed and such return is timely filed. In all other cases, see § 1.905–3 and paragraph (c) of this section for required adjustments upon payment of accrued foreign income taxes that are translated into dollars at the spot rate on the date of payment.

(B) *Scope of election.* In general, an individual taxpayer may make an election under this paragraph (a)(2)(iv) for all foreign income taxes denominated in nonfunctional currency, or only for those foreign income taxes that are denominated in nonfunctional currency and that are attributable to the individual's non-QBU activities and all QBUs with dollar functional currencies. A corporate taxpayer may make an election under this paragraph (a)(2)(iv) for all foreign income taxes that are denominated in nonfunctional currency, or only for those foreign income taxes that are denominated in nonfunctional currency and that are attributable to all QBUs (including the corporate taxpayer) with dollar functional currencies. Therefore, an election under this paragraph (a)(2)(iv) may not be made for foreign income taxes that are denominated in a nonfunctional currency of the taxpayer and attributable to QBUs with non-dollar functional currencies, except as part of an election to translate all taxes denominated in nonfunctional currency at the spot rate on the date of payment. For purposes of this paragraph (a)(2)(iv)(B), foreign income tax is attributable to a QBU if the tax is properly recorded on the books and records of the QBU in accordance with sections 985 through 989. An election under this paragraph (a)(2)(iv) by a domestic corporation (or an individual that has made an election under section 962) does not apply to any taxes paid or accrued by foreign corporations with respect to which the individual or corporation is a United States shareholder. However, an election may be made on behalf of a foreign corporation to translate either all of the foreign corporation's foreign income taxes denominated in nonfunctional currency, or only the foreign income taxes denominated in nonfunctional currency that are attributable to the foreign corporation's QBUs with dollar functional currencies, using the spot rate on the date of payment. Such an election is made using the procedures under § 1.964–1(c)(3) that apply to permit controlling domestic shareholders to make or change a tax accounting election on behalf of a foreign corporation.

(C) *Time and manner of election.* The election under this paragraph (a)(2)(iv) must be made by attaching a statement to the taxpayer's timely filed Federal income tax or information return (including extensions) for the first taxable year to which the election applies. The statement must identify whether the election under this paragraph (a)(2)(iv) is made for all foreign income taxes denominated in nonfunctional currency or only for those foreign income taxes that are denominated in nonfunctional currency and that are either attributable to the taxpayer's QBUs with dollar functional currencies or, in the case of an individual, attributable to non-QBU activities. Once made, the election under this paragraph (a)(2)(iv) applies for the taxable year for which made and all subsequent taxable years unless revoked with the consent of the Commissioner.

(D) *Example*—(*1*) *Facts.* USP, a domestic corporation that uses the calendar year as its taxable year, owns a partnership interest in PS, a non-hybrid partnership organized in Country X. USP also owns an equity interest in HPS, a Country X corporation that has filed an entity classification election under § 301.7701–3 of this chapter to be treated as a partnership for Federal income tax purposes. USP also owns 100% of CFC, a Country Y controlled foreign corporation that uses the U.S. dollar as its functional currency. PS and HPS each use a fiscal year ending November 30 as its taxable year both for Federal income tax purposes and for Country X tax purposes, and their functional currency is the Euro. HPS is the section 901 taxpayer of foreign income taxes denominated in Euros that it pays to Country X and properly records on its books and records. USP takes its distributive share of the HPS taxes into account under sections 702(a)(6) and 901(b)(5) and §§ 1.702–1(a)(6) and 1.704–1(b)(4)(viii) in computing its foreign tax credit. USP is the section 901 taxpayer of Euro-denominated foreign income taxes it pays to Country X with respect to its distributive share of the income of PS, and also pays Country X taxes withheld in Euros from distributions from HPS to USP and properly records these taxes on its books and records. Pursuant to § 1.985–1(b)(1)(iii), USP's functional currency is the dollar. USP timely elects under § 1.986(a)–1(a)(2)(iv) to use the spot rate on the date of payment to translate into dollars its foreign income taxes denominated in nonfunctional currency that are attributable to all QBUs with dollar functional currencies.

(*2*) *Result.* The Euro taxes paid by USP with respect to its distributive share of income from PS and the Euro taxes withheld from distributions from HPS are nonfunctional currency taxes attributable to USP, a QBU with a dollar functional currency. Accordingly, these taxes are translated into dollars at the spot rate on the date the taxes are paid. USP's distributive share of the Euro taxes paid by HPS are attributable to HPS, a Euro functional currency QBU of USP. Because these taxes are not attributable to a dollar QBU of USP, they are not covered by USP's election and so are translated into dollars at the average exchange rate for HPS's U.S. taxable year ending on November 30. See § 1.986(a)–1(a)(1). Foreign income taxes paid by CFC are not covered by USP's election; however, if USP so chooses it may make a separate election on behalf of CFC to use the spot rate on the date of payment to translate either all of CFC's nonfunctional currency taxes, or only those taxes that are attributable to CFC's dollar QBUs (which includes CFC). If instead USP had elected to use the spot rate on the date of payment to translate all of its foreign income taxes denominated in nonfunctional currency, rather than only those taxes attributable to QBUs with dollar functional currencies, then the spot rate on the date of payment would apply to translate all of the Euro taxes paid or accrued by USP, including its distributive share of taxes paid by HPS. However, this election would still not apply to taxes paid or accrued by CFC. See § 1.986(a)–1(a)(2)(iv)(B).

(v) *Regulated investment companies.* In the case of a regulated investment company (as defined in section 851) which takes into account income on an accrual basis, foreign income taxes paid or accrued with respect to such income are translated into dollars using the spot rate on the date the income accrues. See section 986(a)(1)(E).

(b) *Translation of foreign income taxes taken into account when paid.* In the case of a section 901 taxpayer that takes foreign income taxes into account when paid, the amount of any foreign income tax liability denominated in foreign currency, including additional income tax liability denominated in foreign currency or estimated foreign income taxes paid in foreign currency, are translated into dollars using the spot rate on the date of payment of such taxes. See section 986(a)(2)(A). Foreign income taxes withheld in foreign currency are translated into dollars using the spot rate on the date on which such taxes were withheld.

(c) *Refunds or other reductions of foreign income tax liability.* In the case of a section 901 taxpayer that takes foreign income taxes into account when accrued, a reduction in the amount of previously-accrued foreign income taxes that is attributable to a refund of foreign income taxes, a credit allowed in lieu of a refund, or a reduction in or other downward adjustment to an accrued amount, including an adjustment on account of accrued foreign income taxes that were not paid by the date 24 months after the close of the U.S. taxable year to which such taxes relate, is translated into dollars using the exchange rate that was used to translate such amount when claimed as a credit or added to PTEP group taxes (as defined in § 1.960–3(d)(1)). In the case of foreign income taxes taken into account when accrued but translated into dollars on the date of payment, see § 1.905–3(b) for required adjustments to reflect a foreign tax redetermination (as defined in § 1.905–3(a)) attributable to a reduction in the amount of previously-accrued foreign income taxes that is attributable to a difference in exchange rates between the date or taxable year of accrual and the date of payment. In the case of a section 901 taxpayer that takes foreign income taxes into account when paid, a refund or other reduction in or downward adjustment to the amount of foreign income taxes is translated into dollars using the exchange rate that was used to translate such amount when claimed as a credit. If a refund or other reduction of foreign income taxes relates to foreign income taxes paid or accrued on more than one date, then the refund or other reduction is deemed to be derived from, and reduces, the payments of foreign income taxes in order, starting with the most recent payment of foreign income taxes first, to the extent thereof.

(d) *Allocation of refunds of foreign income taxes.* Refunds of foreign income taxes are allocated to the same separate category as the foreign income taxes to which the refunded taxes relate. Refunds are related to foreign income taxes in a separate category if the foreign income tax that was refunded was imposed with respect to that separate category. See § 1.904–6 concerning the allocation of foreign income taxes to separate categories of income.

(e) *Basis of foreign currency refunded*—(1) *Nonfunctional currency tax liability and dollar functional currency.* If the functional currency of the QBU that paid the tax and received the refund is the dollar or the person receiving the refund is not a QBU, then the recipient's basis in the foreign currency refunded is the dollar value of the refund determined under paragraph (c) of this section by using the exchange rate that was used to translate such amount into dollars when claimed as a credit or added to PTEP group taxes.

(2) *Nonfunctional currency tax liability and non-dollar functional currency.* If the functional currency of the QBU receiving the refund is not the dollar and is different from the currency in which the foreign income taxes were paid, then the recipient's basis in the refunded foreign currency is equal to the functional currency value of the nonfunctional currency refund, translated into functional currency at the appropriate exchange rate between the functional currency and the nonfunctional currency. Such exchange rate is determined under the principles of paragraph (c) of this section, substituting the words ''functional currency'' for the word ''dollar'' and using the exchange rate that was used to translate such amount into the QBU's functional currency when claimed as a credit or added to PTEP group taxes (as defined in § 1.960–3(d)(1)). If a QBU receives a refund of nonfunctional currency tax that is denominated in a currency that was the functional currency of the QBU when the refunded tax was claimed as a credit or added to PTEP group taxes, the QBU's basis in the nonfunctional currency received in the refund is determined by using the exchange rate used under § 1.985–5(c) when the QBU's functional currency changed. See § 1.905–3(b)(1)(ii)(C) (*Example 3*).

(3) *Functional currency tax liabilities.* If the functional currency of the QBU receiving the refund is the currency in which the refund was made, then the recipient's basis in the currency received is the amount of the functional currency received. If the QBU receives a refund of functional currency tax that was denominated in a nonfunctional currency of the QBU when the tax was claimed as a credit or added to PTEP group taxes, the QBU will recognize the section 988 gain or loss that would have been recognized under § 1.985–5(b) if the refund had been received

immediately before the QBU's functional currency changed.

(4) *Foreign currency gain or loss.* For rules for determining subsequent foreign currency gain or loss on the disposition of nonfunctional currency, the basis of which is determined under this paragraph (e), see section 988(c)(1)(C).

(f) *Applicability dates.* This section applies to taxable years ending on or after December 16, 2019, and to taxable years of foreign corporations which end with or within a taxable year of a United States shareholder ending on or after December 16, 2019.

■ **Par. 46.** Section 1.988–2 is amended by:

■ 1. Removing the language ''paragraph (a)(2)(iii)(B)'' and adding the language ''paragraphs (a)(2)(iii)(B) and (C)'' in its place in paragraph (a)(2)(iii)(A).

■ 2. Adding paragraph (a)(2)(iii)(C).

The additions read as follows:

§ 1.988–2 Recognition and computation of exchange gain or loss.

(a) * * *

(2) * * *

(iii) * * *

(C) *Basis in refunded foreign income tax.* See § 1.986(a)–1(e) for rules relating to the determination of basis in refunded foreign income tax denominated in nonfunctional currency.

* * * * *

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: October 30, 2019.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2019–24848 Filed 12–16–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–105495–19]

RIN 1545–BP21

Guidance Related to the Allocation and Apportionment of Deductions and Foreign Taxes, Financial Services Income, Foreign Tax Redeterminations, Foreign Tax Credit Disallowance Under Section 965(g), and Consolidated Groups

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance relating to the allocation and apportionment of deductions and creditable foreign taxes, the definition of financial services income, foreign tax redeterminations, availability of foreign tax credits under the transition tax, and the application of the foreign tax credit limitation to consolidated groups.

DATES: Written or electronic comments and requests for a public hearing must be received by February 18, 2020.

ADDRESSES: Send electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–105495–19) 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 (the ''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–105495–19), 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–105495–19), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations under §§ 1.861–8, 1.861–9(b), 1.861–12, 1.861–14, 1.861–17, and 1.954–2(h), Jeffrey P. Cowan, (202) 317–4924; concerning §§ 1.704–1, 1.861–9(e), 1.904–4(e), 1.904(b)–3, 1.904(g)–3, 1.1502–4, and 1.1502–21, Jeffrey L. Parry, (202) 317–4916; concerning §§ 1.861–20, 1.904–6, 1.960–1, and 1.960–7, Suzanne M. Walsh, (202) 317–4908; concerning §§ 1.904–4(c), 1.905–3, 1.905–4, 1.905–5, 1.954–1, 301.6227–1, and 301.6689–1, Larry R. Pounders, (202) 317–5465; concerning §§ 1.965–5 and 1.965–9, Karen J. Cate, (202) 317–4667; concerning submissions of comments and requests for a public hearing, Regina Johnson, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On December 7, 2018, the Treasury Department and the IRS published proposed regulations (REG–105600–18) relating to foreign tax credits in the **Federal Register** (83 FR 63200) (the ''2018 FTC proposed regulations''). Those regulations addressed several significant changes that the Tax Cuts and Jobs Act (Pub. L. 115–97, 131 Stat. 2054, 2208 (2017)) (the ''TCJA'') made with respect to the foreign tax credit rules and related rules for allocating and apportioning deductions in determining the foreign tax credit limitation. The preamble to those proposed regulations requested comments on how to modify the existing approaches for allocating and apportioning deductions, including in particular the rules under § 1.861–17 for allocating and apportioning research and experimentation (''R&E'') expenditures. The 2018 FTC proposed regulations are finalized in the Rules and Regulations section of this issue of the **Federal Register** (the ''2019 FTC final regulations'').

On June 25, 2012, the **Federal Register** published a notice of proposed rulemaking at 77 FR 37837 (the ''2012 OFL proposed regulations'') proposing rules for the coordination of the rules for determining high-taxed passive income with required adjustments to the foreign tax credit limitation in respect of capital gains and the allocation and recapture of overall foreign losses and overall domestic losses, as well as the coordination of the recapture of overall foreign losses on certain dispositions of property and other rules concerning overall foreign losses and overall domestic losses. The 2012 OFL proposed regulations are finalized in the 2019 FTC final regulations.

On November 7, 2007, the **Federal Register** published temporary regulations (T.D. 9362) at 72 FR 62771 and a notice of proposed rulemaking by cross-reference to the temporary regulations at 72 FR 62805 relating to sections 905(c), 986(a), and 6689. Portions of these temporary regulations are finalized in the 2019 FTC final regulations.

This document contains proposed regulations (the ''proposed regulations'') addressing the following issues: (1) The allocation and apportionment of deductions under sections 861 through 865, including new rules on the allocation and apportionment of R&E expenditures and certain deductions of life insurance companies; (2) the definition of financial services income under section 904(d)(2)(D); (3) the allocation and apportionment of creditable foreign taxes; (4) the interaction of the branch loss and dual consolidated loss recapture rules with sections 904(f) and (g); (5) the effect of foreign tax redeterminations of foreign corporations on the application of the high-tax exception described in section 954(b)(4) (including for purposes of determining tested income under section 951A(c)(2)(A)(i)(III)), and required notifications under section 905(c) to the IRS of foreign tax redeterminations and related penalty provisions; (6) the definition of foreign personal holding company income under section 954; (7) the application of the foreign tax credit disallowance under section 965(g); and (8) the application of the foreign tax credit limitation to consolidated groups.

Explanation of Provisions

I. Allocation and Apportionment of Deductions and the Calculation of Taxable Income for Purposes of Section 904(a)

A. Stewardship Expenses, Litigation Damages Awards and Settlement Payments, Net Operating Losses, and Interest Expense

1. Stewardship Expenses

Under § 1.861–8(e)(4)(i), stewardship expenses are definitely related and allocable to dividends received or to be received from related corporations. This reflects a determination that stewardship expenses are, at least in part, intended to protect the shareholder's capital investment and thus are factually related to the income that arises from the investment. Before the enactment of the TCJA, taxpayers with foreign subsidiaries often included in their income foreign source income only when that income was distributed to the taxpayer. However, as a result of the enactment of sections 951A and 245A, a significant portion of the foreign source income of foreign subsidiaries is included in income on a current basis or not at all. The Treasury Department and the IRS are aware that some taxpayers may be interpreting the ''dividends received, or to be received'' phrase in § 1.861–8(e)(4)(ii) to exclude the gross up amount treated as a dividend under section 78 (the ''section

78 dividend''), as well as inclusions under section 951(a)(1), section 951A, and similar provisions, even though the stewardship expenses may be factually related to such gross income.

With respect to the allocation of stewardship expenses, income arising because of one's capital investment in a foreign corporation's stock ordinarily includes not only dividends, but also inclusions under sections 951 and 951A, as well as amounts included under sections 1291, 1293, and 1296 (the ''passive foreign investment company provisions''). Therefore, the proposed regulations provide that stewardship expenses are allocated to dividends and inclusions received or accrued, or to be received or accrued, from related corporations.[1] Thus, stewardship expenses are also allocated to inclusions under sections 951 and 951A, section 78 dividends, and all amounts included under the passive foreign investment company provisions.

With respect to apportionment, the current regulations do not provide an explicit rule but instead provide examples of permissible methods. The Treasury Department and the IRS have determined that an explicit rule would provide certainty for taxpayers and the IRS on the appropriate methodology for apportioning stewardship expenses while ensuring that stewardship expenses are apportioned to gross income in a manner that reflects the purpose of the expenses to protect capital investments or to facilitate compliance with reporting, legal, or regulatory requirements. Therefore, the proposed regulations provide that stewardship expenses are apportioned based upon the relative values of a taxpayer's stock assets, as determined and characterized under § 1.861–9T(g) (and, as relevant, §§ 1.861–12 and 1.861–13) for purposes of allocating and apportioning the taxpayer's interest expense. Therefore, a taxpayer will be required to use the same method to characterize and value its stock assets for purposes of allocating and apportioning its interest and stewardship expenses, and, in some cases as described in Part 1.A.2 of this Explanation of Provisions, certain damages payments. Accordingly, since the fair market value method may not be used for interest allocation and apportionment, it may also not be used for stewardship and certain damages payments. Conforming changes are also proposed with respect to § 1.861–14T(e)(4), which provides rules for the treatment of stewardship expenses with respect to an affiliated group. See also § 1.861–8(g)(18) (*Example 18*) for an example illustrating the application of the proposed rules for stewardship expenses.

The Treasury Department and the IRS are aware that stewardship expenses that are incurred to facilitate compliance with reporting, legal, or regulatory requirements may be more appropriately treated as definitely related to the gross income produced by the particular asset, or assets, whose ownership required the stewardship expenditure. For example, the owner of an entity in a particular jurisdiction might have unique reporting requirements not triggered by the ownership of a similar entity in a different jurisdiction. The Treasury Department and the IRS request comments regarding exceptions to the general rule for the allocation and apportionment of stewardship expenses where it is more appropriate to treat stewardship expenses as definitely related to a more limited class of gross income. Comments are also requested on whether it is more appropriate in certain cases to allocate and apportion stewardship expenses on a separate entity, rather than an affiliated group, basis.

The proposed regulations maintain the definition of stewardship expenses as a duplicative activity (as defined in § 1.482–9(l)(3)(iii)) or a shareholder activity (as defined in § 1.482–9(l)(3)(iv)). *See* proposed § 1.861–8(e)(4)(ii)(A). In particular, shareholder activities are those that preserve the shareholder's capital investment or facilitate compliance with reporting, regulatory, or legal requirements. *See* § 1.482–9(l)(3)(iv). However, the Treasury Department and the IRS are aware that it may be difficult for taxpayers to distinguish between stewardship expenses that result from oversight functions and expenses that are supportive in nature, as described in § 1.861–8(b)(3), and are concerned that expenses may be misclassified as either stewardship or supportive expenses in certain cases. For example, day-to-day management activities do not give rise to stewardship expenses and are typically more supportive in nature. However, the distinction between day-to-day management and oversight may change over time as a taxpayer's investments change. Given these concerns, the Treasury Department and the IRS request comments regarding the definition of stewardship expenses and how to readily distinguish such expenses from supportive expenses that are allocated and apportioned under § 1.861–8(b)(3).

The proposed regulations extend the treatment of stewardship expenses to cover expenses incurred with respect to a partnership. *See* proposed § 1.861–8(e)(4)(ii)(D). Rules similar to those with respect to corporations apply to allocate and apportion stewardship expenses incurred with respect to partnerships.

Finally, the Treasury Department and the IRS are considering whether additional changes to the rules for allocating and apportioning stewardship and similar expenses are appropriate in light of the enactment of the TCJA, and in order to better reflect modern business practices that are increasingly global and mobile in nature. Comments are requested on this topic.

2. Litigation Damages Awards, Prejudgment Interest, and Settlement Payments

The current rule for the allocation and apportionment of legal and accounting fees and expenses in § 1.861–8(e)(5) does not specifically address damages awards, prejudgment interest, or settlement payments arising from product liability and similar claims. The Treasury Department and the IRS are aware that large, unplanned, and relatively rare expenses can have a significant effect on the calculation of a taxpayer's taxable income and foreign tax credit limitation, and, in the absence of clear rules, disputes have arisen regarding the proper treatment of such expenses. Proposed § 1.861–8(e)(5) provides that deductions for damages awards, prejudgment interest, and settlement payments arising from product liability and similar or related claims are allocated to the class or classes of gross income produced by the specific sales of products or services that gave rise to the claims for damage or injury. Damages, prejudgment interest, and settlement payments related to events incident to the production of goods or provision of services, such as damages for injuries caused by industrial accidents, are allocated to the class of gross income produced by the assets involved in the event and, if necessary, apportioned between groupings based on the relative value of the assets in such groupings. In the case of claims made by investors that arise from corporate negligence, fraud, or other malfeasance, the

[1] Duplicative activities or shareholder activities giving rise to stewardship expenses can only be performed with respect to members of a controlled group as described in § 1.482–9(l)(3)(iii)–(iv). Accordingly, relatedness in the context of stewardship expenses includes taxpayers that are members of the same controlled group as defined in § 1.482–1(i)(6). A taxpayer could incur stewardship expenses with respect to a related foreign corporation that is a passive foreign investment company (in addition to a related foreign corporation that is a controlled foreign corporation).

proposed regulations provide that damages, prejudgment interest, and settlement payments paid by the corporation are allocated and apportioned based on the value of all the corporation's assets. In general, the deductions are allocated and apportioned to the statutory or residual groupings to which the related income would be assigned if recognized in the taxable year in which the deductions are allowed.

3. Net Operating Loss Deductions

Under current rules, a net operating loss deduction is allocated and apportioned in the same manner as the deductions giving rise to the net operating loss deduction. However, the rule does not specify how the statutory and residual grouping components of a net operating loss are determined. *See* § 1.861–8(e)(8). The proposed regulations provide that a net operating loss is assigned to the statutory and residual groupings by reference to the losses in each statutory or residual grouping (determined without regard to adjustments made under section 904(b)) that are not allocated to reduce income in a different grouping in the taxable year of the loss. *See* proposed § 1.861–8(e)(8)(i). Furthermore, the proposed regulations clarify that a net operating loss deduction for a taxable year is allocated and apportioned by reference to the statutory and residual grouping components of the net operating loss that is deducted in the taxable year. *See* proposed § 1.861–8(e)(8)(ii). Finally, the proposed regulations provide that except as provided in regulations, for example, in § 1.904(g)–3, a partial net operating loss deduction is treated as ratably comprising the components of the net operating loss.[2] *See* id.

In connection with the proposed regulations under section 250, comments requested clarification on the application of § 1.861–8(e)(8) with respect to net operating losses arising prior to the enactment of the TCJA when the net operating loss is deducted in a post-TCJA year for purposes of applying section 250 as the operative section. *See* 84 FR 8188 (March 6, 2019). These comments will be addressed as part of finalizing those proposed regulations.

4. Application of the Exempt Income/Asset Rule to Insurance Companies in Connection With Certain Dividends and Tax-Exempt Interest

As explained in Part II.B.2 of the Summary of Comments and Explanation of Revisions to the 2019 FTC final regulations, one comment to the 2018 FTC proposed regulations suggested that insurance companies reduce exempt income and assets to reflect prorated amounts of dividends and tax exempt interest. *See* sections 805(a)(4), 807, 812, and 832(b)(5)(B). The 2019 FTC final regulations do not address this issue, and the proposed regulations do not adopt this comment.

Under subchapter L, a nonlife insurance company includes in income its underwriting income, which consists of premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred. The proration rules reduce the company's losses incurred by the ''applicable percentage'' of tax exempt interest or deductible dividends received. *See* section 832(b)(5)(B). For a life insurance company, the proration rules apply in the case of tax exempt interest by reducing the closing balance of reserve items by the ''policyholder's share'' (currently a fixed percentage, originally intended to be the portion of tax favored investment income used to fund the company's obligations to policyholders) of tax exempt interest. *See* sections 807(b)(1)(B) and 812. Similarly, a life insurance company is allowed a dividends received deduction (DRD) for intercorporate dividends from non-affiliates only in proportion to the ''company's share'' of the dividends, but not for the policyholder's share. *See* section 805(a)(4)(A). Fully deductible dividends from affiliates are excluded from proration for life insurance companies if the dividends are not themselves distributions from tax exempt interest or from dividend income that would not be fully deductible if received directly by the taxpayer.

While the mechanics of the proration rules differ depending on whether a company is a life or nonlife insurance company and whether the amount relates to dividends or tax exempt interest, the purpose of those provisions is the same. That is, the policyholder's share or applicable percentage of dividends and tax exempt interest should not create a double benefit by reason of a DRD or section 103 tax exemption for interest in the first instance and a reduction to income (via increases in unpaid losses and reserves during the taxable year) in the second. Regardless of the mechanics, however, the policyholder's share and applicable percentage adjustments do not change the fact that tax exempt interest and (for a nonlife insurance company) the applicable percentage of dividends eligible for DRDs remain exempt from U.S. tax. Including those exempt amounts and the corresponding exempt assets in the apportionment formula in allocating expenses under § 1.861–8T(d)(2)(i)(B), as the comment suggests, would effectively apportion reserve deductions (which already do not include the disallowed deductions deemed to be attributable to the exempt income, except in the case of the policyholder's share of life insurance DRDs) to exempt U.S. source income, with the result that those deductions would reduce unrelated U.S. source income, in contravention of the rule in § 1.861–8T(d)(2)(i)(B). *See also Travelers Insurance Company* v. *United States,* 303 F.3d 1373 (2002).

The current regulations already provide the appropriate rules in this area. Section 1.861–8T(d)(2)(ii)(B) provides that the policyholder's share of dividends received by a life insurance company is treated as tax exempt income notwithstanding the partial disallowance of the DRD, and § 1.861–14T(h) provides for the direct allocation to the dividends of an amount of reserve expenses equal to the disallowed portion of the DRDs. The current regulations do not provide a special rule for either tax exempt interest of a life insurance company or DRDs and tax exempt interest of a nonlife insurance company because, when a policyholder's share or applicable percentage is accounted for as either a reserve adjustment or a reduction to losses incurred, no further modification to the generally applicable rules is required to ensure that the appropriate amount of expenses are apportioned to U.S. source income.

Nevertheless, in order to provide greater clarity, the proposed regulations provide in proposed § 1.861–8(d)(2)(ii)(B), (d)(2)(v), and (e)(16) the effect of certain deduction limitations on the treatment of income and assets generating dividends received deductions and tax exempt interest held by insurance companies. More specifically, the proposed regulations provide that in the case of insurance companies, the term exempt income includes dividends for which a deduction is provided by sections 243(a)(1) and (2) and 245, without regard to the proration rules disallowing a portion of the deduction. Similarly, the term exempt income includes tax exempt interest without regard to the proration rules. These provisions apply on a company wide basis and therefore include each separate account of the company. Two examples are provided in proposed § 1.861–8(d)(2)(v)(B) that illustrate the application of these rules.

[2] A partial net operating loss deduction occurs when the full net operating loss is not deductible in the carryover year.

5. Other Requests for Comments on Expense Allocation

The Treasury Department and the IRS continue to study the rules for allocating and apportioning interest deductions. In addition, the Treasury Department and the IRS expect the implementation of section 864(f) (which is effective for taxable years beginning after December 31, 2020) will have a significant impact on the effect of interest expense apportionment and will necessitate a reexamination of the existing expense allocation rules. Therefore, the Treasury Department and the IRS are studying whether further guidance with respect to allocation and apportionment of interest expense, taking into account the changes made by the TCJA and the future implementation of section 864(f), is required. Comments are requested on this topic.

The Treasury Department and the IRS are also considering whether rules providing for the capitalization and amortization of certain expenses solely for purposes of § 1.861–9 may better reflect asset values under the tax book value method. For example, solely for purposes of § 1.861–9, research and experimental expenditures and advertising expenses could be treated as if they were capitalized and amortized. Comments are requested on this topic.

As noted in Part III.B.4.iii of the Summary of Comments and Explanation of Revisions to the 2019 FTC final regulations, the Treasury Department and the IRS are studying whether additional rules for allocating and apportioning expenses to foreign branch category income or limiting the amount of the gross income reallocated as a result of certain disregarded payments are appropriate. Comments are requested on whether such special rules would more accurately reflect the business profits of a foreign branch, while maintaining administrability for taxpayers and the IRS.

B. Certain Loans Made by Partnerships to Partners

The 2018 FTC proposed regulations included rules addressing the source and separate category of interest income and expense related to loans to a partnership by a U.S. person (or a member of its affiliated group) that owns an interest (directly or indirectly) in the partnership. These rules were finalized in the 2019 FTC final regulations. *See* § 1.861.9(e)(8).

As discussed in Part II.C.1 of the Summary of Comments and Explanation of Revisions of the 2019 FTC final regulations, several comments to the 2018 FTC proposed regulations requested that the rules under § 1.861–9(e)(8) with respect to specified partnership loans be expanded to cover loans made by a partnership to a partner (an ''upstream partnership loan''). The Treasury Department and the IRS agree with comments that rules addressing upstream partnership loans would reduce distortions that could otherwise affect the foreign tax credit limitation. Therefore, the comments are adopted in proposed § 1.861–9(e)(9)(ii), which generally provides that, to the extent the borrower in an upstream partnership loan transaction takes into account both interest expense and interest income with respect to the same loan, the interest income is assigned to the same statutory and residual groupings as those groupings from which the matching amount of interest expense is deducted, as determined under the allocation and apportionment rules in §§ 1.861–9 through 1.861–13. Additionally, proposed § 1.861–9(e)(9)(i) provides that, for purposes of applying the allocation and apportionment rules, the borrower does not take into account as an asset its proportionate share of the loan, as otherwise provided under § 1.861–9(e)(2) and (3). Proposed § 1.861–9(e)(8)(iv) also applies the upstream partnership loan rules to transactions that are not loans but that give rise to deductions that are allocated and apportioned in the same manner as interest expense under § 1.861–9T(b). An anti-avoidance rule similar to the rule in § 1.861–9(e)(8)(iii) is included to cover back-to-back third-party loans that are intended to circumvent the purposes of the rules. *See* proposed § 1.861–9(e)(8)(iii). These rules are being proposed in order to provide taxpayers an additional opportunity to comment on the rule.

Additionally, the Treasury Department and the IRS are aware that some taxpayers may be converting existing partnership debt structures that were used to increase a taxpayer's foreign tax credit limitation before the issuance of § 1.861–9(e)(8) from partnership debt into partnership equity that provides for guaranteed payments for the use of capital. The taxpayer then takes the position that the guaranteed payments are neither allocated and apportioned under the rules in § 1.861–9 nor included in subpart F income by reason of § 1.954–2(h).

Guaranteed payments for the use of capital are similar to a loan from the partner to the partnership because the payment is for the use of money and is generally deductible. *See* section 707(c). Because these arrangements raise the same policy concerns as ordinary debt instruments, the proposed regulations revise § 1.861–9(b) and § 1.954–2(h)(2)(i) explicitly to provide that guaranteed payments for the use of capital described in section 707(c) are treated similarly to interest deductions for purposes of allocating and apportioning deductions under §§ 1.861–8 through 1.861–14 and are treated as income equivalent to interest under section 954(c)(1)(E). No inference is intended as to whether or not § 1.861–9T(b) or § 1.954–2(h)(2) include guaranteed payments for taxable years before the proposed regulations are applicable.

C. Treatment of Assets Connected With Capitalized, Deferred, or Disallowed Interest

Section 1.861–12T(f)(1) provides that, in certain circumstances, where interest expense that is capitalized, deferred, or disallowed under a provision of the Code, the adjusted basis or fair market value of the asset to which the interest expense is connected is reduced by the principal amount of the interest that is capitalized, deferred, or disallowed. One comment with respect to the 2018 FTC proposed regulations recommended that the Treasury Department and the IRS consider narrowing the scope of the rule in § 1.861–12T(f)(1) to prevent taxpayers from taking overly expansive views of the rule in order to minimize the value of controlled foreign corporation (''CFC'') stock that attracts interest expense to reduce the foreign tax credit limitation. In response to the comment, the proposed regulations clarify what it means for an asset to be connected with indebtedness, modify the existing example, and add a new example. *See* proposed § 1.861–12(f).

D. Treatment of Section 818(f) Reserve Expenses for Consolidated Groups

Section 818(f)(1) provides that the deduction for life insurance reserves and certain other deductions (''section 818(f) expenses'') are treated as items which cannot definitely be allocated to an item or class of gross income. Therefore, when a life insurance company computes its foreign tax credit limitation, its section 818(f) expenses generally reduce its U.S. source income and foreign source income ratably. However, issues arise as to how to allocate and apportion section 818(f) expenses if the life insurance company is a member of an affiliated group of corporations (including both life and nonlife members) (the group, ''life-nonlife consolidated group'') that join in filing a consolidated return.

The Treasury Department and the IRS are aware of at least five potential methods for allocating section 818(f) expenses in a life-nonlife consolidated group. First, the expenses might be allocated solely among items of the life insurance company that has the reserves (''separate entity method''). Second, to the extent the life insurance company has engaged in a reinsurance arrangement that constitutes an intercompany transaction (as defined in § 1.1502–13(b)(1)), the expenses might be allocated in a manner that achieves single entity treatment between the ceding member and the assuming member (''limited single entity method''). Third, the expenses might be allocated among items of all life insurance members (''life subgroup method''). Fourth, the expenses might be allocated among items of all members of the consolidated group (including both life and non-life members) (''single entity method''). Fifth, the expenses might be allocated based on a facts and circumstances analysis (''facts and circumstances method'').

In response to the request for comments in the 2018 FTC proposed regulations, the Treasury Department and the IRS have received comments advocating for certain of the aforementioned allocation methods. One comment recommended an allocation method similar to the single entity method. The comment proposed that, if all members of a consolidated group were treated as a single corporation, and if that corporation would constitute a life insurance company, then section 818(f) expenses might be allocated and apportioned to all members of the consolidated group, including nonlife members of a life-nonlife consolidated group.

Two other comments disagreed with the single entity method. These comments proposed that section 818(f) expenses generally be allocated on the separate entity method. However, if the facts and circumstances demonstrate a sufficient factual relationship between the expense and the income of more than one life insurance company, these comments proposed that such expenses might be allocated based on the facts and circumstances method. The comments did not provide examples of when facts and circumstances would demonstrate a sufficient relationship to qualify for this treatment.

The Treasury Department and the IRS decline to adopt the single entity method in the proposed regulations. Section 818(f) only applies to a life insurance company; thus, section 818(f) expenses should not be allocated to nonlife members of a consolidated group. The Treasury Department and the IRS also decline to adopt the facts and circumstances method because a broad facts and circumstances approach would introduce substantial uncertainty into the tax system and would be difficult to administer.

The Treasury Department and the IRS considered adopting the life subgroup method in the proposed regulations. This method would reflect a single entity approach for life insurance companies that operate businesses and manage assets and liabilities on a group basis. Under this paradigm, section 818(f) expenses would be treated as not definitely related to an item or class of gross income of the entire life subgroup for purposes of calculating the foreign tax credit limitation, and therefore generally ratably reduce U.S. source income and foreign source income of the life subgroup.

The Treasury Department and the IRS also considered adopting the separate entity method. The separate entity method would allocate and apportion section 818(f) expenses on a separate company basis. This method is consistent with the Code because section 818(f) expenses generally are computed on a separate company basis and relate to the liabilities of a specific life insurance company. In addition, this method is consistent with the treatment of reserves when members of a consolidated group engage in an intercompany transaction. Under § 1.1502–13(e)(2)(ii)(A), direct insurance transactions between members of a consolidated group are accounted for by both members on a separate entity basis. For example, if one member provides life insurance coverage for another member with respect to its employees, the premiums, reserve increases and decreases, and death benefit payments are determined and taken into account by both members on a separate entity basis (rather than on a single entity basis under the general rules of § 1.1502–13). *See also* § 1.1502–13(e)(2)(ii)(B)(*2*) (providing that reserves resulting from intercompany reinsurance transactions are determined on a separate entity basis).

After considering both methods, proposed § 1.861–14(h)(1) adopts the separate entity method. As noted previously, this method generally is consistent with section 818(f) and with the separate entity treatment of reserves under § 1.1502–13(e)(2). Nevertheless, the Treasury Department and the IRS are concerned that this method may create opportunities for consolidated groups to use intercompany transactions to shift their section 818(f) expenses and achieve a more desirable foreign tax credit result. Accordingly, the Treasury Department and the IRS request comments on whether a life subgroup method more accurately reflects the relationship between section 818(f) expenses and the income producing activities of the life subgroup as a whole, and whether the life subgroup method is less susceptible to abuse because it might prevent a consolidated group from inflating its foreign tax credit limitation through intercompany transfers of assets, reinsurance transactions, or transfers of section 818(f) expenses. The Treasury Department and the IRS also request comments on whether an anti-abuse rule may be appropriate to address concerns with the separate entity method, and regarding the appropriate application of § 1.1502–13(c) to neutralize the ancillary effects of separate-entity computation of insurance reserves, such as the computation of limitations under section 904.

E. Allocation and Apportionment of R&E Expenditures

Part I.G of the Explanation of Provisions of the 2018 FTC proposed regulations discussed the interaction between the current rules for allocating and apportioning R&E expenditures and the changes made to section 904(d) by the TCJA, and requested comments on how the regulations should be revised to account for the new category in section 904(d)(1)(A) (the ''section 951A category''). The comments received are addressed in this Part I.E.

1. Relevant Class of Gross Income and Application of the Gross Income Method

Several comments to the 2018 FTC proposed regulations recommended that the regulations for allocating and apportioning R&E expenditures under § 1.861–17 be revised to preclude allocation and apportionment of R&E expenditures to the section 951A category. The comments stated that R&E expenditures are incurred by a U.S. taxpayer to develop intangible property that cannot generate income in the section 951A category, which is limited to inclusions under section 951A (''GILTI inclusions'') and the related section 78 dividend in respect of deemed paid taxes. Further, to the extent a GILTI inclusion is attributable to a CFC's income derived from intangible property developed by the worldwide group, the comments stated that the intangible property must have either been developed by the CFC or a CFC affiliate (in which case the R&E expenditures were not borne by the U.S. taxpayer), or licensed or acquired by the CFC from a U.S. affiliate, which would require that the U.S. affiliate take into account an arm's length royalty, gain on transfer, or a deemed income amount under section 367(d) to which its R&E expenditures should be allocated.

The Treasury Department and the IRS agree with the comments that the rules under § 1.861–17 should be modified to reflect the fact that R&E expenditures that are deductible under section 174 generally give rise to intangible property, and that under the rules in sections 367(d) and 482, the person incurring such R&E expenditures must be compensated properly when such intangible property gives rise to income. Therefore, proposed § 1.861–17(b) provides that the rules in that section are premised on the fact that successful R&E expenditures ultimately result in the creation of intangible property (as defined in section 367(d)(4)) and, therefore, R&E expenditures ordinarily are considered deductions that are definitely related to all gross intangible income reasonably connected with the relevant Standard Industrial Classification Manual code (''SIC code'') category (or categories) of the taxpayer and so are allocable to all items of gross intangible income related to the SIC code category (or categories) as a class. Gross intangible income is defined as all gross income earned by a taxpayer that is attributable, in whole or in part, to intangible property derived from R&E expenditures and does not include dividends or any amounts included under section 951, 951A, or 1293. *See* proposed § 1.861–17(b)(2). As a result, when applying § 1.861–17 to section 904 as the operative section, because a U.S. taxpayer's gross intangible income, as defined in the proposed regulations, does not include income assigned to the section 951A category, none of its R&E expenditures are allocated or apportioned to the section 951A category.

Under § 1.861–17(c) and (d), a taxpayer may elect to apportion R&E expenditures, in excess of amounts exclusively apportioned to the place the R&E is performed under § 1.861–17(b), on the basis of either sales or gross income. In contrast to the sales method, the gross income method of apportioning R&E expenditures (1) limits taxpayers to exclusively apportion only 25 percent of R&E expenditures based on the place of research activities (instead of 50 percent under the sales method), and (2) requires the apportionment to or among the statutory groupings to be at least half of what would have been apportioned under the sales method. These limits reflect concerns that the gross income method could produce inappropriate results in cases where the types of gross income recognized by the taxpayer in the statutory and residual groupings in a SIC code category are different. For example, if a taxpayer sells products incorporating its intangible property in the United States but earns royalties from licensing its intangible property used by others to make sales abroad, comparing the gross income from sales, which includes value attributable to other factors in addition to intangible property, to the gross royalty income will generally distort the extent to which the R&E expenditures produce U.S. and foreign source income from intangible property. In such cases, the gross income method is inconsistent with the general principle under § 1.861–8T(c) that the method of apportionment ''reflect to a reasonably close extent the factual relationship between the deduction and the grouping of gross income.'' In comparison, the sales method requires that taxpayers use a single, consistent measure—gross receipts from sales and services—to attribute R&E expenditures to their various groupings and, therefore, more clearly reflects the anticipated income expected to be derived from successful R&E expenditures.

Therefore, the proposed regulations eliminate the optional gross income method and require R&E expenditures in excess of the amount exclusively apportioned under § 1.861–17(b) to be apportioned among the statutory and residual groupings within the class of gross intangible income on the basis of the relative amounts of gross receipts from sales and services in each grouping. *See* proposed § 1.861–17(d). For this purpose, gross receipts are assigned to the grouping to which the gross intangible income attributable to the sale or service is assigned. For example, where the taxpayer licenses intangible property to a CFC which, in turn, sells products or services incorporating the intangible property, the gross receipts of the CFC are assigned to a grouping based on the source and character of the related royalty included by the taxpayer. Proposed § 1.861–17(d)(1)(iii). This rule addresses concerns that the Treasury Department and the IRS have had since before the TCJA's enactment that taxpayers would assign the gross receipts from CFC sales to U.S. customers to the residual grouping for U.S. source income while arguing that the related royalty income earned by the U.S. company that owns the intangible property can be treated as foreign source income, with the mismatch resulting in an inflation of R&E expenditures apportioned to U.S. source income. The proposed regulations also clarify that the sales method applies to income from services.

Under § 1.861–17(a)(2)(ii), the relevant SIC code categories are determined by reference to the three digit classification of the SIC code. Proposed § 1.861–17(b)(3)(iv) clarifies the rules relating to goods or property that are described in the SIC code category for ''wholesale trade'' or ''retail trade.'' The purpose of this rule is to match R&E expenditures with a taxpayer's core business and minimize the number of a taxpayer's SIC code categories. This rule provides that vertically integrated taxpayers that perform upstream activities (for example, extraction or manufacturing) before downstream wholesale and retail functions must aggregate their wholesale and retail R&E expenditures and sales with their R&E expenditures and sales in the most closely related three-digit SIC code category. A taxpayer cannot use a SIC code category within the wholesale or retail trade divisions unless its business is generally limited to sales-related activities. Taxpayers engaged in both wholesale and retail trade, but not related upstream activities, are not required to aggregate their wholesale and retail R&E expenditures and sales.

Comments are requested on whether a different classification method that takes into account more recent changes in the economy and business practices should be used. For example, comments are requested on whether NAICS codes would be more appropriate.

Comments to § 1.861–17 were also received in connection with the proposed regulations under section 250. *See* 84 FR 8188 (March 6, 2019). Further changes to the rules for allocating and apportioning R&E expenditures will be considered as part of addressing comments in finalizing those regulations.

2. Elimination of Legally Mandated R&E and Increased Exclusive Apportionment of R&E

Under § 1.861–17(a)(4), R&E expenditures that are undertaken solely to meet legal requirements (''legally mandated R&E'') imposed by a political entity and that cannot reasonably be expected to generate amounts of gross income (beyond de minimis amounts) outside a single geographic source are allocated directly to gross income within the geographic source imposing the requirement. A rule similar to the legally mandated R&E rule existed in regulations issued in 1977 that allocated and apportioned R&E expenditures (''the 1977 regulations'').

Since the adoption of the legally mandated R&E rule in the 1977 regulations, the Treasury Department and the IRS have observed that taxpayers rarely rely on the legally mandated R&E rule. In particular, legal requirements for certain products may significantly overlap between multiple jurisdictions because those jurisdictions have similar legal requirements that relate to areas such as consumer safety, pollution, or pharmaceutical products. In addition, multiple jurisdictions may have similar legal requirements because of multilateral trade and investment agreements or because taxpayers choose to sell their products only in markets with similar requirements. See, for example, IRS Coordinated Issue Biotech and Pharmaceutical Industries Legally Mandated R&E Expense (June 18, 2003) (discussing the International Conference on Harmonization, subsequently the International Council for Harmonization, and its role in rationalizing and harmonizing pharmaceutical regulations in multiple jurisdictions). To reflect the changing international business environment and simplify the regulations with respect to R&E, the proposed regulations eliminate the legally mandated R&E rule.

Under § 1.861–17(b), an exclusive apportionment of R&E expenditures is made if activities representing more than 50 percent of the R&E expenditures were performed in a particular geographic location, such as the United States. Under § 1.861–17(b)(1)(ii), for taxpayers electing the gross income method, 25 percent of R&E expenditures is exclusively apportioned to the geographic location where the R&E activities accounting for more than 50 percent of the deductible expenses were incurred. Under § 1.861–17(b)(1)(i), for taxpayers electing the sales method, 50 percent of R&E expenditures are exclusively apportioned to the geographic location where the R&E activities accounting for more than 50 percent of the deductible expenses were incurred. After this initial exclusive apportionment, the remainder of the taxpayer's R&E expenditures are apportioned under either the sales or gross income methods.

The 1977 regulations also included a rule similar to a rule in the current regulations at § 1.861–17(b)(2). Under this rule, taxpayers may demonstrate to the satisfaction of the Commissioner that an even higher amount of R&E expenditures should be exclusively apportioned to a geographic location. According to the current regulations, the exclusive apportionment rules are based on the understanding that R&E may be more valuable where it is undertaken because R&E benefits products all of which may be sold in the nearest market but only some of which may be sold in foreign markets, and R&E is often used in the nearest market first before it is used in other markets. Therefore, under the increased exclusive apportionment rule, a taxpayer may establish to the satisfaction of the Commissioner that one or both of these conditions are satisfied—that is, its research is expected to have a particularly limited or long delayed application outside the geographic area where the research is performed, such that a greater amount of R&E expenditures should be initially exclusively apportioned.

Similar to the legally mandated rule, the Treasury Department and the IRS have observed that taxpayers have rarely used the current increased exclusive apportionment rule since the issuance of the 1977 regulations. Moreover, when it has been used, the facts and circumstances nature of the analysis has caused hard-to-resolve disagreements between the Commissioner and taxpayers. Changes in the international business environment have also contributed to the decreased utilization of this rule. Accordingly, the proposed regulations eliminate the increased exclusive apportionment rule.

Finally, proposed § 1.861–17(b) clarifies that the exclusive apportionment rule applies only to section 904 as the operative section. *See also* Part I.E.1 of this Explanation of Provisions (noting that comments were received in connection with proposed regulations under section 250 and that further changes will be considered as part of addressing comments in finalizing those regulations).

3. Sales Made by Other Entities

The sales method for apportioning R&E expenditures provides that gross receipts from sales of products or provision of services within a relevant SIC code category by controlled parties of the taxpayer are taken into account in apportioning the taxpayer's R&E expenditures if the controlled party is reasonably expected to benefit from the taxpayer's research and experimentation. Under § 1.861–17(c)(3)(iv), the sales of controlled parties that enter a valid cost sharing arrangement (''CSA'') with a taxpayer are excluded from the apportionment formula because the controlled party is not expected to benefit from the taxpayer's remaining R&E expenditures.

Proposed § 1.861–17 clarifies the treatment of CSAs in two respects. First, consistent with § 1.482–7, the taxpayer's R&E expenditures allocated and apportioned under § 1.861–17 do not include any amounts that are not deductible by reason of the second sentence under § 1.482–7(j)(3)(i) (relating to cost sharing transaction payments from a controlled party). Second, the proposed regulations clarify that the exclusion of the controlled party's gross receipts applies only for purposes of apportioning those R&E expenditures that are intangible development costs with respect to the CSA. If a taxpayer who enters a CSA also incurs R&E expenditures that are not intangible development costs with respect to the CSA, then those expenses would be apportioned under the generally applicable rules, including the rules concerning controlled party sales. *See* proposed § 1.861–17(d)(4)(v).

One comment suggested that § 1.861–17 be modified to provide that a taxpayer's R&E expenditures that are funded by a foreign affiliate under a contract research arrangement should be directly allocated to the taxpayer's income from such arrangements. The terms of the contract research arrangement are not clear from the comment, and it is unclear whether the described expenditures that are reimbursed by a foreign affiliate are paid or incurred by the taxpayer to develop or improve a product in connection with the taxpayer's trade or business. *See* §§ 1.174–1 and 1.174–2. If the expenditures are not paid or incurred by the taxpayer to develop or improve a product in connection with its trade or business, the taxpayer may not deduct them under section 174. As a result, § 1.861–17 would not apply to these expenditures. The expenditures would instead be allocated and apportioned under the general rules in § 1.861–8 on the basis of the factual relationship of deductions to gross income. *See* § 1.861–8(a)(2). The Treasury Department and the IRS request comments on whether contract research arrangements involving expenditures reimbursed by a foreign affiliate are generally paid or incurred by the taxpayer in connection with its trade or business such that a deduction under section 174 is allowable, and whether a special rule for such expenditures should be considered.

Another comment suggested a special rule for ''licensor models'' whereby CFCs pay royalties to compensate for a taxpayer's R&E expenditures. The comment suggested that in order to avoid allocation and apportionment of R&E expenditures to the section 951A category, the activities of the licensee CFC should be excluded for purposes of apportioning the licensor's R&E

expenditures and should be treated similarly to cost sharing arrangements. The comment suggested in the alternative that if the CFC sales are not excluded entirely, that R&E expenditures should be netted against the royalty income to which the R&E expenditures are apportioned.

The Treasury Department and the IRS agree that R&E expenditures should be allocated and apportioned solely with respect to the gross intangible income of the taxpayer rather than the net income of a licensee, and therefore not allocated and apportioned to the section 951A category. *See* Part I.D.1 of this Explanation of Provisions. Unlike in the case of a CSA, however, a licensor earns royalties or other forms of gross intangible income from the use of its intangible property, and it would not be appropriate to exclude such royalties in allocating R&E expenditures of the licensor. The proposed regulations require the use of the sales method, which would effectively attribute R&E expenditures to the taxpayer's royalty income based on the proportion of the gross receipts of the licensees over the total gross receipts of the taxpayer and its licensees. This approach is preferable to the comment's alternative recommendation of netting R&E expenditures against the amount of royalties because taxpayers may earn different types of gross intangible income (for example, from sales of property as well as royalties) and comparing such amounts could lead to distortive results.

Finally, under § 1.861–17(c)(3)(ii) and (f)(3), sales made by controlled corporations and partnerships taken into account to apportion R&E expenditures are reduced to reflect the taxpayer's percentage ownership of such entities. This reduction is inappropriate because the taxpayer's gross intangible income is not dependent on its percentage ownership of the entity to which it transfers intangible property. The proposed regulations, therefore, eliminate the rule reducing sales of controlled corporations that are taken into account and include partnership sales to the same extent as those made by controlled corporations.

F. Application of Section 904(b) to Net Operating Losses

The 2018 FTC proposed regulations included a rule in § 1.904(b)–3(d) coordinating the application of section 904(b)(4) with sections 904(f) and 904(g), which apply after section 904(b)(4). This rule is finalized substantially as proposed in the 2019 FTC final regulations. However, the 2018 FTC proposed regulations did not coordinate any of the adjustments required under section 904(b) with the net operating loss provisions. Therefore, the proposed regulations include a coordination rule. Under proposed § 1.904(b)–3(d)(2), for purposes of determining the source and separate category of a net operating loss, the separate limitation loss and overall foreign loss rules of section 904(f) and the overall domestic loss rules of section 904(g) are applied without taking into account the adjustments required under section 904(b). The Treasury Department and the IRS have determined this rule is appropriate because the amount of the net operating loss eligible to be carried to another year under section 172 is not affected by the adjustments required by section 904(b).

II. Foreign Tax Credit Limitation Under Section 904

A. Definition of Financial Services Entity

Section 904(d)(2)(D) provides that financial services income can only be received by a person ''predominantly engaged in the active conduct of a banking, insurance, financing, or similar business.'' Under current law, the principal significance of this provision is that under section 904(d)(2)(C), passive income of such a person is not assigned to the passive category. The preamble to the 2018 FTC proposed regulations noted that the Treasury Department and the IRS were considering modifications to the gross income-based test for determining financial services entity (''FSE'') status and requested comments in this regard. One comment was received requesting that any future modifications not affect the classification of income derived by a substantial (and genuinely active) financial services group. The Treasury Department and IRS agree that a substantial and genuinely active financial services group should be included in the definition of an FSE.

However, numerous places in the Code use similar concepts and, at times, the same terms, but provide different definitions (even when largely overlapping in application). The Treasury Department and IRS have determined that interpretive guidance should be simplified and made consistent where possible and appropriate. For example, section 954(h) in the subpart F rules defines ''predominantly engaged in the active conduct of a banking, financing, or similar business'' (which in the case of a lending or finance business, requires more than 70 percent of the gross income be derived directly from transactions with unrelated customers); section 1297(b)(2)(B) in the passive foreign investment company (''PFIC'') rules defines ''active conduct of an insurance business by a qualifying insurance corporation''; and section 953(e)(3) defines the term ''qualifying insurance company'' in order to determine the amount of passive income excluded from subpart F income as income derived in the active conduct of an insurance business under section 954(i).

In order to promote simplification and greater consistency with other Code provisions that have complementary policy objectives, proposed § 1.904–4(e)(2) modifies the definition of an FSE by adopting a definition of ''predominantly engaged in the active conduct of a banking, insurance, financing, or similar business'' and ''income derived in the active conduct of a banking, insurance, financing, or similar business'' that is generally consistent with sections 954(h), 1297(b)(2)(B), and 953(e). Conforming changes are made to the rules for affiliated groups in proposed § 1.904–4(e)(2)(ii) and partnerships in proposed § 1.904–4(e)(2)(i)(C).

Comments are requested on whether additional guidance is needed with respect to section 954(h) (including in particular section 954(h)(2)(B)(ii), which authorizes the Treasury Department to issue regulations regarding corporations not licensed as a bank in the United States) and section 952(c)(1)(B)(vi) (defining a qualified financial institution for purposes of the qualified deficit rules).

In addition, when the regulations defining an FSE were originally promulgated in 1988, section 904(d)(1)(C) assigned financial services income to its own separate category. This separate category was repealed in 2004, effective for taxable years beginning after 2006, but the rules in section 904(d)(2)(C) and (D) were retained. The proposed regulations make additional clarifying changes to reflect the repeal of the separate category for financial services income.

Finally, in 2004, a definition of financial services group was added in section 904(d)(2)(C)(ii) which was based on the definition of an affiliated group under section 1504(a) but expanded to include insurance companies and foreign corporations. While the current regulations already include foreign corporations as part of an affiliated group, proposed § 1.904–4(e)(2)(ii) conforms the definition of an affiliated group to also include insurance companies referenced in section 1504(b)(2).

B. Allocation and Apportionment of Foreign Income Taxes

As explained in Part III.G of the Summary of Comments and Explanation of Revisions to the 2019 FTC final regulations, the Treasury Department and the IRS have determined that additional guidance regarding the allocation and apportionment to separate categories of creditable foreign income taxes in § 1.904–6 is warranted. As a result of changes made by the TCJA, the accurate allocation and apportionment of foreign income taxes to the gross income to which they relate has taken on increased importance. See, for example, sections 245A(d), 960, 965(g), and § 1.861–8(e)(6) (allocating the deduction for foreign income taxes, including at the level of a CFC, to statutory and residual groupings). Therefore, taxpayers will benefit from increased certainty on how to match foreign income taxes with income, particularly in the case of differences in how a U.S. taxable base and foreign taxable base are computed with respect to the same transaction. Furthermore, because these rules are relevant in numerous contexts outside of section 904, the general rules in § 1.904–6 (which address allocating and apportioning taxes to separate categories) have been moved to new proposed § 1.861–20 and generalized to apply for purposes of allocating and apportioning foreign income taxes to statutory and residual groupings. Rules specific to the allocation and apportionment of foreign income taxes to separate categories remain in proposed § 1.904–6. Conforming changes are proposed to §§ 1.704–1(b)(4)(viii)(*d*)(*1*) and 1.960–1(d), which currently rely on the ''principles of'' § 1.904–6, as well as § 1.965–5(b)(2) (in the case of foreign corporation taxable years beginning after December 31, 2019).

Current § 1.904–6 provides that the allocation and apportionment of foreign tax expense to a section 904 separate category is made on the basis of the income as computed under foreign law on which the tax is imposed; foreign tax is allocated to the separate category to which the income included in the foreign tax base would be assigned under Federal income tax principles. *See* 1.904–6(a)(1). If the foreign tax base includes income in more than one separate category, the tax is apportioned among the separate categories on the basis of the relative amounts of foreign taxable income in each category. In making this determination, foreign law rules apply, with certain modifications, to determine the foreign law deductions that reduce the foreign law gross income to compute the foreign law amount of taxable income in each separate category. *See* § 1.904–6(a)(1)(ii).

Proposed § 1.861–20 adopts the principles of § 1.904–6 but provides more detailed guidance on how to apply those principles, which are illustrated by several examples. Proposed § 1.861–20(c) provides that foreign tax expense is allocated and apportioned among the statutory and residual groupings by first assigning the items of gross income under foreign law (''foreign gross income'') on which a foreign tax is imposed to a grouping, then allocating and apportioning deductions under foreign law to that income, and finally allocating and apportioning the foreign tax among the groupings. *See* proposed § 1.861–20(c).

Proposed § 1.861–20(d)(1) provides a general rule for assigning foreign gross income to a statutory or residual grouping. Under this rule, a foreign gross income item is assigned to a grouping by characterizing the item under Federal income tax law. If an item of gross income or loss arises under Federal income tax law from the same transaction or realization event from which the foreign gross income item arose (a ''corresponding U.S. item''), the foreign gross income item is assigned to the same statutory or residual grouping as the corresponding U.S. item. In the case of a corresponding U.S. item that is an item of loss (or zero), the foreign gross income is assigned to the same grouping to which an item of gain would be assigned had the transaction or realization event given rise to an item of gain under Federal income tax law. *See* proposed § 1.861–20(d)(1).

Proposed § 1.861–20(d)(2) sets forth rules for assigning a foreign gross income item to a grouping if there is no corresponding U.S. item in the U.S. taxable year in which the taxpayer paid or accrued the foreign income tax imposed on foreign taxable income that includes the foreign gross income item. Proposed § 1.861–20(d)(2)(i) generally addresses the circumstance in which there is no corresponding U.S. item either because the event giving rise to the foreign gross income is a nonrecognition event under Federal income tax law or because the recognition event giving rise to the foreign gross income occurred under Federal income tax law in a different U.S. taxable year. In both cases, proposed § 1.861–20(d)(2)(i) assigns the foreign gross income to the grouping to which the corresponding U.S. item would be assigned if the event giving rise to the foreign gross income resulted in the recognition of gross income or loss under Federal income tax law in the same U.S. taxable year in which the foreign income tax is paid or accrued.

Proposed § 1.861–20(d)(2)(ii) provides guidance regarding the treatment of foreign gross income items that are either excluded from gross income under Federal income tax law or attributable to base differences. Under § 1.861–20(d)(2)(ii)(A), with the exception of base difference items, foreign gross income that is a type of income expressly excluded from gross income under Federal income tax law is assigned to the grouping to which the gross income would be assigned if it were included in U.S. gross income. Proposed § 1.861–20(d)(2)(ii)(B) provides an exclusive list of items that are excluded from U.S. gross income and that, if taxable under foreign law, are treated as base differences. The items are death benefits described in section 101, gifts and inheritances described in section 102, contributions to capital described in section 118 and the receipt of property in exchange for stock described in section 1032, the receipt of property in exchange for a partnership interest described in section 721, returns of capital described in section 301(c)(2), and distributions to partners described in section 733. The Treasury Department and the IRS have determined that foreign tax on these items, which are excluded from U.S. gross income, is particularly difficult to associate with a particular type of U.S. gross income. Accordingly, foreign tax on base difference items is assigned to the residual grouping, with the result that no credit is allowed if the tax is paid by a CFC, and the tax is assigned to the separate category described in section 904(d)(2)(H)(i) if paid (or treated as paid) by a taxpayer claiming a direct credit under section 901. Comments are requested on whether the list should be expanded to include other items that have no logical analogue to items included in U.S. gross income, or whether a different assignment of any of these types of foreign gross income would be more appropriate.

Proposed § 1.861–20(d)(3) sets forth special rules that apply for purposes of assigning certain items of foreign gross income to a grouping, including rules for distributions that both Federal income tax law and foreign law recognize, certain foreign law distributions such as consent dividends, inclusions under foreign law CFC regimes, disregarded payments, inclusions from reverse hybrids, and gain on the sale of a disregarded entity.

In the case of a distribution from a non-hybrid corporation that is recognized for both Federal income tax law and foreign tax law purposes, proposed § 1.861–20(d)(3)(i)(B) treats foreign gross income arising from the distribution as a dividend and as capital gain to the extent of the portions of the distribution that are, under Federal income tax law, characterized as a dividend and capital gain, respectively. The foreign gross income is assigned to the same statutory and residual groupings as the corresponding amounts of dividend and capital gain as computed for U.S. tax purposes. Foreign gross income arising from the portion of the distribution that is a return of capital under Federal income tax law is treated as a base difference under proposed § 1.861–20(d)(2)(ii)(B).

If foreign law, but not Federal income tax law, recognizes a deemed distribution or consent dividend (a ''foreign law distribution''), proposed § 1.861–20(d)(3)(i)(C) assigns the resulting foreign gross income to a statutory or residual grouping by applying proposed § 1.861–20(d)(3)(i)(B) as though Federal income tax law recognized the distribution in the U.S. taxable year in which the taxpayer paid or accrued tax with respect to the foreign law distribution. For example, if a taxpayer recognizes foreign gross income arising from a foreign law distribution, and proposed § 1.861–20(d)(3)(i)(B) (as applied for purposes of section 904 as the operative section) would treat the distribution as made out of general category section 965(a) previously taxed earnings and profits if the distribution had also occurred under Federal income tax law, the foreign gross income is assigned to the general category.

If a taxpayer (including an upper-tier CFC) includes an item of foreign gross income by reason of a foreign law regime similar to the subpart F provisions under sections 951 through 959 (a ''foreign law subpart F regime''), proposed § 1.861–20(d)(3)(i)(D) assigns that item to the same statutory or residual grouping as the gross income (determined under the foreign law subpart F regime) of the foreign law CFC that gave rise to the foreign gross income of the taxpayer. The taxpayer's gross income included under the foreign law subpart F regime is, in other words, treated as the foreign gross income of the foreign law CFC, and the general rules of proposed §§ 1.861–20(d)(1) and (2) apply to characterize that foreign gross income and assign it to the statutory and residual groupings. For example, in applying proposed § 1.861–20(d)(3)(i)(D) in applying section 960 as the operative section where an upper-tier CFC is the taxpayer, the upper-tier CFC's foreign law subpart F inclusion is treated as the foreign gross income of the foreign law CFC, which is treated as if it were the taxpayer. If the foreign law CFC has a corresponding U.S. item of subpart F income for which its United States shareholder elects to apply the high tax exception under section 954(b)(4), the foreign gross income and the associated foreign tax paid by the upper-tier CFC are assigned to a residual income group under § 1.960–1(d). In addition, § 1.904–6(f) includes a special rule assigning certain items of foreign gross income recognized by a United States shareholder of a CFC that is also a foreign law CFC to the section 951A category for purposes of applying section 904 as the operative section.

Proposed § 1.861–20(d)(3)(ii) addresses the assignment of foreign gross income arising from disregarded payments between a foreign branch (as defined in § 1.904–4(f)(3)) and its owner. If the foreign gross income item arises from a payment made by a foreign branch to its owner, proposed § 1.861–20(d)(3)(ii)(A) generally assigns the item to the statutory and residual groupings by deeming the payment to be made ratably out of the after-tax income, computed for Federal income tax purposes, of the foreign branch, and deeming the branch income to arise in the statutory and residual groupings in the same ratio as the tax book value of the assets, including stock, owned by the foreign branch. If the item of foreign gross income arises from a disregarded payment to a foreign branch from its owner, proposed § 1.861–20(d)(3)(ii)(B) generally assigns the item to the residual grouping. However, proposed § 1.861–20(d)(3)(ii)(C) assigns an item of foreign gross income attributable to gain recognized under foreign law with respect to the receipt of a disregarded payment in exchange for property under the rule in § 1.861–20(d)(2)(i). In addition, proposed § 1.904–6(b)(2) includes special rules assigning foreign gross income items arising from certain disregarded payments for purposes of applying section 904 as the operative section.

Proposed § 1.861–20(d)(3)(iii) addresses the assignment to a statutory or residual grouping of foreign gross income that a taxpayer includes by reason of its ownership of a reverse hybrid. Under this rule, the foreign gross income that a taxpayer recognizes from a reverse hybrid is assigned to the statutory and residual groupings by treating that foreign gross income as the income of the reverse hybrid and applying the general rules of proposed § 1.861–20(d). However, § 1.904–6(f) includes a special rule assigning certain items of foreign gross income recognized by a United States shareholder of a controlled foreign corporation that is a reverse hybrid to the section 951A category for purposes of applying section 904 as the operative section. The Treasury Department and the IRS request comments on whether additional rules are needed to address other fact patterns in which the U.S. and a foreign country tax different persons on the same item of income, for example, in the case of a sale-repurchase agreement.

Finally, under proposed § 1.861–20(d)(3)(iv), if a taxpayer recognizes an item of foreign gross income that is gain from the sale of a disregarded entity, and Federal income tax law characterizes the transaction as a sale of the assets of the disregarded entity, the foreign gross income is assigned to the statutory and residual groupings in the same proportion as the gain that the taxpayer would have recognized if foreign law also treated the transaction as a sale of assets.

Changes to § 1.904–6 and § 1.960–1 are proposed to clarify and, in certain cases, modify the application of proposed § 1.861–20 for purposes of computing the foreign tax credit limitation under section 904 and foreign income taxes deemed paid under section 960.

Proposed § 1.904–6(b)(1) assigns foreign gross income that is attributable to a base difference, and the associated tax, to the separate category described in section 904(d)(2)(H)(i). Proposed § 1.904–6(b)(2)(i) generally provides that if a foreign branch makes a disregarded payment to another foreign branch or to its owner that causes the taxpayer's gross income under Federal income tax law that is otherwise attributable to the foreign branch to be attributed to another foreign branch or to the foreign branch owner under § 1.904–4(f)(2)(vi)(A) or § 1.904–4(f)(2)(vi)(D), the foreign gross income that arises by reason of the disregarded payment is assigned to the same category as the reattributed U.S. gross income. Under proposed § 1.904–6(b)(2)(ii), items of foreign gross income that a taxpayer includes solely by reason of the receipt by a foreign branch of a disregarded payment from its foreign branch owner that is a United States person are generally assigned to the foreign branch category (or, in the case of a foreign branch owner that is a partnership, to the partnership's general category income that is attributable to the foreign branch). However, items of foreign gross income attributable to gain recognized under foreign law with respect to the receipt of a disregarded payment in exchange for property are characterized and assigned under the rules of § 1.861–20(d)(2)(i). Under proposed § 1.904–6(b)(3), if a taxable disposition of property acquired in a disregarded sale results in the recognition of U.S. gross income that is reattributed to or from a foreign branch under § 1.904–4(f)(2)(vi)(A) or § 1.904–4(f)(2)(vi)(D), any foreign gross income arising from that disposition of property under foreign law is assigned to the same separate category as the corresponding U.S. item of gain under § 1.861–20(d)(1) without regard to the reattribution of U.S. gross income. This rule is intended to better match income and taxes in situations where the foreign country only taxes gain that arises during the period that follows the disregarded sale.

Finally, § 1.904–6(f) addresses the circumstance in which a United States shareholder pays or accrues foreign income tax with respect to foreign gross income that it recognizes because it owns a foreign law CFC or a reverse hybrid. The foreign income tax is allocated and apportioned to a category by treating the foreign gross income of the United States shareholder as the foreign gross income of the foreign law CFC or reverse hybrid under proposed §§ 1.861–20(d)(3)(i)(D) or 1.861–20(d)(3)(ii)(B). Proposed § 1.904–6(f) reassigns to the section 951A category the foreign gross income that, if the foreign law CFC or reverse hybrid recognized the foreign gross income instead of the United States shareholder, would be assigned to the general category tested income group of the foreign law CFC or reverse hybrid to which an inclusion under section 951A is attributable. The amount of the foreign gross income that is reassigned is based upon the inclusion percentage, as defined in § 1.960–2(c)(2), of the United States shareholder.

The Treasury Department and the IRS are continuing to study the allocation and apportionment of foreign income tax that is imposed on foreign gross income that is associated with the general category tested income group of a foreign law CFC or reverse hybrid under proposed §§ 1.861–20(d)(3)(i)(D) and 1.861–20(d)(3)(ii)(B), respectively. Comments are requested on the proper treatment of such foreign income tax in the circumstance in which some or all of the tax is not assigned to the section 951A category under proposed § 1.904–6(f) because no inclusion is attributable to the tested income group, or the inclusion percentage of the United States shareholder is less than 100 percent. In particular, comments are requested on the interaction of proposed § 1.904–6(f) with sections 245A(g) and 909.

Proposed § 1.960–1(d)(3)(ii) makes conforming changes and in addition clarifies that, if proposed § 1.861–20 would otherwise apply to assign foreign gross income to a PTEP group that is not increased as a result of a distribution described in section 959(b), the foreign taxable income is assigned to the income group to which the income, computed under Federal income tax law, that gave rise to the PTEP would be assigned if recognized under Federal income tax law in the year in which tax was imposed.

The Treasury Department and the IRS are also studying whether additional guidance should be provided on allocating and apportioning foreign taxes described in section 903 (tax in lieu of income tax), and foreign income taxes for which the foreign taxable base is computed formulaically with respect to a unitary business. The Treasury Department and the IRS are also studying whether the rules in § 1.861–8(e)(6) for allocating and apportioning state income taxes should be revised in light of changes made by the TCJA and changes to state rules for taxing foreign income. Comments are requested on these topics.

C. Overall Foreign Loss Recapture on Property Dispositions

One comment was received with respect to the 2012 OFL proposed regulations, which recommended addressing dispositions that result in additional income recognition under branch loss recapture and dual consolidated loss recapture rules. The comment pointed out that these additional income recognition amounts are determined after first determining the additional recognition amount under section 904(f)(3) and therefore recommended adding the coordination of these rules as a new Step Nine in the ordering rules of § 1.904(g)–3. The comment recommended that the additional income recognition amounts resulting from branch loss recapture and dual consolidated loss recapture should not be subject to the overall foreign loss (OFL) recapture rules.

The branch loss recapture rules under section 367(a) referenced by the comment letter were repealed by the TCJA (subject to a special savings clause that applies with respect to losses incurred before January 1, 2018) and replaced with a new set of branch loss recapture rules in section 91. One of the principal differences between the two regimes is that previously the branch loss recapture amounts were treated as foreign source income, whereas under new section 91(d) they are treated as U.S. source income. Accordingly, although the branch loss recapture amounts for losses incurred after December 31, 2017, are no longer subject to the OFL recapture rules or separate limitation loss (SLL) recapture rules, they are now potentially subject to the overall domestic loss (ODL) recapture rules, and therefore ordering rules are still needed for the application of the branch loss recapture rules, including the rules for losses incurred before January 1, 2018, that are subject to the special savings clause.

The Treasury Department and the IRS agree with the recommendation to add a new Step Nine to § 1.904(g)–3 to clarify that additional income amounts recognized by reason of branch loss recapture and dual consolidated loss recapture are not taken into account for purposes of the ordering rules until after the section 904(f)(3) amounts are determined. However, the Treasury Department and the IRS do not agree that those additional income amounts should not be subject to the OFL or ODL recapture rules. The fact that a loss recapture rule may provide that the additional income amount is treated as U.S. source income does not mean it should be treated any differently than any other U.S. source income that is subject to the ODL recapture rules. The same reasoning applies to additional income amounts that are treated as foreign source income and therefore subject to the OFL recapture rules. Accordingly, Step Nine in proposed § 1.904(g)–(3)(j) provides that like section 904(f)(3) recapture amounts addressed in Step Eight, the additional income recognized by reason of branch loss and dual consolidated loss recapture will be subject to the first seven steps of the ordering rules. However, Step Nine applies only to additional income amounts with respect to branch loss and dual consolidated loss recapture that are determined after taking into account an offset for a section 904(f)(3) recapture amount. For example, if a taxpayer has a dual consolidated loss recapture in a year in which there is no section 904(f)(3) recapture, then there is only one application of Steps One through Seven, which takes into account the additional income, and Steps Eight and Nine will not apply.

When Step Nine applies, the proposed regulations provide that for purposes of determining how much of the additional income with respect to branch loss and dual consolidated loss recapture will be subject to the ODL, OFL or SLL recapture rules, any increases to an ODL, OFL or SLL account balance in the current year due to the original application of Steps One through Seven (prior to the application of Steps Eight or Nine) are taken into account.

In addition, if any additional income with respect to a branch loss or dual consolidated loss recapture is foreign source income in a separate category for which there is a remaining OFL account balance after Steps One through Eight, a special rule applies for purposes of determining the OFL recapture amount under § 1.904(f)–2(c) (the lesser of the maximum potential recapture or 50 percent of total foreign source income). The special rule provides that a taxpayer must first determine a hypothetical OFL recapture amount, which is the OFL recapture amount that would have been determined in the original application of Steps One through Seven (prior to the application of Steps Eight and Nine) if the additional income in Step Nine were also taken into account. From that hypothetical OFL recapture amount, the taxpayer subtracts the actual OFL recapture amount that was determined in the original application of Steps One through Seven (without taking into account the additional income in Step Nine). The remainder is then the OFL recapture amount with respect to the additional income in Step Nine. This special rule is necessary because a simple reapplication of the OFL recapture amount rules in § 1.904(f)–2(c) to just the additional income in Step Nine could result in requiring an excessive amount of recapture, because the same amount of foreign source income in other separate categories may be used twice to increase the OFL recapture amount (once in the original calculation and again in the second calculation with respect to the additional income).

III. Foreign Tax Redeterminations Under Section 905(c)

As discussed in Part III of the Background section of the 2019 FTC final regulations, portions of the temporary regulations relating to sections 905(c), 986(a), and 6689 (TD 9362) (the ''2007 temporary regulations'') are being reproposed in order to provide taxpayers an additional opportunity to comment on those rules in light of the changes made by the TCJA. References in this preamble to the 2007 temporary regulations are understood to refer to the corresponding provisions of the accompanying proposed regulations, which were issued by cross-reference to the 2007 temporary regulations at 72 FR 62805.

In particular, the rules being reproposed are: (1) § 1.905–3T(d)(2), which addresses foreign tax redeterminations that affect foreign taxes deemed paid under section 960, (2) § 1.905–4T, which in general provides the procedural rules for how to notify the IRS of a foreign tax redetermination, and (3) § 301.6689–1T, which provides rules for the penalty for failure to notify the IRS of a foreign tax redetermination. In addition, the proposed regulations contain a transition rule in proposed §§ 1.905–3(b)(2)(iv) and 1.905–5 to address foreign tax redeterminations of foreign corporations that relate to taxable years before the amendments made by the TCJA. *See* Part III.D of this Explanation of Provisions.

A. Adjustments to Foreign Taxes Paid by Foreign Corporations

Section 1.905–3T(d)(2) of the 2007 temporary regulations reflects the law in effect before the TCJA, which generally required foreign tax redeterminations of foreign corporations to be taken into account by prospectively adjusting the foreign corporations' pools of post-1986 undistributed earnings and post-1986 foreign income taxes, rather than by adjusting the calculation of deemed-paid taxes and the United States shareholder's (''U.S. shareholder'') U.S. tax liability in the prior year or years in which the adjusted foreign tax was included in the calculation of foreign taxes deemed paid. Section 1.905–3T(d)(3) of the 2007 temporary regulations provides exceptions to the pooling adjustment rules that required redeterminations of the U.S. shareholder's U.S. tax liability in situations where refunds or other downward adjustments to a foreign corporation's foreign tax liability would otherwise cause a substantial overstatement of deemed paid taxes. With the repeal of the pooling regime and related amendments to section 905(c) in the TJCA, the statute now requires U.S. tax redeterminations to reflect all foreign tax redeterminations, including those that result in adjustments to foreign taxes deemed paid. Accordingly, proposed § 1.905–3(b)(2)(i) provides that a U.S. tax redetermination is required in all cases to account for the effect of a foreign corporation's foreign tax redetermination.

Section 1.905–3T(d)(3)(ii), illustrated by an example in § 1.905–3T(d)(3)(iii), provides that the required U.S. tax redetermination is made by taking the foreign tax redetermination into account in the prior year to which the redetermined foreign tax relates, and further provides that a U.S. tax redetermination is also required for any subsequent year in which the domestic corporate shareholder received or accrued a distribution or inclusion from the foreign corporation, which under pre-TCJA law would have resulted in foreign taxes deemed paid. Under these rules, the amount of the adjusted foreign tax was deemed to ''relate back'' and adjust the foreign corporation's earnings and profits, as well as its creditable foreign taxes, in the adjusted year.

In any case where a U.S. tax redetermination and adjustment to deemed paid taxes is required, an adjustment to the foreign corporation's taxable income and earnings and profits in the functional currency amount of the adjusted foreign tax (whether upward to reflect a refund or downward to reflect an additional payment of foreign tax) in the relation-back year is necessary in order to coordinate the computation of the U.S. shareholder's inclusions with the amount of the section 78 dividend in the amount of the adjusted foreign taxes deemed paid. This is because under sections 954(b)(5) and 951A(c)(2)(ii), the creditable foreign tax reduces the foreign corporation's subpart F income, tested income, and earnings and profits, so that the amount included in the U.S. shareholder's income under sections 951 and 951A is an after-foreign-tax amount; the section 78 dividend prevents the effective allowance of both a deduction and a credit for an amount of foreign tax that both reduces the inclusion and is allowed as a deemed paid foreign tax credit. If the foreign corporation's deduction from income and earnings and profits in respect of foreign taxes were adjusted in a different year than the year in which its creditable foreign taxes were adjusted, the amount of foreign tax that reduces the U.S. shareholder's inclusion and the amount added to income under section 78 in respect of the deemed paid tax would not match, such that the U.S. shareholder's income would be understated or overstated by the amount of the foreign tax adjustment.

Accordingly, proposed § 1.905–3(b)(2)(ii) clarifies that the required adjustments by reason of a foreign tax redetermination of a foreign corporation include not only adjustments to the amount of foreign taxes deemed paid and related section 78 dividend, but also adjustments to the foreign corporation's income and earnings and profits and the amount of the U.S. shareholder's inclusions under sections 951 and 951A in the year to which the redetermined foreign tax relates. The TCJA amendments, by eliminating deemed paid taxes under section 902 with respect to dividends and basing deemed paid taxes under section 960 with respect to subpart F and GILTI inclusions on current year income and taxes rather than multi-year pools, will require more redeterminations of U.S. tax liability to adjust deemed paid credits under section 960, but fewer adjustments to intervening years, since a foreign tax adjustment to one year will generally no longer affect the calculation of deemed paid taxes with respect to inclusions in other years. New examples at proposed § 1.905–3(b)(2)(v) illustrate these rules.

Section 905(c)(1)(B) and (C) require a redetermination of U.S. tax if accrued taxes remain unpaid after two years, or if any tax paid is refunded in whole or in part. These provisions are not limited to cases in which the foreign tax redetermination reduces the amount of the foreign tax credit. Accordingly, proposed §§ 1.905–3(a) and 1.905–3(b)(2)(ii) also provide that the rules under section 905(c) apply in cases in which foreign tax redeterminations affect U.S. tax liability even though there may be no change to the amount of foreign tax credits originally claimed. For example, under the proposed regulations a redetermination of U.S. tax liability is required when a foreign tax redetermination affects whether or not a taxpayer is eligible for the high-tax exception under section 954(b)(4) (the ''subpart F high-tax exception'') in the year to which the redetermined foreign tax relates. Similarly, a foreign tax redetermination could affect the subpart F income, tested income, and earnings and profits of a CFC in the year to which the tax relates, see proposed § 1.905–3(b)(2)(ii), and therefore affect the amount of a U.S. shareholder's inclusion under section 951 or section 951A with respect to the adjusted year. Corresponding amendments are proposed to the rules in §§ 1.904–4(c)(7) and 1.954–1(d).

B. Foreign Tax Redeterminations of Successor Entities

The proposed regulations at § 1.905–3(b)(3) add a rule clarifying that if at the time of a foreign tax redetermination the person with legal liability for the tax (the ''successor'') is a different person than the person that had legal liability for the tax in the year to which the redetermined tax relates (the ''original taxpayer''), the required redetermination of U.S. tax liability is made as if the foreign tax redetermination occurred in the hands of the original taxpayer. This could occur, for example, if a disregarded entity is sold to a different taxpayer, or if a CFC liquidates into another CFC that has transferee liability for the liquidated CFC's foreign tax. The proposed regulations further provide that Federal income tax principles apply to determine the tax consequences if the successor remits, or receives a refund of, a tax that in the year to which the redetermined tax relates was the legal liability of, and thus considered paid by, the original taxpayer. Thus, for example, when the original taxpayer owns the successor which remits a tax that was the legal liability of, and considered paid by, the original taxpayer (for example, if a controlled foreign corporation that was formerly a disregarded entity pays additional tax after a foreign audit), then a distribution can result from the successor to the original taxpayer. *See Herbert Enoch,* 57 T.C. 781 (1972) (finding constructive dividend when a corporation discharged its shareholder's personal liability on debt). The Treasury Department and the IRS request comments on whether additional rules are required to address situations involving predecessors or successors.

C. Notification to the IRS of Foreign Tax Redeterminations and Related Penalty Provisions

Proposed § 1.905–4 contains rules for notifying the IRS of a foreign tax redetermination. Proposed § 301.6689–1 contains rules regarding the penalty for failure to notify the IRS of a foreign tax redetermination. This Part III.C describes changes made to §§ 1.905–4 and 301.6689–1 relative to the rules that were contained in the 2007 temporary regulations.

1. Notification Through Amended Returns

Section 1.905–4T(b)(1)(iv) of the 2007 temporary regulations provides that, if more than one foreign tax redetermination requires a redetermination of U.S. tax liability for the same taxable year of the taxpayer (the affected year) and those redeterminations occur within two consecutive taxable years, the taxpayer generally may file for the affected year one amended return, Form 1118 (Foreign Tax Credit—Corporations) or Form 1116 (Foreign Tax Credit), and one statement under § 1.905–4T(c) with respect to all of the redeterminations. Proposed § 1.905–4(b)(1)(iv) clarifies that, if more than one foreign tax redetermination requires a redetermination of U.S. tax liability for the same affected year and those redeterminations occur within the same taxable year or within two consecutive taxable years, the taxpayer may file for the affected year one amended return and one statement under proposed § 1.905–4(c) with respect to all of the redeterminations. Proposed § 1.905–4(b)(1)(iv) also provides that the due date of the amended return and statement varies depending on whether the net effect of the foreign tax redeterminations reduces or increases the U.S. tax liability in the affected taxable year.

Section 1.905–4T(b)(1)(v) of the 2007 temporary regulations provides that, if a foreign tax redetermination requires a redetermination of U.S. tax liability that otherwise would result in an additional amount of U.S. tax due, but such amount is eliminated as a result of a carryback or carryover of an unused foreign tax under section 904(c), the taxpayer may, in lieu of applying the rules of §§ 1.905–4T(b)(1)(i) and (b)(1)(ii), notify the IRS of such redetermination by attaching a statement to the original return for the taxpayer's taxable year in which the foreign tax redetermination occurs. Section 1.905–4T(b)(1)(v) of the 2007 temporary regulations does not apply if the foreign tax redetermination does not change the U.S. tax liability for the taxable year to which the tax relates for a reason other than the carryback or carryover of an unused foreign tax. Section 1.905–4T(b)(1)(v) of the 2007 temporary regulations also does not apply if more than one foreign tax redetermination occurring within the same taxable year or two consecutive taxable years requires a redetermination of U.S. tax liability for the same taxable year but, taking into account all such foreign tax redeterminations on a net basis, results in no additional amount of U.S. tax liability due for such taxable year.

Proposed § 1.905–4(b)(1)(v) provides that, if a foreign tax redetermination (either alone or in combination with certain other foreign tax redeterminations as provided in proposed § 1.905–4(b)(1)(iv)) does not result in a change to the amount of U.S. tax due for a taxable year, for reasons including but not limited to a carryover or carryback of unused foreign taxes under section 904(c), no amended return is required for such year. Instead, appropriate adjustments are made to the amounts carried over from that year (for example, unused foreign taxes). If no amended return is required for any year, the taxpayer must attach a statement containing the information described in § 1.904–2(f) to the taxpayer's timely filed (with extensions) original return for the taxpayer's taxable year in which the foreign tax redetermination occurs.

2. Foreign Tax Redeterminations of Pass-Through Entities

The 2007 temporary regulations did not specifically provide guidance for pass-through entities that report creditable foreign taxes to their partners, shareholders, or beneficiaries and subsequently have a foreign tax redetermination with respect to such foreign taxes. The proposed regulations provide rules whereby these entities can satisfy their obligations under section 905(c). Proposed § 1.905–4(b)(2) generally provides that a pass-through entity that reports creditable foreign income tax to its partners, shareholders, or beneficiaries, is required to notify the IRS and its partners, shareholders, or beneficiaries if there is a foreign tax redetermination with respect to such foreign income tax. See proposed § 1.905–4(c) for the information required to be provided with the notification.

Additionally, in 2015, Congress introduced the centralized audit partnership regime, which requires that certain adjustments be made at the level of the partnership, rather than by partners. *See* sections 6221 through 6241 (enacted in § 1101 of the Bipartisan Budget Act of 2015, Pub. L. 114–74 (''BBA'') and as amended by the Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114–113, div Q, and by sections 201 through 207 of the Tax Technical Corrections Act of 2018, contained in Title II of Division U of the Consolidated Appropriations Act of 2018, Pub. L. 115–141). Under this regime, in order to make an adjustment to a partnership-related item (as defined in section 6241(2)), the partnership must file an administrative adjustment request (''AAR''). Sections 6227(d) and 6235(a) contemplate that these rules will be coordinated with the application of section 905(c).

On June 14, 2017, the Treasury Department and the IRS published in the **Federal Register** (82 FR 27334) a notice of proposed rulemaking and on November 30, 2017, the Treasury Department and the IRS published in the **Federal Register** (82 FR 56765) another notice of proposed rulemaking. Each notice of proposed rulemaking requested comments on how a partnership subject to the centralized partnership audit regime should fulfill the requirements of section 905(c). One comment was received with respect to this issue and it recommended that partnerships satisfy their obligations under section 905(c) by filing an AAR under section 6227 and by following the procedures under that section to take necessary adjustments into account. Consistent with this request and with sections 6227(d) and 6235(a), proposed § 1.905–4(b)(2)(ii) provides that if a redetermination of U.S. tax liability would require a partnership adjustment as defined in § 301.6241–1(a)(6), the partnership must file an AAR under section 6227 without regard to the time restrictions on filing an AAR in section 6227(c). *See also* § 1.6227–1(g).

The use of the AAR process, even if the period under section 6227(c) is closed, is intended to further the purpose of sections 905(c), 6227(d), 6235(a), and 6241(11). An AAR is analogous to an amended return, which is required from other taxpayers who have a foreign tax redetermination, and provides an administrable process whereby a partnership, and its partners, can satisfy their obligations under section 905(c). The Treasury Department and the IRS request comments on any further coordination that may be required between sections 905(c) and 6227 in order to carry out the purposes of the foreign tax credit and the centralized partnership audit regime.

3. Alternative Notification Requirements

Proposed § 1.905–4(b)(3) provides that an amended return and Form 1118 (Foreign Tax Credit—Corporations) or Form 1116 (Foreign Tax Credit), is not required to notify the IRS of a foreign tax redetermination and redetermination of U.S. tax liability if the taxpayer satisfies alternative notification requirements that may be prescribed by the IRS through forms, instructions, publications, or other guidance. For example, as provided in Notice 2016–10, 2016–1 I.R.B. 1, the Treasury Department and the IRS intend to issue regulations providing for alternative notification procedures in the case of tax refunds received by regulated investment companies making the election to pass through foreign tax credits under section 853. The Treasury Department and the IRS request comments on additional alternative approaches to complying with the notification requirements in section 905(c) that minimize burdens to both taxpayers and the IRS.

4. Foreign Tax Redeterminations of LB&I Taxpayers

Section 1.905–4T(b)(3) of the 2007 temporary regulations provides a special rule for U.S. taxpayers under the jurisdiction of the Large and Mid-Size Business Division. The proposed regulations reflect the organization's name change to Large Business and International Division (LB&I).

Under the special rule for U.S. taxpayers under LB&I jurisdiction (''LB&I rule''), such taxpayers are required, in limited circumstances, to provide to their examiners notice of a foreign tax redetermination that requires a redetermination of U.S. tax, in lieu of filing an amended return. One of the threshold requirements of § 1.905–4T(b)(3) of the 2007 temporary regulations is that the taxpayer must provide the statement describing the foreign tax redetermination no later than 120 days after the latest of (1) the date the foreign tax redetermination occurs, (2) the opening conference of the examination for the affected taxable year, or (3) the hand-delivery or postmark date of the opening letter concerning the examination. In no case, however, can the alternative notification procedure apply if the 120-day period within which notification must be made would start after the due date of the return for the taxable year in which the foreign tax redetermination occurs.

The LB&I rule contained in the proposed regulations is generally the same as the rule in the 2007 temporary regulations, and the Explanation of Provisions of the 2007 temporary regulations contains an explanation of the rules. However, one change has been made with respect to § 1.905–4T(b)(3) of the 2007 temporary regulations. Section 1.905–4T(b)(3) provides that, if that provision applies to permit notification during an audit, in lieu of filing an amended return a taxpayer must provide to the examiner the statement described in § 1.905–4T(c) of the 2007 temporary regulations, which contains information that enables the IRS to verify and compare the original computations with respect to a claimed foreign tax credit, the revised computations resulting from the foreign tax redetermination, and the net changes resulting therefrom. In order to satisfy the requirements of § 1.905–4T(c), a taxpayer is required to recompute its U.S. tax liability during the course of an examination, rather than only at the conclusion of the audit. To minimize administrative burdens, the statement requirement at proposed § 1.905–4(b)(4)(iii) requires the taxpayer to provide to the examiner the original amount of foreign taxes paid or accrued in the year to which the foreign tax redetermination relates, the revised amount of foreign taxes paid or accrued, and documentation with respect to the revisions, including exchange rates and dates of accrual and/or payment. This information must be provided with a penalties-of-perjury declaration signed by a person authorized to sign the return of the taxpayer.

In order to clarify when the special rules for LB&I taxpayers apply, the proposed regulations reorganize certain portions of the 2007 temporary regulations into a list of conditions, all of which must be met in order for § 1.905–4(b)(4) to apply. These conditions are as follows: (1) A foreign tax redetermination occurs while the U.S. taxpayer is under the jurisdiction of LB&I (or a successor division); (2) the foreign tax redetermination results in a downward adjustment to the amount of foreign tax paid or accrued, or included in the computation of foreign taxes deemed paid; (3) the foreign tax redetermination requires a redetermination of U.S. tax liability and accordingly, but for § 1.905–4(b)(4), the taxpayer would be required to notify the IRS of such foreign tax redetermination under § 1.905–4(b)(1)(ii) by filing an amended return; (4) the return for the taxable year for which a redetermination of U.S. tax liability is required is under examination; and (5) the due date specified in § 1.905–4(b)(1)(ii) for providing notice of such foreign tax redetermination is not before the latest of the opening conference or the hand-delivery or postmark date of the opening letter concerning the examination of the return for the taxable year for which a redetermination of U.S. tax liability is required by reason of such foreign tax redetermination.

5. Penalty Provisions

Section 6689 provides that a taxpayer may be subject to a penalty if it fails to notify the IRS of a foreign tax redetermination on or before the date prescribed by regulations. Section 301.6689–1T(a) (issued in TD 8210 on June 22, 1988) states that the penalty may apply if a taxpayer fails to notify the IRS of a foreign tax redetermination ''on or before the date prescribed in regulations.'' However, the preamble of the 2007 temporary regulations, in describing section 6689, provides that, ''Under section 6689, a taxpayer that fails to notify the IRS of a foreign tax redetermination in the time *and manner* prescribed by regulations for giving such notice is subject to a penalty.'' (Emphasis added.) Because it is implicit in section 6689 that the required notification must comply with the requirements of section 905(c), the proposed regulations conform to the preamble description in the 2007 temporary regulations. Accordingly, proposed § 301.6689–1(a) provides that the penalty may apply if a taxpayer fails to notify the IRS of a foreign tax redetermination ''on or before the date and in the manner prescribed in regulations.''

The penalty under section 6689 is generally computed by reference to the amount of the deficiency resulting from a foreign tax redetermination. If a partnership fails to timely file an AAR as required under proposed § 1.905–4(b)(2)(ii) such that the penalty under section 6689 is applicable there is ambiguity regarding the correct base upon which the penalty is computed because partnerships do not generally have deficiencies in chapter 1 tax. Under the centralized partnership audit regime enacted by the BBA, if an adjustment is made to a partnership-related item of a partnership that is subject to the BBA (either by the IRS or by the partnership upon the filing of an AAR), the default rule is that the partnership is liable for an imputed underpayment calculated on the adjustments, which is an approximate substitute for the amount of chapter 1 tax that would have been owed by its partners. *See* sections 6221(a) and 6225. The fact that section 6689 is silent as to the proper base for calculating a section 6689 penalty for a partnership that is subject to BBA creates a special enforcement consideration and requires clarification. Therefore, consistent with the principles of section 6233(a)(3) (which treats the imputed underpayment as an understatement or underpayment for purposes of computing a penalty) and the requirement in section 6227(d) that regulations coordinate the application of sections 905(c) and 6227, proposed § 301.6689–1 provides that in computing the amount of the penalty imposed under section 6689, the penalty is calculated on a deficiency or by reference to the amount of the imputed underpayment that results from the foreign tax redetermination.

Finally, because section 6662 may apply if a taxpayer's U.S. tax liability is understated on an original return even if section 6689 applies to a failure to notify the IRS of a subsequent foreign tax redetermination, the proposed regulations eliminate the reference in § 301.6689–1(b) to section 6653(a) (the predecessor to section 6662).

D. Transition Rule Relating to the TCJA

The TCJA repealed the pooling rules of section 902 and related provisions of section 905(c) that mandated prospective pooling adjustments to account for redeterminations of foreign taxes paid by foreign corporations that were eligible to be deemed paid by domestic corporate shareholders of the foreign corporations. Proposed §§ 1.905–3(b)(2)(iv) and 1.905–5 provide a transition rule providing that post-2017 redeterminations of pre-2018 foreign income taxes must be accounted for by adjusting the foreign corporation's taxable income and earnings and profits, post-1986 undistributed earnings, and post-1986 foreign income taxes (or pre-1987 accumulated profits and pre-1987 foreign income taxes, as applicable) in the pre-2018 year to which the redetermined foreign taxes relate. A redetermination of U.S. tax liability is required to account for the effect of the foreign tax redetermination on foreign taxes deemed paid by domestic corporate shareholders of the foreign corporation in the relation-back year and any subsequent pre-2018 year in which the domestic corporate shareholder computed a deemed-paid credit under section 902 or 960 with respect to the foreign corporation, as well as any year to which unused foreign taxes from any such year were carried. The proposed regulations generally apply the currency translation rules applicable under prior law and the notification requirements of proposed § 1.904–4 to redeterminations of U.S. tax liability required by proposed § 1.905–3(b)(2)(iv) in these circumstances.

The Treasury Department and the IRS request comments on whether an alternative adjustment to account for post-2017 foreign tax redeterminations with respect to pre-2018 taxable years of foreign corporations, such as an adjustment to the foreign corporation's taxable income and earnings and profits, post-1986 undistributed earnings, and post-1986 foreign income taxes as of the foreign corporation's last taxable year beginning before January 1, 2018, may provide for a simplified and reasonably accurate alternative.

IV. Foreign Income Taxes Taken Into Account Under Section 954(b)(4)

As discussed in Part III.A of this Explanation of Provisions, proposed § 1.905–3(b)(2) provides that a U.S. tax redetermination is required when a foreign tax redetermination affects whether or not a taxpayer is eligible for the subpart F high-tax exception. Proposed § 1.954–1(d)(3)(iii) therefore provides that the subpart F high-tax exception is applied by taking into account the redetermined foreign tax in the adjusted year.

The proposed regulations also include an additional clarification relating to schemes involving jurisdictions that do not impose corporate income tax on a CFC until its earnings are distributed. The Treasury Department and the IRS are aware that certain taxpayers claim that taxes are treated as paid or accrued for purposes of § 1.954–1(d)(3) even in the absence of any distribution triggering foreign tax. The IRS may challenge this position under existing law. Furthermore, the proposed regulations clarify that foreign income taxes that have not accrued because they are contingent on a future distribution are not taken into account for purposes of determining the amount of foreign income taxes paid or accrued with respect to an item of income. However, if a redetermination of U.S. tax liability is required under proposed §§ 1.905–3(a) and 1.905–3(b)(2)(ii) when tax is imposed on the foreign corporation in connection with a distribution, the redetermined foreign tax is taken into account in applying § 1.954–1(d)(3) in the adjusted year.

V. Disallowance of Foreign Tax Credits Under Section 965(g)

The Treasury Department and the IRS are aware that certain taxpayers may have engaged in certain transactions that are intended to avoid the disallowance of foreign tax credits under section 965(g) with respect to distributions of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits. For example, certain U.S. shareholders of specified foreign corporations may incur foreign income taxes on distributions recognized for foreign tax purposes that are not recognized for U.S. tax purposes (for example, consent dividends). When the section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits are distributed for U.S. tax purposes, no foreign income tax is imposed by the foreign jurisdiction. The taxpayers may argue that the foreign income taxes on the foreign distributions are not associated with a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits for U.S. tax purposes, and, accordingly, the credit need not be reduced by the section 965(g) disallowance.

Proposed § 1.965–5(b)(2) clarifies that the principles of § 1.904–6 apply in determining the extent to which foreign income taxes are attributable to distributions of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits for purposes of § 1.965–5(b)(1). For example, under the principles of § 1.904–6, foreign withholding taxes imposed on an amount that is recognized as a dividend for foreign, but not Federal income, tax purposes are attributable to an item of income to which that amount would be assigned if recognized as a distribution for Federal income tax purposes. To the extent a distribution would be a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits if it were recognized for U.S. tax purposes, under proposed § 1.965–5(b)(2) the tax would be associated with section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits and disallowed in part by reason of section 965(g). For foreign corporation taxable years beginning after December 31, 2019, § 1.861–20 applies in lieu of § 1.904–6.

The IRS may challenge the credits claimed for foreign income taxes imposed on distributions recognized solely for foreign tax purposes in prior years to the extent that such foreign income taxes would be considered imposed on distributions of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits had such distributions been recognized for U.S. tax purposes.

VI. Updates to Consolidated Foreign Tax Credit Rules

Proposed § 1.1502–4 includes amendments to regulations under section 1502 relating to the computation of the consolidated foreign tax credit. The proposed amendments update the regulations to reflect changes in the law, such as by eliminating out-of-date references to the per-country limitation. For purposes of determining the foreign tax credit limitation, the proposed regulations also provide that the amount of foreign source income in each separate category, used as the numerator in the foreign tax credit limitation fraction, is determined by applying the rules of § 1.1502–11, as well as sections 904(f) and 904(g), on a group-wide basis, rather than applying those rules on a separate member basis and combining the results.

The proposed regulations also add new rules for purposes of determining the source and separate category of a consolidated NOL, as well as the portion of a consolidated net operating loss (''CNOL'') that is apportioned to a separate return year of a member. The Treasury Department and the IRS have determined that, when characterizing a CNOL that is apportioned to a separate return year, it is generally appropriate to link the source and separate category of the CNOL with the member's assets that are expected to produce income with that same source and separate category so as to minimize the creation of loss accounts under sections 904(f) and 904(g) in the year in which the CNOL is used. The proposed regulations achieve this result formulaically through a two-step process that generally determines a CNOL's source and separate category by reference to the statutory and residual groupings described in § 1.861–8 for purposes of applying section 904 as the operative section, which are foreign source income in each separate category, and the residual grouping, which is U.S. source income.

First, the member determines a tentative apportionment, which is a proportionate share of the amount of the CNOL in each grouping based on a comparison of the value of the member's assets in that grouping to the value of the group's total assets in the grouping. Because the total of tentative apportionments of the CNOL does not necessarily equal the member's total share of the CNOL, an adjustment is provided. If the total tentative apportionments exceed the CNOL attributable to the member, the tentative apportionment in each grouping is reduced by a pro rata share of the excess, in proportion to the amount of the tentative apportionment in that grouping over the total tentative apportionments. In contrast, if the total tentative apportionments are less than the CNOL attributable to the member, the tentative apportionment in each grouping is increased by a pro rata share of that deficiency, in proportion to the remaining CNOL in that grouping (after subtracting the tentative apportionment) over the total remaining CNOL in all groupings.

VII. Applicability Dates

The rules in proposed §§ 1.861–8, 1.861–9, 1.861–12, 1.861–14, 1.904–4(c)(7) and (8), 1.904(b)–3, 1.954–1, and 1.954–2, generally apply to taxable years that end on or after December 16, 2019.

The rules in proposed §§ 1.704–1(b)(4)(viii)(*d*)(*1*), 1.861–17, 1.861–20, 1.904–6, and 1.960–1 apply to taxable years beginning after December 31, 2019. However, taxpayers that are on the sales method for taxable years beginning after December 31, 2017, and before January 1, 2020, may rely on proposed § 1.861–17 if they apply it consistently. Therefore, a taxpayer on the sales method for its taxable year beginning in 2018 may rely on proposed § 1.861–17 but must also apply the sales method (relying on proposed § 1.861–17) for its taxable year beginning in 2019.

Proposed §§ 1.904–4(e) and 1.904(g)–3 apply to taxable years ending on or after the date the final regulations are filed with the **Federal Register**.

In general, proposed §§ 1.905–3, 1.905–4, 1.905–5, and 301.6689–1 apply to foreign tax redeterminations (as defined in § 1.905–3(a)) occurring in taxable years ending on or after December 16, 2019, and to foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a U.S.

shareholder ending on or after December 16, 2019. In the case of foreign tax redeterminations of foreign corporations, proposed § 1.905–3 is limited to foreign tax redeterminations that relate to taxable years of foreign corporations beginning after December 31, 2017, and proposed § 1.905–5 is limited to foreign tax redeterminations that relate to taxable years of foreign corporations beginning before January 1, 2018.

Proposed § 1.965–5(b)(2) applies to taxable years of foreign corporations that end on or after December 16, 2019, and with respect to a United States person, to the taxable years in which or with which such taxable years of the foreign corporations end.

Proposed § 1.1502–4 applies to taxable years for which the original consolidated Federal income tax return is due (without extensions) after December 17, 2019.

Special Analyses

I. Regulatory Planning and Review

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, reducing costs, harmonizing rules, and promoting flexibility. The Executive Order 13771 designation for any final rule resulting from these proposed regulations will be informed by comments received.

The proposed regulations have been designated by the Office of Information and Regulatory Affairs (OIRA) as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (MOA, April 11, 2018) between the Treasury Department and the Office of Management and Budget 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 and Need for the Proposed Regulations

Before the Tax Cuts and Jobs Act (TCJA), the United States taxed its citizens, residents, and domestic corporations on their worldwide income. However, to the extent that a foreign jurisdiction and the United States taxed the same income, this framework could have resulted in double taxation. The U.S. foreign tax credit (FTC) regime alleviated potential double taxation by allowing a non-refundable credit for foreign income taxes paid or accrued that could be applied to reduce the U.S. tax on foreign source income. Although TCJA eliminated the U.S. tax on some foreign source income, the United States continues to tax other foreign source income, and to provide foreign tax credits against this U.S. tax. The changes made by TCJA to international taxation necessitate certain changes in this FTC regime.

The FTC calculation operates by defining different categories of foreign source income (a ''separate category'') based on the type of income.[3] Foreign taxes paid or accrued as well as deductions for expenses borne by U.S. parents and domestic affiliates that support foreign operations are also allocated to the separate categories under similar principles. The taxpayer can then use foreign tax credits allocated to each category against the U.S. tax owed on income in that category. This approach means that taxpayers who pay foreign taxes on income in one category cannot claim a credit against U.S. taxes owed on income in a different category, an important feature of the FTC regime. For example, suppose a domestic corporate taxpayer has $100 of active foreign source income in the ''general category'' and $100 of passive foreign source income, such as interest income, in the ''passive category.'' It also has $50 of foreign taxes associated with the ''general category'' income and $0 of foreign taxes associated with the ''passive category'' income. The allowable FTC is determined separately for the two categories. Therefore, none of the $50 of ''general category'' FTCs can be used to offset U.S. tax on the ''passive category'' income. This taxpayer has a pre-FTC U.S. tax liability of $42 (21 percent of $200) but can claim a FTC for only $21 (21 percent of $100) of this liability, which is the U.S. tax owed with respect to active foreign source income in the general category. The $21 represents what is known as the taxpayer's foreign tax credit limitation. The taxpayer may carry the remaining $29 of foreign taxes ($50 minus $21) back to the prior taxable year and then forward for up to 10 years (until used), and is allowed a credit against U.S. tax on general category foreign source income in the carryover year, subject to certain restrictions.

The proposed regulations are needed to address changes introduced by the TCJA and to respond to outstanding issues raised in comments to the 2018 FTC proposed regulations. In particular, the comments highlighted the following areas of concern: (a) Uncertainty concerning appropriate allocation of R&E expenditures across FTC categories, (b) the need to treat loans from partnerships to partners the same as loans from partners to partnerships with respect to aligning interest income to interest expense, and (c) uncertainty regarding the appropriate level of aggregation (affiliated group versus subgroup) at which expenses of insurance companies should be allocated to foreign source income. In addition, the proposed regulations are needed to expand the application of section 905(c) to cases where a foreign tax redetermination changes a taxpayer's eligibility for the high-taxed exception under subpart F and GILTI.

B. Overview of the Proposed Regulations

These proposed regulations address the following issues: (1) The allocation and apportionment of deductions under sections 861 through 865, including new rules on the allocation and apportionment of research and experimentation (R&E) expenditures and certain deductions of life insurance companies; (2) the definition of financial services income under section 904(d)(2)(D); (3) the allocation of foreign income taxes to the foreign income to which such taxes relate; (4) the interaction of the branch loss and dual consolidated loss recapture rules with sections 904(f) and (g); (5) the effect of foreign tax redeterminations of foreign corporations on the application of the high-tax exception described in section 954(b)(4) (including for purposes of determining tested income under section 951A(c)(2)(A)(i)(III)), and required notifications under section 905(c) to the IRS of foreign tax redeterminations and related penalty provisions; (6) the definition of foreign personal holding company income under section 954; (7) the application of the foreign tax credit disallowance under section 965(g); and (8) the application of the foreign tax credit limitation to consolidated groups.

[3] Prior to the TCJA, these categories were primarily the passive income and general income categories. The TCJA added new separate categories for global intangible low-taxed income (the section 951A category) and foreign branch income.

C. Economic Analysis

1. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of these proposed regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these regulations.

2. Summary of Economic Effects

The proposed regulations provide certainty and clarity to taxpayers regarding the allocation of income, expenses, and foreign income taxes to the separate categories. In the absence of the enhanced specificity provided by these regulations, similarly situated taxpayers might interpret the foreign tax credit provisions of the tax code differently, potentially resulting in inefficient patterns of economic activity. For example, in the absence of the proposed regulations, one taxpayer might have chosen not to undertake research (that is, incur R&E expenses) in a particular location, based on that taxpayer's interpretation of the tax consequences of such expenditures, that another taxpayer, making a different interpretation of the tax treatment of R&E, might have chosen to pursue in that same location. If this difference in interpretations confers a competitive advantage on the less productive enterprise, U.S. economic performance may suffer. The guidance provided in these regulations helps to ensure that taxpayers face more uniform incentives when making economic decisions. In general, economic performance is enhanced when businesses face more uniform signals about tax treatment.

Because the TCJA is new, the Treasury Department and the IRS do not know with reasonable precision the tax interpretations that taxpayers might make in the absence of this guidance. To the extent that taxpayers would generally have interpreted the foreign tax credit rules as being less favorable to the taxpayer than the proposed regulations provide, the proposed regulations may result in additional international activity by these taxpayers relative to the no-action baseline. This additional activity may include both activities that are beneficial to the U.S. economy (perhaps because they represent enhanced international opportunities for businesses with U.S. owners) and activities that are not beneficial (perhaps because they are accompanied by reduced activity in the United States). In essence, the Treasury Department and the IRS recognize that additional foreign economic activity by U.S. taxpayers may be a complement or substitute to activity within the United States and that to the extent these regulations change this activity (relative to the no-action baseline or alternative regulatory approaches), a mix of results may occur.

The Treasury Department and the IRS have not undertaken quantitative estimates of the economic effects of these regulations. The Treasury Department and the IRS do not have readily available data or models to estimate with reasonable precision (i) the tax stances that taxpayers would likely take in the absence of the proposed regulations or under alternative regulatory approaches; (ii) the difference in business decisions that taxpayers might make between the proposed regulations and the no-action baseline or alternative regulatory approaches; or (iii) how this difference in those business decisions will affect measures of U.S. economic performance.

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 no-action baseline and relative to alternative regulatory approaches. This analysis is presented in part I.C.3 of these Special Analyses.

3. Economic Effects of Specific Provisions

i. Rules for Allocating R&E Expenditures Under the Sales Method

a. Background

Under long-standing foreign tax credit rules, taxpayers must allocate expenditures to income categories. In the case of research and experimentation (R&E) expenditures, taxpayers can elect between a ''sales method'' and a ''gross income method'' to allocate the R&E expenses.[4]

The TCJA created some uncertainty regarding the application of the sales method because of the introduction of the section 951A category. In particular, comments raised issues regarding whether any R&E expenditures should be allocated to the section 951A category. The fact that sales by CFCs generate tested income and tested income is generally assigned to the section 951A category might imply that R&E expenditures should be allocated to the section 951A category. But the fact that royalty payments from the CFC to the U.S. taxpayer (*e.g.,* in remuneration for IP held by the parent that is licensed to the CFC to create the products that are sold) are in the general category implies that R&E expenditures should be allocated to the general category.

The gross income method is based on a different apportionment factor (gross income) as compared to the sales method (gross receipts). However, the gross income method is subject to certain conditions that require the result to be within a certain band around the result under the sales method, because historically the Treasury Department and the IRS have considered that the gross income method could lead to anomalous results and could be more easily manipulated than the sales method.[5] The uncertainty with respect to R&E expense allocation under the sales method needed resolution, and because the gross income method is tied to the sales method, any changes to the sales method required consideration of the gross income method.

b. Options Considered for the Proposed Regulations

The Treasury Department and the IRS considered three options with respect to the allocation of R&E expenditures to the section 951A category for purposes of calculating the FTC limitation. The first option was to confirm that R&E expenditures are allocated to the section 951A category under the sales method and to otherwise leave their treatment under the gross income method unchanged. The second option was to revise the sales method to provide that R&E expenditures are only allocated to the income that represents the taxpayer's return on intellectual property (thus, R&E expenditures could not be allocated to income from the taxpayer's CFC sales) and otherwise leave their treatment under the gross income method unchanged. The third option was to revise the sales method as considered in the second option and eliminate the gross income method for purposes of allocating R&E expenditures.

The proposed regulations adopt the last option. This option allows for the provision of an allocation and apportionment method for R&E

[4] If the taxpayer chooses the gross income method, 25 percent of the R&E expenditures are exclusively apportioned to the source where more than 50 percent of the taxpayer's R&E activities occur (generally the United States), and the other 75 percent is apportioned ratably. If a taxpayer chooses the sales method then 50 percent of the R&E expenditures are exclusively apportioned on the same basis, and the other 50 percent is apportioned ratably.

[5] The gross income method is more susceptible to manipulation because taxpayers can manage the type and amount of their foreign gross income by, for example, not paying a dividend and because presuming a factual relationship between the R&E expenditure and the related class of income based on the relative amounts of a taxpayer's gross income was more attenuated than a factual relationship based on sales.

expenditures that generally matches the expense reasonably with the income it generates. The matching of income and expenses generally produces a more efficient tax system contingent on the overall Code. Additionally, because this option results in no R&E expense being allocated to section 951A category income, it does not incentivize taxpayers with excess credits in the section 951A category to perform R&E through foreign subsidiaries; instead, the chosen option generally incentivizes choosing the location of R&E based on economic considerations rather than tax-related reasons, contingent on the overall Code. Finally, because the proposed regulations adopt the principle of allocating and apportioning R&E expenditures to IP-related income of the U.S. taxpayer, the gross income method is no longer relevant, because it allocates and apportions R&E expenditures to the section 951A category, and section 951A category gross income is not IP income to the U.S. taxpayer.

c. Number of Affected Taxpayers

The Treasury Department and the IRS have determined that the population of affected taxpayers consists of any U.S. taxpayer with R&E expenditures and foreign operations. There are around 2,500 such taxpayers in currently available tax filings from taxable years 2015–2017. Based on Statistics of Income data for 2014, approximately $40 billion of R&E expenses of such taxpayers were allocated to foreign source income, out of a total of $190 billion in qualified research expenses reported by such taxpayers in that year.[6]

ii. Application of Section 905(c) To Changes Affecting the High-Tax Exception

a. Background

Section 905(c) provides special rules for a foreign tax redetermination (FTR), which is when the amount of foreign tax paid in an earlier year (origin year) is changed in a later year (FTR year). This redetermination may be necessary, for example, because the taxpayer gets a refund or because a foreign audit determines that the taxpayer owes additional foreign tax. Since these additional taxes (or refunds) relate to the origin year, an FTR affects a taxpayer's origin year tax position (as well as FTC carryovers from that year).

Prior to TCJA, FTRs of foreign corporations generally resulted in prospective "pooling adjustments" to foreign tax credits. Under this approach, taxpayers simply added to or reduced the amount of foreign taxes in their foreign subsidiary's FTC "pool" going forward rather than amend the deemed paid taxes claimed on their origin year return. TCJA eliminated the pooling mechanism for taxes (because the adoption of a participation exemption system along with the elimination of deferral made it unnecessary) and replaced it with a system where taxes are deemed paid each year with an inclusion or distribution of previously taxed earnings and profits ("PTEP").

The 2019 FTC final regulations make clear that an FTR of a United States taxpayer must always be accounted for in the origin year, and that the taxpayer must file an amended return reflecting any resulting change in the taxpayer's U.S. tax liability. Section 905(c) provides tools to enforce this amended return requirement. It suspends the statute of limitations with respect to the assessment of any additional U.S. tax liability that results from an FTR, and imposes a civil penalty on taxpayers who fail to notify the IRS (through an amended return) of a FTR. To reflect the repeal of the pooling mechanism, the proposed regulations generally require taxpayers to account for FTRs of foreign subsidiaries on an amended return that reflects revised foreign taxes deemed paid under section 960 and any resulting change in the taxpayer's U.S. tax liability. However, the 2019 FTC final regulations require U.S. tax redeterminations only by reason of FTRs that affect the amount of foreign tax credit taxpayers claimed in the origin year. The rules do not apply to other tax effects, such as when the FTR changes the amount of earnings and profits the taxpayer's CFC had in the origin year, or affects whether or not the CFC's income qualifies for the high-tax exception under GILTI or subpart F.

The interaction of FTRs and the high-tax exception under GILTI and subpart F increases the importance of filing an origin year amended return. In particular, FTRs can give rise to inaccurate origin year U.S. liability calculations in the absence of an amended return precisely because they can change taxpayers' eligibility for the high-tax exception. Therefore, the proposed regulations provide that the section 905(c) rules cover situations in which the FTR affects not only the amount of FTCs taxpayers claimed in the origin year, but also whether or not their CFC's income qualified for the high-tax exception.

b. Options Considered for the Proposed Regulations

The Treasury Department and the IRS considered two options for expanding section 905(c) to cover the high-tax exception. The first option was to limit section 905(c) to changes in the amount of FTCs. The second option was to provide that section 905(c) applies in connection with the high-tax exceptions under GILTI and subpart F.

The proposed regulations adopt the second option. The first option would lead to frequent occurrences of inaccurate results with respect to the GILTI and subpart F high-tax exceptions because it is common for foreign audits to change the amount of tax paid in a prior year. Furthermore, taxpayers would have an incentive to overpay their CFC's foreign tax in the origin year, claim the high-tax exception to avoid subpart F or GILTI inclusions, wait for the 3 year statute of limitations to pass, and then claim a foreign tax refund with the foreign authorities. Without section 905(c) applying, taxpayers would have no obligation or threat of penalty for not amending the origin year return. Although there are FTC regulations that deny a credit if taxpayers make a noncompulsory payment of tax (*i.e.,* taxpayers paid more foreign tax than is necessary under foreign law), those rules are challenging to administer. While taxpayers have the burden to prove that they were legally required to pay the tax, the IRS may need to engage foreign tax law experts to establish that the taxpayer could have successfully fought paying it.

The second option provides a more accurate tax calculation than the first option, and it is instrumental in avoiding abuse. The increased number of amended returns will increase compliance costs for taxpayers, but the Treasury Department and the IRS consider that, in light of the high-tax exception, accurate origin year tax liability calculations necessitate these increased costs; however, the Treasury Department and the IRS solicit comments on this issue.

c. Number of Affected Taxpayers

The Treasury Department and the IRS determined that the proposed regulations potentially affect those U.S. taxpayers that pay foreign taxes and have a redetermination of that tax. Although data reporting the number of taxpayers subject to an FTR in a given year do not exist, some taxpayers currently subject to FTRs will file amended returns. The Treasury Department and the IRS estimate that there are approximately 300 to 600 U.S.

[6] Note, however, that these taxpayers might have additional R&E expenses which are not qualified R&E expenses. The tax data do not separately identify such expenses.

companies with foreign affiliates that file amended returns per year. However, the expansion of the section 905(c) requirement to file an amended return to instances where a FTR changes eligibility for the high-tax exception under GILTI or subpart F has the potential to significantly increase the number of taxpayers filing amended returns. The Treasury Department and the IRS have determined that a high upper bound for the number of taxpayers subject to a FTR that will be required to file amended returns (*i.e.,* taxpayers affected by this provision) can be derived by estimating the number of taxpayers with a potential GILTI or subpart F inclusion. Based on currently available tax filings for taxable years 2015 and 2016, there were about 15,000 C corporations with CFCs that filed at least one Form 5471 with their Form 1120 return. In addition, for the same period, there were about 30,000 individuals with CFCs that e-filed at least one Form 5471 with their Form 1040 return. In 2015 and 2016, there were about 3,000 S corporations with CFCs that filed at least one Form 5471 with their 1120S return. The identified S corporations had an estimated 150,000 shareholders, as an upper bound. Finally, the Treasury Department and the IRS estimate that there were approximately 7,000 U.S. partnerships with CFCs that e-filed at least one Form 5471 as Category 4 or 5 filers in 2015 and 2016. The identified partnerships had approximately 2 million partners, as indicated by the number of Schedules K–1 filed by the partnerships. This number includes both domestic and foreign partners, so it substantially overstates the number of partners that would actually be affected by the final regulations because it includes foreign partners.

iii. Extension of the Partnership Loan Rule to Loans From the Partner to the Partnership

a. Background

The 2019 FTC final regulations provide a rule that aligns interest income and expense when a U.S. partner makes a loan to the partnership. Under this matching rule, the partner's gross interest income is apportioned between U.S. and foreign sources in each separate category based on the partner's interest expense apportionment ratios. This rule minimizes the artificial increase in foreign source taxable income based solely on offsetting amounts of interest income and expense from a related party loan to a partnership. Comments in response to the 2018 FTC proposed regulations requested an equivalent rule when the partnership makes a loan to a U.S. partner.

b. Options Considered for the Proposed Regulations

The Treasury Department and the IRS considered two options with respect to this rule. The first option was to not provide a rule, because the abuse the Treasury Department and the IRS were concerned about was not relevant with respect to loans from the partnership to the partner. In the absence of a matching rule, the U.S. partner's U.S. source taxable income would be artificially increased but this income is not eligible to be sheltered by FTCs. The second option was to provide an identical rule for loans from the partnership to the partner as was provided in the 2019 FTC final regulations for loans from the partner to the partnership. The proposed regulations adopt the second option. This symmetry helps to ensure that similar economic transactions are treated similarly.

c. Number of Affected Taxpayers

The Treasury Department and the IRS consider the population of affected taxpayers to consist of any U.S. partner in a partnership which has a loan from the partnership to the partner or certain other parties related to the partner. The Treasury Department and the IRS estimate that there are approximately 450 partnerships and 5,000 partners that would be affected by this regulation.

iv. Allocation and Apportionment of Expenses for Insurance Companies

a. Background

Section 818(f) provides that for purposes of applying the expense allocation rules to life insurance companies, the deduction for policyholder dividends, reserve adjustments, death benefits, and certain other amounts are treated as items that cannot be definitely allocated to an item or class of gross income. That means, in general, that the expenses are apportioned ratably across all gross income.

Under the expense allocation rules, for most purposes, affiliated groups are treated as a single entity, although there are exceptions for certain expenses. The statute is unclear, however, about how affiliated groups are to be treated with respect to the allocation of certain expenses for insurance companies. Depending on the approach, the results could be different because the gross income categories across the affiliated group could be calculated in multiple ways. The Treasury Department and the IRS received comments and are aware that in the absence of further guidance taxpayers are likely to take opposite positions on this treatment. Some taxpayers argue that the expenses described in section 818(f) are apportioned based on the gross income of the entire affiliated group, while others argue that expenses are apportioned on a separate company or subgroup basis taking into account only the gross income of life insurance companies.

b. Options Considered for the Proposed Regulations

The Treasury Department and the IRS are aware of at least five potential methods for allocating section 818(f) expenses in a life-nonlife consolidated group. First, the expenses might be allocated solely among items of the life insurance company that has the reserves (''separate entity method''). Second, to the extent the life insurance company has engaged in a reinsurance arrangement that constitutes an intercompany transaction (as defined in § 1.1502–13(b)(1)), the expenses might be allocated in a manner that achieves single entity treatment between the ceding member and the assuming member (''limited single entity method''). Third, the expenses might be allocated among items of all life insurance members (''life subgroup method''). Fourth, the expenses might be allocated among items of all members of the consolidated group (including both life and non-life members) (''single entity method''). Fifth, the expenses might be allocated based on a facts and circumstances analysis (''facts and circumstances method'').

In response to the request for comments in the 2018 FTC proposed regulations, the Treasury Department and the IRS received comments advocating for certain of the aforementioned allocation methods. The proposed regulations adopt the separate entity method because it is consistent with section 818(f) and with the separate entity treatment of reserves under § 1.1502–13(e)(2). The Treasury Department and the IRS recognize, however, that this method may create opportunities for consolidated groups to use intercompany transactions to shift their section 818(f) expenses and achieve a more desirable foreign tax credit result. Accordingly, the Treasury Department and the IRS request comments on whether a life subgroup method more accurately reflects the relationship between section 818(f) expenses and the income producing activities of the life subgroup as a whole, and whether the life subgroup method is less susceptible to abuse because it might prevent a consolidated group from inflating its foreign tax credit limitation through intercompany transfers of assets, reinsurance transactions, or transfers of section 818(f) expenses. The Treasury Department and the IRS also request comments regarding the appropriate application of § 1.1502–13(c) to neutralize the ancillary effects of separate-entity computation of insurance reserves, such as the computation of limitations under section 904.

c. Number of Affected Taxpayers

The Treasury Department and the IRS have determined that the population of affected taxpayers consists of life insurance companies that are members of an affiliated group. The Treasury Department and the IRS have established that there are approximately 60 such taxpayers.

II. Paperwork Reduction Act

For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (''PRA''), there is a collection of information in proposed §§ 1.905–4 and 1.905–5(b).

When a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination (FTR), the proposed regulations generally require the taxpayer to notify the IRS of the FTR and provide certain information necessary to redetermine the U.S. tax due for the year or years affected by the FTR. If there is no change in the U.S. tax liability as a result of the FTR or if the FTR is caused by certain de minimis fluctuations in foreign currency rates, the taxpayer may simply attach the notification to their next filed tax return and make any appropriate adjustments in that year. However, taxpayers are generally required to file an amended return (or an administrative adjustment request in the case of certain partnerships) for the year or years affected by the FTR along with an updated Form 1116 Foreign Tax Credit (Individual, Estate, or Trust) (covered under OMB Control Number 1545–0074 individual, or 1545–0121 estate and trust) or Form 1118 Foreign Tax Credit-Corporations (OMB Control Number 1545–0123), and a written statement providing specific information relating to the FTR. Since the burden for filing amended income tax returns and the Forms 1116 and 1118 are covered under the OMB Control Numbers listed in the prior sentence, the burden estimates for OMB Control Number 1545–1056 only cover the burden for the written statements.

For purposes of the PRA, the reporting burden associated with proposed §§ 1.905–4 and 1.905–5(b) will be reflected in the PRA submission associated with OMB control number 1545–1056, which is set to expire on December 31, 2020. The number of respondents to this collection was estimated at 13,000 and the total estimated burden time was estimated to be 54,000 hours and total estimated monetized costs of $2,430,540 ($2016).

For taxpayers who are required to file an amended return (along with related Form 1116 or Form 1118) in order to report an FTR, and for purposes of the PRA, the reporting burden for filing the amended return will be reflected in OMB control numbers 1545–0123 (relating to business filers, which represents a total estimated burden time, including all related forms and schedules, of 3.157 billion hours and total estimated monetized costs of $58.148 billion ($2017)), 1545–0074 (relating to individual filers, which represents a total estimated burden time, including all related forms and schedules, of 1.784 billion hours and total estimated monetized costs of $31.764 billion ($2017)), and 1545–0121 (relating to estate and trust filers, which represents a total estimated burden time, including all related forms and schedules, of 25,066,693 hours). These overall burden estimates for OMB control numbers 1545–0123, 1545–0074, and 1545–0121 include, but do not isolate, the estimated burden of the foreign tax credit-related forms as a result of the information collection in the proposed regulations. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the proposed regulations. These burdens have also been reported for other regulations related to the taxation of cross-border income and the Treasury Department and the 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 TCJA.

As a result of the changes made in the TCJA to the foreign tax credit rules generally, and to section 905(c) specifically, the Treasury Department and the IRS anticipate that the number of respondents may increase modestly among taxpayers who file Form 1120 series returns. The possible increase in the number of respondents is due to the elimination of adjustments to pools of post-1986 earnings and profits and post-1986 foreign income taxes as an alternative to filing an amended return following the changes made in the TCJA. These changes to the burden estimate will be reflected in the PRA submission for the renewal of OMB control number 1545–1056 as well as in the OMB control numbers 1545–0074 (for individuals) and 1545–0123 (for business taxpayers).

The estimates for the number of impacted filers with respect to the collections of information described in this Part II of the Special Analyses are based on filers of income tax returns that file a Form 1065, Form 1040, or Form 1120 series because only filers of these forms are generally subject to the collection of information requirement. The IRS estimates the number of impacted filers to be the following:

TAX FORMS IMPACTED

Collection of information	Number of respondents (estimated)	Forms to which the information may be attached
§ 1.905–4	8,900–11,700	Form 1065 series, Form 1040 series, and Form 1120 series.
§ 1.905–5(b)	8,900–11,700	Form 1065 series, Form 1040 series, and Form 1120 series.

The Treasury Department and the IRS request comments on all aspects of information collection burdens related to these proposed regulations, including estimates for how much time it would take to comply with the paperwork burdens described in this Part II of the Special Analyses and ways for the IRS to minimize the paperwork burden. 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 TCJA and those that arise out of discretionary authority exercised in the proposed regulations. The Treasury Department and the IRS welcome comments on all aspects of information collection burdens related to the foreign tax credit. In addition, when available, drafts of IRS forms are posted for comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.htm.*

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the proposed 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.

The proposed regulations provide guidance needed to comply with statutory changes and affect individuals and corporations claiming foreign tax credits. The domestic small business entities that are subject to the foreign tax credit rules in the Code and in the proposed regulations are generally those domestic small business entities that are at least 10 percent corporate shareholders of foreign corporations, and so are eligible to claim dividends-received deductions or compute foreign taxes deemed paid under section 960 with respect to inclusions under subpart F and section 951A from CFCs. Other aspects of these proposed regulations also affect domestic small business entities that operate in foreign jurisdictions or that have income from sources outside of the United States. Based on 2017 Statistics of Income data, the Treasury Department and the IRS computed the fraction of taxpayers owning a CFC by gross receipts size class. The smaller size classes have a relatively small fraction of taxpayers that own CFCs, which suggests that many domestic small business entities would be unaffected by these regulations.

Many of the important aspects of the proposed regulations, including all of the rules in proposed §§ 1.861–8(d)(2)(ii)(B), 1.904–4(c)(7), 1.904–6(f), 1.905–3(b)(2), 1.905–5, 1.954–1, 1.954–2, and 1.965–5(b)(2) apply only to U.S. persons that operate a foreign business in corporate form, and, in most cases, only if the foreign corporation is a CFC. Because it takes significant resources and investment for a business to operate outside of the United States in corporate form, and in particular to own a CFC, the owners of such businesses will infrequently be domestic small business entities, as indicated by the Table. Other provisions in the proposed regulations, including the rules in proposed §§ 1.861–8(d)(2)(v), 1.861–8(e)(16), 1.861–14, 1.904–4(e), 1.1502–4, and 1.1502–21, generally apply only to members of a consolidated group and insurance companies or other members of the financial services industry earning income from sources outside of the United States. It is infrequent for domestic small entities to operate as part of an affiliated group, to be taxed as an insurance company, or to constitute a financial services entity, and also earn income from sources outside of the United States. Consequently, the Treasury Department and the IRS project that the proposed regulations are unlikely to affect a substantial number of domestic small business entities, however adequate data are not available at this time to certify that a substantial number of small entities would be unaffected.

FRACTION OF U.S. CORPORATE TAXPAYERS REPORTING CFC OWNERSHIP, BY GROSS RECEIPTS SIZE CLASS

Gross receipts size class	Percentage with a CFC
<1 mil	0.40
1–5 mil	0.80
5–10 mil	2.70
10–20 mil	4.50
20–30 mil	9.30
30–50 mil	12.00
50–100 mil	19.70
100–150 mil	26.80
150–200 mil	32.50
200–250 mil	37.40
250–500 mil	43.70
>=500 mil	63.50

* Data based on 2017 Statistics of Income sample for all 1120 returns except 1120–S and return type=2 (1120–L, 1120–RIC, 1120–F, 1120–REIT, 1120–PC,1120, 1120–L Consolidated 1504c return (controlling industries 524142 and 524143),1120–PC Consolidated 1504C return (controlling industries 524156, 524159), and 1120 Section 594/1504c consolidated return (controlling industries not 524142, 524143, 524156, 524159), 1120 Non-consolidated return).

The Treasury Department and the IRS have determined that the proposed regulations will not have a significant economic impact on domestic small business entities. Based on published information from 2013, foreign tax credits as a percentage of three different tax-related measures of annual receipts (see Table for variables) by corporations are substantially less than the 3 to 5 percent threshold for significant economic impact. The amount of foreign tax credits in 2013 is an upper bound on the change in foreign tax credits resulting from the proposed regulations.

Size (by business receipts)	Under $500,000 (%)	$500,000 under $1,000,000 (%)	$1,000,000 under $5,000,000 (%)	$5,000,000 under $10,000,000 (%)	$10,000,000 under $50,000,000 (%)	$50,000,000 under $100,000,000 (%)	$100,000,000 under $250,000,000 (%)	$250,000,000 or more (%)
FTC/Total Receipts	0.03	0.00	0.00	0.01	0.01	0.03	0.09	0.56
FTC/(Total Receipts-Total Deductions)	0.48	0.03	0.04	0.26	0.22	0.51	1.20	9.00
FTC/Business Receipts	0.05	0.00	0.00	0.01	0.01	0.04	0.10	0.64

Source: Statistics of Income (2013) Form 1120 available at *https://www.irs.gov/statistics.*

Although proposed § 1.905–4 contains a collection of information requirement, the small businesses that are subject to the requirements of proposed § 1.905–4 are domestic small entities with significant foreign operations. The data to assess precise counts of small entities affected by proposed § 1.905–4 are not readily available, but, as the data above suggest, a significant number of small entities are not likely to have significant foreign operations. Further, as demonstrated in the second table in this Part III, foreign tax credits do not have a significant economic impact for small business entities. Therefore, the Treasury Department and the IRS have determined that a substantial number of domestic small business entities will not be subject to proposed § 1.905–4. Moreover, as discussed in this Part III, the proposed regulations do not have a significant economic impact on small entities. Accordingly, it is hereby certified that the requirements of proposed § 1.905–4 will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f), these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses. The Treasury Department and the IRS also request comments from the public on the certifications in this Part III.

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 proposed 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 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. Additionally, the Treasury Department and the IRS have specifically requested comments in the following parts of the Explanation of Provisions: I.A.1 (various aspects of stewardship expense including definition and exceptions), I.A.5 (future implementation of section 864(f) and potential capitalization of certain expenses solely for purposes of § 1.861–9), I.D (life subgroup method), I.E.1 (different classification methods for R&E expenditures), I.E.3 (contract research arrangements), II.A (additional guidance under sections 954(h) and 952(c)(1)(B)(vi) with respect to financial services entities), II.B (the treatment of foreign tax on base differences and on income that is recognized by a different person for U.S. tax purposes, the interaction of proposed § 1.904–6(f) with sections 245A(g) and 909, and the allocation and apportionment of certain state and foreign income taxes), III.B (foreign tax redeterminations and predecessor or successor entities), III.C.1 (alternative notification requirements under section 905(c)), III.C.2 (coordination between sections 905(c) and 6227), and III.D (alternative adjustments for post-2017 foreign tax redeterminations with respect to pre-2018 taxable years of foreign corporations).

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 Karen J. Cate, Jeffrey P. Cowan, Jeffrey L. Parry, Larry R. Pounders, and Suzanne M. Walsh 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

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, 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 is amended by revising the entries for § 1.861–14 and adding entries for §§ 1.905–4 and 1.905–4(b)(2)(ii) to read in part as follows:

Authority: 26 U.S.C. 7805.

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Section 1.861–14 also issued under 26 U.S.C. 864(e)(7).

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Section 1.905–4 also issued under 26 U.S.C. 989(c)(4) and 26 U.S.C. 6689(a).

Section 1.905–4(b)(2)(ii) also issued under 26 U.S.C. 6227(d) and 26 U.S.C. 6241(11).

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■ **Par 2.** Section 1.704–1 is amended by:

■ 1. Revising the fourth sentence and adding a new fifth sentence in paragraph (b)(1)(ii)(*b*)(*1*).

■ 2. Revising paragraph (b)(4)(viii)(*d*)(*1*).

The revisions read as follows:

§ 1.704–1 Partner's distributive share.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(*b*) * * *

(*1*) * * * Except as provided in the next sentence, the provisions of paragraphs (b)(4)(viii)(*a*)(*1*), (b)(4)(viii)(*c*)(*1*), (b)(4)(viii)(*c*)(*2*)(*ii*) and (*iii*), (b)(4)(viii)(*c*)(*3*) and (*4*), (b)(4)(viii)(*d*)(*1*) (as in effect on July 24, 2019), and *Examples 1, 2,* and *3* in paragraphs (b)(6)(i), (ii), and (iii) of this section apply for partnership taxable years that both begin on or after January 1, 2016, and end after February 4, 2016. For partnership taxable years beginning after December 31, 2019, paragraph (b)(4)(viii)(*d*)(*1*) of this section applies. * * *

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(4) * * *

(viii) * * *

(*d*) * * * *1 In general.* CFTEs are allocated and apportioned to CFTE categories in accordance with § 1.861–20 by treating each CFTE category as a statutory grouping (with no residual grouping). See *Examples 2* and *3* in paragraphs (b)(6)(ii) and (iii) of this section, which illustrate the application of this paragraph in the case of serial disregarded payments subject to withholding tax. In addition, if as described in § 1.861–20(e), foreign law does not provide for the direct allocation or apportionment of expenses, losses or other deductions allowed under foreign law to a CFTE category of income, then such expenses, losses or other deductions must be allocated and apportioned to gross income as determined under foreign law in a manner that is consistent with the allocation and apportionment of such items for purposes of determining the net income in the CFTE categories for Federal income tax purposes pursuant to paragraph (b)(4)(viii)*c3* of this section.

* * * * *

■ **Par. 3.** Section 1.861–8 is amended by:

■ 1. Adding a sentence to the end of paragraph (a)(1).

■ 2. Revising paragraph (d)(2)(ii)(B).

■ 3. Adding paragraph (d)(2)(v).

■ 4. Revising paragraph (e)(4)(ii).

■ 5. Revising the heading of paragraph (e)(5) and adding five sentences to the end of paragraph (e)(5).

■ 6. Revising the first sentence of paragraph (e)(6)(i).

■ 7. Revising paragraphs (e)(7) and (8).

■ 8. Adding paragraph (e)(16).

■ 9. Adding paragraphs (g)(15) through (18) and paragraph (g)(24);

■ 10. Revising paragraph (h).

The additions and revisions read as follows:

§ 1.861–8 Computation of taxable income from sources within the United States and from other sources and activities.

(a) * * * (1) * * * The term ''section 861 regulations'' means this section, §§ 1.861–8T, 1.861–9, 1.861–9T, 1.861–10, 1.861–10T, 1.861–11, 1.861–11T, 1.861–12, 1.861–12T, 1.861–13, 1.861–14, 1.861–14T, 1.861–17, and § 1.861–20.

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(B) *Certain stock and dividends.* The term ''exempt income'' includes the portion of the dividends that are deductible under section 243(a)(1) or (2) (relating to the dividends received deduction) or section 245(a) (relating to the dividends received deduction for dividends from certain foreign corporations). Thus, for purposes of apportioning deductions using a gross income method, gross income does not include a dividend to the extent that it gives rise to a dividend received deduction under either section 243(a)(1), section 243(a)(2), or section 245(a). In addition, for purposes of apportioning deductions using an asset method, assets do not include that portion of the value of the stock (determined in accordance with § 1.861–9(g), and, as relevant, §§ 1.861–12 and 1.861–13) equal to the portion of dividends paid thereon that would be deductible under either section 243(a)(1), section 243(a)(2), or section 245(a). For example, in the case of stock for which all dividends would be allowed a deduction of 50 percent under section 243(a)(1), 50 percent of the value of the stock is treated as an exempt asset. In the case of stock which generates, has generated, or can reasonably be expected to generate qualifying dividends deductible under section 243(a)(3), such stock does not constitute an exempt asset. However, such stock and the qualifying dividends thereon are eliminated from consideration in the apportionment of interest expense under the consolidation rule set forth in § 1.861–11T(c), and in the apportionment of other expenses under the consolidation rules set forth in § 1.861–14T.

* * * * *

(v) *Dividends received deduction and tax-exempt interest of insurance companies*—(A) *In general.* For purposes of characterizing gross income or assets as exempt or not exempt under this section, the following rules apply on a company wide basis pursuant to the rules in paragraphs (d)(2)(v)(A)(*1*) and (*2*) of this section.

(*1*) In the case of an insurance company taxable under section 801, the term ''exempt income'' includes the portion of dividends received that satisfy the requirements of deductibility under sections 243(a)(1) and (2) and 245(a) but without regard to any disallowance under section 805(a)(4)(A)(ii) of the policyholder's share of the dividends or any similar disallowance under section 805(a)(4)(D), and also includes tax-exempt interest but without reduction for the policyholder's share of tax-exempt interest that reduces the closing balance of items described in section 807(c), as provided under section 807(a)(2)(B) and 807(b)(1)(B). The term ''exempt assets'' includes the corresponding portion of assets that give rise to exempt income described in the preceding sentence. See § 1.861–8(e)(16) for a special rule concerning the allocation of reserve expenses to dividends received by a life insurance company.

(*2*) In the case of an insurance company taxable under section 831, the term ''exempt income'' includes the portion of interest and dividends deductible under sections 832(c)(7) and (12) or sections 834(c)(1) and (7). Exempt income also includes the amounts reducing the losses incurred under section 832(b)(5) to the extent such amounts are not already taken into account in the preceding sentence. The term ''exempt assets'' includes the corresponding portion of assets that give rise to exempt income described in the preceding two sentences.

(B) *Examples.* The following examples illustrate the application of paragraph (d)(2)(v)(A) of this section.

(*1*) *Example 1*—(*i*) *Facts.* U.S.C. is a domestic life insurance company that has $300x of gross income, consisting of $100x of foreign source general category income and $200x of U.S. source passive category interest income, $100x of which is tax-exempt interest income from municipal bonds under section 103. U.S.C.'s opening balance of its section 807(c) reserves is $50,000x and USP's closing balance of its section 807(c) reserves is $50,130x. Under section 807(b)(1)(B), USP's closing balance of its section 807(c) reserves, $50,130x, is reduced by the amount of the policyholder's share of tax-exempt interest. The policyholder's share of tax-exempt interest under section 812(b) is equal to 30 percent of the $100x of tax-exempt interest ($30x). Therefore, under sections 803(a)(2) and 807(b), USP's reserve deduction is $100x ($50,130x of reserve deduction minus $30x (30 percent of $100x of tax-exempt interest), minus $50,000x). U.S.C. has no other income or deductions.

(*ii*) *Analysis—allocation.* Under section 818(f)(1), U.S.C.'s reserve deduction is treated as an item that cannot be definitely allocated to an item or class of gross income. Accordingly, under paragraph (b)(5) of this section, U.S.C.'s reserve deduction is allocable to all of U.S.C.'s gross income as a class.

(*iii*) *Analysis—apportionment.* Under paragraph (c)(3) of this section, the reserve deduction is ratably apportioned between the statutory grouping (foreign source general category income) and the residual grouping (U.S. source income) on the basis of the relative amounts of gross income in each grouping. For purposes of apportioning deductions under § 1.861–8T(d)(2)(i)(B), exempt income is not taken into account. Under paragraph (d)(2)(v)(A)(*1*) of this section, in the case of an insurance company taxable under section 801, exempt income includes tax-exempt interest without regard to any reduction for the policyholder's share. U.S.C. has U.S. source income of $200x of which $100x is tax-exempt without regard to the reduction for the policyholder's share of tax-exempt interest that reduces the closing balance of items described in section 807(c). Thus, the gross income taken into account in apportioning U.S.C.'s reserve deduction is $100x of foreign source general category gross income and $100x of U.S. source gross income. Of U.S.C.'s $100x reserve deduction, $50x ($100x × $100x/$200x) is apportioned to foreign source general category gross income and $50x ($100x × $100x/$200x) is apportioned to U.S. source gross income.

(*2*) *Example 2*—(*i*) *Facts.* U.S.C. is a domestic life insurance company that has $300x of gross income consisting of $100x of foreign source general category income and $200x of U.S. source general category dividend income eligible for the 50% dividends received deduction (DRD) under section 243(a)(1). Under section 805(a)(4)(A)(ii), U.S.C. is allowed a 50% DRD on the company's share of the dividend received. Under section 812(a), the company's share is equal to 70% of the dividend income eligible for the DRD under section 243(a)(1), which results in a DRD of $70x (70% × 50% × $200x), and under section 812(b), the policyholder's share is equal to 30% of the dividend income eligible for the DRD under section 243(a)(1), or $30x. U.S.C. is entitled to a $130x deduction for an increase in its life insurance reserves under sections 803(a)(2) and 807(b). Unlike for tax-exempt interest income, there is no adjustment under section 807(b)(1)(B) to the reserve deduction for the policyholder's share of dividends eligible for the DRD under section 243(a)(1). U.S.C. has no other income or deductions.

(*ii*) *Analysis—allocation.* Under section 818(f)(1), U.S.C.'s reserve is treated as an item that cannot be definitely allocated to an item or class of gross income except that, under § 1.861–8(e)(16), an amount of reserve expenses of a life insurance company equal to the DRD that is disallowed because it is attributable to the policyholder's share of dividends is treated as definitely related to such dividends. Thus, U.S.C. has a life insurance reserve deduction of $130x, of which $30x (equal to the policyholder's share of the DRD that would have been allowed under section 243(a)(1)) is directly allocated and apportioned to U.S. source dividend income. Under paragraph (b)(5) of this section, the remaining portion of U.S.C.'s reserve deduction ($100x) is allocable to all of U.S.C.'s gross income as a class.

(*iii*) *Analysis—apportionment.* Under paragraph (c)(3) of this section, the deduction is ratably apportioned between the statutory grouping (foreign source general category income) and the residual grouping (U.S. source income) on the basis of the relative amounts of gross income in each grouping. For purposes of apportioning deductions under § 1.861–8T(d)(2)(i)(B), exempt income is not taken into account. Under paragraph (d)(2)(v)(A)(*1*) of this section, in the case of an insurance company taxable under section 801, exempt income includes dividends deductible under section 805(a)(4) without regard to any reduction to the DRD for the policyholder's share in section 804(a)(4)(A)(ii). Thus, the gross income taken into account in apportioning $100x of U.S.C.'s remaining reserve deduction is $100x of foreign source general category gross income and $100x of U.S. source gross income. Of U.S.C.'s $100x remaining reserve deduction, $50x ($100x × $100x/$200x) is apportioned to foreign source general category gross income and $50x ($100x × $100x/$200x) is apportioned to U.S. source gross income.

* * * * *

(e) * * *

(4) * * *

(ii) *Stewardship expenses*—(A) *In general.* Stewardship expenses result from ''overseeing'' functions undertaken for a corporation's own benefit as an investor in a related corporation. For purposes of this section, stewardship expenses of a corporation are those expenses resulting from ''duplicative activities'' (as defined in § 1.482–9(l)(3)(iii)) or ''shareholder activities'' (as defined in § 1.482–9(l)(3)(iv)) of the corporation with respect to the related corporation. Thus, for example, stewardship expenses include expenses of an activity the sole effect of which is either to protect the corporation's capital investment in the related corporation or to facilitate compliance by the corporation with reporting, legal, or regulatory requirements applicable specifically to the corporation, or both. If a corporation has a foreign or international department which exercises overseeing functions with respect to related foreign corporations and, in addition, the department performs other functions that generate other foreign-source income (such as fees for services rendered outside of the United States for the benefit of foreign related corporations and foreign-source royalties), some part of the deductions with respect to that department are considered definitely related to the other foreign-source income. In some instances, the operations of a foreign or international department will also generate U.S. source income (such as fees for services performed in the United States).

(B) *Allocation.* Stewardship expenses are considered definitely related and allocable to dividends and inclusions received or accrued, or to be received or accrued, under sections 78, 951 and 951A, as well as amounts included under sections 1291, 1293, and 1296, from the related corporation.

(C) *Apportionment.* Stewardship expenses must be apportioned between the statutory grouping (or groupings) and residual grouping based on the relative values of the stock in each grouping held by a taxpayer, as determined and characterized under § 1.861–9T(g) (and, as relevant, §§ 1.861–12 and 1.861–13) for purposes of allocating and apportioning the taxpayer's interest expense.

(D) *Partnerships.* The principles of paragraph (e)(4)(ii)(A) of this section apply to determine if expenses incurred with respect to a partnership are stewardship expenses. Stewardship expenses incurred with respect to a partnership are considered definitely related and allocable to a partner's distributive share of partnership income. The principles of paragraph (e)(4)(ii)(C) of this section apply to apportion expenses incurred with respect to a partnership.

(5) *Legal and accounting fees and expenses; damages awards, prejudgment interest, and settlement payments.* * * * Awards for litigation or arbitral damages, prejudgment interest, and payments in settlement of or in anticipation of claims for damages, including punitive damages, arising from product liability and similar or related claims are definitely related and allocable to the class of gross income produced by the specific sales of the products or services that gave rise to the claims for damage or injury. If the claims arise from an event incident to the production of products or provision of services rather than from damage or injury caused by the product or service, the payments are definitely related and allocable to the class of gross income ordinarily produced by the assets used to produce the products or services that are involved in the event. If necessary, the deductions arising from the event are apportioned among the statutory and residual groupings on the basis of the relative values (as determined under § 1.861–9T(g) and, as relevant, §§ 1.861–12 and 1.861–13, for purposes of allocating and apportioning the taxpayer's interest expense) of the assets in each grouping. If the claims are made by investors in a corporation, arise from negligence, fraud, or other malfeasance of the corporation (or its representatives), and are not described in the preceding two sentences, then the damages, prejudgment interest, and settlement payments paid by the corporation are definitely related and allocable to all income of the corporation and are apportioned among the statutory and residual groupings based on the relative value of the corporation's assets in each grouping (as determined under § 1.861–9T(g) and, as relevant, §§ 1.861–12 and 1.861–13, for purposes of allocating and apportioning the taxpayer's interest expense). The grouping (or groupings) of income to which damages, prejudgment interest, and settlement payments is allocated and apportioned is determined based on the groupings to which the related income would be assigned if the income were recognized in the taxable year in which the deduction is allowed.

(6) * * * (i) * * * The deduction for foreign income, war profits and excess profits taxes allowed by section 164 is

allocated and apportioned among the applicable statutory and residual groupings under § 1.861–20. * * *

* * * * *

(7) *Losses on the sale, exchange, or other disposition of property.* See §§ 1.865–1 and 1.865–2 for rules regarding the allocation of certain losses.

(8) *Net operating loss deduction*—(i) *Components of net operating loss.* A net operating loss is assigned to statutory or residual grouping components by reference to the losses in each such statutory or residual grouping that are not allocated to reduce income in other groupings in the taxable year of the loss. For example, for purposes of section 904, the source and separate category components of a net operating loss are determined by reference to the amounts of separate limitation loss and U.S. source loss (determined without regard to adjustments required under section 904(b)) that are not allocated to reduce U.S. source income or income in other separate categories under the rules of sections 904(f) and 904(g) for the taxable year in which the net operating loss arose. *See* § 1.904(g)–3(d)(2). See § 1.1502–4 for rules applicable in computing the foreign tax credit limitation and determining the source and separate category of a net operating loss of a consolidated group.

(ii) *Components of section 172 deduction.* A net operating loss deduction allowed under section 172 is allocated and apportioned to statutory and residual groupings by reference to the statutory and residual grouping components of the net operating loss that is deducted in the taxable year. Except as provided under the rules for an operative section, a partial net operating loss deduction is treated as ratably comprising the components of a net operating loss. See, for example, § 1.904(g)–3, which is an exception to the general rule described in the previous sentence and provides rules for determining the source and separate category of a partial net operating loss deduction for purposes of section 904 as the operative section.

* * * * *

(16) *Special rule for the allocation of reserve expenses of a life insurance company.* An amount of reserve expenses of a life insurance company equal to the dividends received deduction that is disallowed because it is attributable to the policyholders' share of dividends received is treated as definitely related to such dividends. See paragraph (d)(2)(v)(B)(*2*) of this section (*Example 2*).

* * * * *

(g) * * *

(15) *Example 15: Payment in settlement of claim for damages allocated to specific class of gross income*—(i) *Facts*—USP, a domestic corporation, designs, manufactures, and sells Product A in the United States. USP also operates a foreign branch, within the meaning of § 1.904–4(f)(3)(vii), in Country X through FDE, a disregarded entity organized in Country X, which manufactures and sells Product A in Country X. USP earns $300x of U.S. source income from sales of Product A to customers in the United States. The sales of Product A to customers in Country X result in aggregate gross income of $100x, of which $80x is U.S. source income attributable to USP's manufacturing activities and $20x is U.S. source income attributable to FDE's distribution activities. The $100x of income from sales of Product A to customers in Country X constitutes foreign branch category income. FDE is sued under Country X law for damages after Product A harms a customer in Country X. FDE makes a deductible payment to the Country X customer in settlement of the legal claims for damages.

(ii) *Analysis.* Because Product A caused the customer's injury, the claim for damages arose from the specific sales of Product A to the customer in Country X. Claims that might arise from damages caused by Product A to customers in the United States are irrelevant in allocating the deduction for the settlement payments made to the customer in Country X. Therefore, FDE's damages payment deduction is allocable to the class of gross income of sales of Product A in Country X. For purposes of section 904(d), because that class of gross income consists solely of U.S. source income, none of that income is included in the statutory grouping of foreign source foreign branch category income, and accordingly the damages payment deduction reduces USP's residual grouping of U.S. source income.

(16) *Example 16: Legal damages payment arising from event prior to sale*—(i) *Facts*- The facts are the same as in paragraph (g)(15) of this section (the facts in *Example 15*) except that there is a disaster at FDE's warehouse in Country X arising from the negligence of an employee. The inventory of Product A in the warehouse is destroyed and FDE employees as well as residents in the vicinity of the warehouse are injured. USP's reputation in the United States suffers such that USP expects to subsequently lose market share in the United States. FDE makes damages payments totaling $80x to both its injured employees and the nearby residents.

(ii) *Analysis.* FDE's warehouse in Country X is used in connection with sales of Product A to customers in Country X. Thus, the $80x damages payment is allocable to the class of gross income ordinarily produced by the assets used to produce Product A. No apportionment of the $80x is necessary for purposes of applying section 904(d) because the class of gross income to which the deduction is allocated consists solely of U.S. source income.

(17) *Example 17: Payment following a change in law*—(i) *Facts.* The facts are the same as in paragraph (g)(15) (the facts in *Example 15*) except that FDE manufactures and sells Product A in Country X in 2015 (before the enactment of the section 904(d)(1)(B) separate category for foreign branch income) and is sued in 2016 under Country X law for damages after Product A harms a customer in Country X. FDE makes a deductible damages payment to the Country X customer pursuant to a court judgment in 2019.

(ii) *Analysis.* The specific sales of Product A in Country X in 2015 led to the customer's injury in Country X. The payment in 2019 of the deductible damages payment is definitely related and allocable to the class of gross income consisting of Product A sales in Country X. Although the income earned from the Product A sales in Country X in 2015 was foreign source general category income, in 2019 the assets used to produce such income is U.S. source foreign branch category income. Accordingly, the deductible damages payment is allocated to foreign branch category income. No apportionment of the payment is necessary because the class of gross income to which the deduction is allocated consists solely of U.S. source income.

(18) *Example 18: Stewardship and supportive expenses*—(i) *Facts*—(A) USP, a domestic corporation, manufactures and sells Product A in the United States. USP owns 100% of the stock of USSub, a domestic corporation, and CFC1, CFC2, and CFC3, which are all controlled foreign corporations. USP and USSub file separate returns for U.S. Federal income tax purposes but are members of the same affiliated group under section 243(b)(2). USSub, CFC1, CFC2, and CFC3 perform similar functions in the United States and in the foreign countries T, U, and V, respectively. The tax book value of USP's stock in each of its four subsidiaries is $10,000x.

(B) USP's supervision department (the Department) incurs expenses of $1,500x. The Department is responsible for the supervision of its four subsidiaries and for rendering certain services to the subsidiaries, and the Department provides all the supportive functions necessary for USP's foreign activities. The Department performs three principal types of activities. First, the Department performs services outside the United States for the direct benefit of CFC2 for which a fee is paid by CFC2 to USP. The cost to the Department of the services for CFC2 is $900x, which results in a total charge (after a $100x markup) to CFC2 of $1,000x, all of which is foreign source income to USP. Second, the Department provides services related to license agreements that USP maintains with subsidiaries CFC1 and CFC2 and which give rise to foreign source income to USP. The cost of the services is $60x. Third, it performs activities described in § 1.482–9(l)(3)(iii) that are in the nature of shareholder oversight, that duplicate functions performed by the subsidiaries' own employees, and that do not provide an additional benefit to the subsidiaries. For example, a team of auditors from USP's accounting department periodically audits the subsidiaries' books and prepares internal reports for use by USP's management. Similarly, USP's treasurer periodically reviews for the board of directors of USP the subsidiaries' financial policies. These activities do not provide an additional benefit to the related corporations. The cost of the duplicative services and related supportive expenses is $540x.

(C) USP also earns the following items of income. First, under section 951(a), USP includes $2,000x of subpart F income that is passive category income. Second, under section 951A and the section 951A regulations (as defined in § 1.951A–1(a)(1)), USP has a GILTI inclusion amount of $2,000x. USP's deduction under section 250 is $1,000x (''section 250 deduction''), all of which is by reason of section 250(a)(1)(B)(i). No portion of USP's section 250 deduction is reduced by reason of section 250(a)(2)(B). Finally, USP also earns $1,000x of fees from CFC2 and receives royalties of $1,000x from CFC1 and CFC2.

(D) Under § 1.861–9T(g)(3), USSub owns assets that generate income described in the residual grouping of gross income from U.S. sources. USP uses the asset method described in § 1.861–12T(c)(3)(ii) to characterize the stock in its CFCs. After application of § 1.861–13(a), USP determines that $5,000x of the stock of each of the three CFCs is assigned to the section 951A category (''section 951A category stock'') in the non-section 245A subgroup; $2,000x of the stock of each of the three CFCs is assigned to the general category in the section 245A subgroup; and $3,000x of the stock of each of the three CFCs is assigned to the passive category in the non-section 245A subgroup. Additionally, under § 1.861–8(d)(2)(ii)(C)(*2*), $2,500x of the stock of each of the three CFCs that is section 951A category stock is an exempt asset. Accordingly, with respect to the stock of its controlled foreign corporations in the aggregate, USP has $7,500x of section 951A category stock in a non-section 245A subgroup, $6,000x of general category stock in a section 245A subgroup, $9,000x of passive category stock in a non-section 245A subgroup, and $7,500x of stock that is an exempt asset.

(ii) *Analysis*—(A) *Character of USP Department services.* The first and second activities (the services rendered for the benefit of CFC2, and the provision of services related to license agreements with CFC1 and CFC2) are not properly characterized as stewardship expenses because they are not incurred solely to protect the corporation's capital investment in the related corporation or to facilitate compliance by the corporation with reporting, legal, or regulatory requirements applicable specifically to the corporation. The third activity described is in the nature of shareholder oversight and is characterized as stewardship as described in paragraph (e)(4)(ii)(A) of this section because the expense is related to duplicative activities.

(B) *Allocation.* First, the deduction of $900x for expenses related to services rendered for the benefit of CFC2 is definitely related (and therefore allocable) to the $1,000x in fees for services that USP receives from CFC2. Second, the $60x of deductions attributable to USP's license agreements with CFC1 and CFC2 are definitely related (and therefore allocable) solely to royalties received from CFC1 and CFC2. Third, the stewardship deduction of $540x is definitely related (and therefore allocable) to dividends and inclusions received from all the subsidiaries.

(C) *Apportionment*—(*1*) No apportionment of USP's deduction of $900x for expenses related to the services is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, foreign source general category income.

(*2*) No apportionment of USP's deduction of $60x attributable to the ancillary services is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, foreign source general category income.

(*3*) For purposes of apportioning USP's $540x stewardship expenses in determining the foreign tax credit limitation, the statutory groupings are foreign source general category income, foreign source passive category income, and foreign source section 951A category income. The residual grouping is U.S. source income.

(*4*) USP's deduction of $540x for the Department's stewardship expenses which are allocable to dividends and inclusions received from the subsidiaries are apportioned using the same value of USP's stock in USSub, CFC1, CFC2, and CFC3 that is used for purposes of allocating and apportioning USP's interest expense. However, the $10,000x value of USP's stock of USSub is eliminated because USSub generates qualifying dividends deductible under section 243(a)(3). *See* § 1.861–8(d)(2)(ii)(B).

(*5*) Although USP may be allowed a section 245A deduction with respect to dividends from the CFCs, the value of the stock of the CFCs is not eliminated because the section 245A deduction does not create exempt income or result in the stock being treated as an exempt asset. *See* section 864(e)(3) and § 1.861–8T(d)(2)(iii)(C). Therefore, the only asset value upon which stewardship expenses are apportioned is the stock in USP's CFCs.

(*6*) Taking into account the characterization of USP's stock in CFC1, CFC2, and CFC3, and excluding the exempt portion, the $540x of Department expenses is apportioned as follows: $180x ($540x × $7,500x/$22,500x) to section 951A category income, $144x ($540x × $6,000x/$22,500x) to general category income, and $216x ($540x × $9,000x/$22,500x) to passive category income. Section 904(b)(4)(B)(i) applies to $144x of the stewardship expense apportioned to the CFCs' stock that is characterized as being in the section 245A subgroup in the general category.

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(24) For guidance, see § 1.861–8T(g) *Example* 24.

* * * * *

(h) *Applicability date*—(1) Except as provided in paragraph (h)(2) of this section, this section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraphs (d)(2)(ii)(B), (d)(2)(v), (e)(4), (e)(5), (e)(6)(i), (e)(8), (e)(16), and (g)(15) through (g)(18) of this section apply to taxable years that end on or after December 16, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also end before December 16, 2019, see § 1.861–8(d)(2)(ii)(B), (e)(4), (e)(5), (e)(6)(i), and (e)(8) as in effect on December 17, 2019.

■ **Par. 4.** Section 1.861–8T is amended by revising paragraph (d)(2)(ii)(B) to read as follows:

§ 1.861–8T Computation of taxable income from sources within the United States and from other sources and activities (temporary).

* * * * *

(d) * * *

(2)* * *

(ii) * * *

(B) For further guidance, see § 1.861–8(d)(2)(ii)(B).

* * * * *

■ **Par. 5.** Section 1.861–9 is amended by:

■ 1. Revising paragraphs (a) and (b).

■ 2. Revising paragraphs (c)(1) through (4).

■ 3. Adding paragraph (e)(9).

■ 4. Revising paragraph (k).

The revisions and additions read as follows:

§ 1.861–9 Allocation and apportionment of interest expense and rules for asset-based apportionment.

(a) For further guidance, see § 1.861–9T(a).

(b) *Interest equivalent*—(1) *Certain expenses and losses*—(i) *General rule.* Any expense or loss (to the extent deductible) incurred in a transaction or series of integrated or related transactions in which the taxpayer secures the use of funds for a period of time is subject to allocation and apportionment under the rules of this section and § 1.861–9T(b) if such expense or loss is substantially incurred in consideration of the time value of money. However, the allocation and apportionment of a loss under this paragraph (b) and § 1.861–9T(b) does not affect the characterization of such loss as capital or ordinary for any purpose other than for purposes of the section 861 regulations (as defined in § 1.861–8(a)(1)).

(ii) *Examples.* For further guidance see § 1.861–9T(b)(1)(ii)

(2) *Certain foreign currency borrowings.* For further guidance see § 1.861–9T(b)(2) through (7).

(3) through (7) [Reserved]

(8) *Guaranteed payments.* Any deductions for guaranteed payments for

the use of capital under section 707(c) are allocated and apportioned in the same manner as interest expense.

(c)(1) *Disallowed deductions.* For further guidance, see § 1.861–9T(c)(1) through (4).

(2) through (4) [Reserved]

* * * * *

(e) * * *

(9) *Special rule for upstream partnership loans*—(i) *In general.* For purposes of apportioning interest expense that is not directly allocable under paragraph (e)(4) of this section or § 1.861–10T, an upstream partnership loan debtor's (UPL debtor) pro rata share of the value of the upstream partnership loan (as determined under paragraph (h)(4)(i) of this section) is not considered an asset of the UPL debtor taken into account as described in paragraphs (e)(2) and (3) of this section.

(ii) *Treatment of interest expense and interest income attributable to an upstream partnership loan.* If a UPL debtor (or any other person in the same affiliated group as the UPL debtor) takes into account a distributive share of upstream partnership loan interest income (UPL interest income), the UPL debtor assigns an amount of its distributive share of the UPL interest income equal to the matching expense amount for the taxable year that is attributable to the same loan to the same statutory and residual groupings using the same ratios as the statutory and residual groupings of gross income from which the upstream partnership loan interest expense (UPL interest expense) is deducted by the UPL debtor (or any other person in the same affiliated group as the UPL debtor). Therefore, the amount of the distributive share of UPL interest income that is assigned to each statutory and residual grouping is the amount that bears the same proportion to the matching expense amount as the UPL interest expense in that statutory or residual grouping bears to the total UPL interest expense of the UPL debtor (or any other person in the same affiliated group as the UPL debtor).

(iii) *Anti-avoidance rule for third party back-to-back loans.* If, with a principal purpose of avoiding the rules in this paragraph (e)(9), a partnership makes a loan to a person that is not related (within the meaning of section 267(b) or 707) to the lender, the unrelated person makes a loan to a direct or indirect partner in the partnership (or any person in the same affiliated group as a direct or indirect partner), and the first loan would constitute an upstream partnership loan if made directly to the direct or indirect partner (or person in the same affiliated group as a direct or indirect partner), then the rules of this paragraph (e)(9) apply as if the first loan was made directly by the partnership to the partner (or affiliate of the partner), and the interest expense paid by the partner is treated as made with respect to the first loan. Such a series of loans will be subject to this recharacterization rule without regard to whether there was a principal purpose of avoiding the rules in this paragraph (e)(9) if the loan to the unrelated person would not have been made or maintained on substantially the same terms but for the loan of funds by the unrelated person to the direct or indirect partner (or affiliate of the partner). The principles of this paragraph (e)(9)(iii) also apply to similar transactions that involve more than two loans and regardless of the order in which the loans are made.

(iv) *Interest equivalents.* The principles of this paragraph (e)(9) apply in the case of a partner, or any person in the same affiliated group as the partner, that takes into account a distributive share of income and has a matching expense amount (treating any interest equivalent described in §§ 1.861–9(b) and 1.861–9T(b) as interest income or expense for purposes of paragraph (e)(9)(v)(B) of this section) that is allocated and apportioned in the same manner as interest expense under §§ 1.861–9(b) and 1.861–9T(b).

(v) *Definitions.* For purposes of this paragraph (e)(9), the following definitions apply.

(A) *Affiliated group.* The term *affiliated group* has the meaning provided in § 1.861–11(d)(1).

(B) *Matching expense amount.* The term *matching expense amount* means the lesser of the total amount of the UPL interest expense taken into account directly or indirectly by the UPL debtor for the taxable year with respect to an upstream partnership loan or the total amount of the distributive shares of the UPL interest income of the UPL debtor (or any other person in the same affiliated group as the UPL debtor) with respect to the loan.

(C) *Upstream partnership loan debtor (UPL debtor).* The term *upstream partnership loan debtor,* or *UPL debtor,* means the person that holds the payable with respect to an upstream partnership loan. If a partnership holds the payable, then any partner in the partnership (other than a partner described in paragraph (e)(4)(i) of this section) is also considered a UPL debtor.

(D) *Upstream partnership loan interest expense (UPL interest expense).* The term *upstream partnership loan interest expense,* or *UPL interest expense,* means an item of interest expense paid or accrued with respect to an upstream partnership loan, without regard to whether the expense was currently deductible (for example, by reason of section 163(j)).

(E) *Upstream partnership loan interest income (UPL interest income).* The term *upstream partnership loan interest income,* or *UPL interest income,* means an item of gross interest income received or accrued with respect to an upstream partnership loan.

(F) *Upstream partnership loan.* The term *upstream partnership loan* means a loan by a partnership to a person that owns an interest, directly or indirectly through one or more other partnerships or other pass-through entities, in the partnership, or to any person in the same affiliated group as that person.

(vi) *Examples.* The following examples illustrate the application of this paragraph (e)(9).

(A) *Example 1*—(*1*) *Facts.* US1, a domestic corporation, directly owns 60% of PRS, a foreign partnership that is not engaged in a U.S. trade or business. The remaining 40% of PRS is directly owned by US2, a domestic corporation that is unrelated to US1. US1, US2, and PRS all use the calendar year as their taxable year. In Year 1, PRS loans $1,000x to US1. For Year 1, US1 has $100x of interest expense with respect to the loan and PRS has $100x of interest income with respect to the loan. US1's distributive share of the interest income is $60x. Under paragraph (e)(2) of this section, $75x of US1's interest expense with respect to the loan is allocated to U.S. source income and $25x is allocated to foreign source foreign branch category income. Under paragraph (h)(4)(i) of this section, US1's share of the total value of the loan between US1 and PRS is $600x.

(*2*) *Analysis.* The loan by PRS to US1 is an upstream partnership loan and US1 is an UPL debtor. Under paragraph (e)(9)(iv)(B) of this section, the matching expense amount is $60x, the lesser of the UPL interest expense taken into account by US1 with respect to the loan for the taxable year ($100x) and US1's distributive share of the UPL interest income ($60x). Under paragraph (e)(9)(ii) of this section, US1 assigns $45x of the UPL interest income to U.S. source income ($60x × $75x/$100x) and $15x of the UPL interest income to foreign source foreign branch category income ($60x × $25x/$100x). Under paragraph (e)(9)(i) of this section, the disregarded portion of the upstream partnership loan is $600x.

(B) *Example 2*—(*1*) *Facts.* The facts are the same as in paragraph (e)(9)(vi)(A)(*1*) of this section (the facts in *Example 1*), except that US1 and US2 are part of the same affiliated group, US2's distributive share of the interest income is $40x, and under paragraph (h)(4)(i) of this section US2's share of the total value of the loan between US1 and PRS is $400x.

(*2*) *Analysis.* The loan by PRS to US1 is an upstream partnership loan and US1 is an UPL debtor. Under paragraph (e)(9)(iv)(B) of this section, the matching expense amount is $100x, the lesser of the UPL interest expense taken into account by US1 with respect to the loan for the taxable year ($100x) and the total amount of US1 and US2's distributive shares of the UPL interest income ($100x). Under paragraph (e)(9)(ii) of this section, US1 assigns $75x of the UPL interest income to U.S. source income ($100x × $75x/$100x) and $25x of the UPL interest income to foreign source foreign branch category income ($100x × $25x/$100x). Under paragraph (e)(9)(i) of this section, the disregarded portion of the upstream partnership loan is $1,000x, the total amount of US1 and US2's share of the loan between US1 and PRS.

* * * * *

(k) *Applicability date*—(1) Except as provided in paragraph (k)(2) of this section, this section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraphs (b)(1)(i), (b)(8), and (e)(9) of this section apply to taxable years that end on or after December 16, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also end before December 16, 2019, see § 1.861–9T(b)(1)(i) as contained in 26 CFR part 1 revised as of April 1, 2019].

■ **Par. 6.** Amend § 1.861–9T by revising paragraph (b)(1)(i) and adding paragraph (b)(8) to read as follows:

§ 1.861–9T Allocation and Apportionment of interest expense (temporary).

* * * * *

(b) * * *

(1) * * *

(i) *General rule.* For further guidance, see § 1.861–9(b)(1)(i).

* * * * *

(8) *Guaranteed payments.* For further guidance, see § 1.861–9(b)(8).

* * * * *

■ **Par. 7.** Section 1.861–12 is amended by revising paragraphs (d) through (i) and adding paragraph (k) to read as follows:

§ 1.861–12 Characterization rules and adjustments for certain assets.

* * * * *

(d) Treatment of notes. For further guidance, see § 1.861–12T(d) through (e).

(e) [Reserved]

(f) *Assets connected with capitalized, deferred, or disallowed interest*—(1) *In general.* In the case of any asset in connection with which interest expense accruing during a taxable year is capitalized, deferred, or disallowed under any provision of the Code, the value of the asset for allocation and apportionment purposes is reduced by the principal amount of indebtedness the interest on which is so capitalized, deferred, or disallowed. Assets are connected with debt (the interest on which is capitalized, deferred, or disallowed) only if using the debt proceeds to acquire or produce the asset causes the interest to be capitalized, deferred, or disallowed.

(2) *Examples.* The following examples illustrate the application of paragraph (f)(1) of this section.

(i) *Example 1: Capitalized interest under section 263A*—(A) *Facts.* X is a domestic corporation that uses the tax book value method of apportionment. X has $1,000x of indebtedness and incurs $100x of interest expense. Using $800x of the $1,000x debt proceeds to produce tangible property, X capitalizes $80x of interest expense under the rules of section 263A. X deducts the remaining $20x of interest expense.

(B) *Analysis.* Because interest on $800x of debt is capitalized under section 263A by reason of the use of debt proceeds to produce the tangible property, $800x of the principal amount of X's debt is connected to the tangible property under paragraph (f)(1) of this section. Therefore, for purposes of apportioning the remaining $20x of X's interest expense, the adjusted basis of the tangible property is reduced by $800x.

(ii) *Example 2: Disallowed interest under section 163(l)*—(A) *Facts.* X, a domestic corporation, owns 100% of the stock of Y, a domestic corporation. X and Y file a consolidated return and use the tax book value method of apportionment. In Year 1, X makes a loan of $1,000x to Y (Loan A) and Y then uses the Loan A proceeds to acquire in a cash purchase all the stock of a foreign corporation, Z. Interest on Loan A is payable in U.S. dollars or, at the option of Y, in stock of Z.

(B) *Analysis.* Under section 163(l), Loan A is a disqualified debt instrument because interest on Loan A is payable at the option of Y in stock of a related party to Y. Because Loan A is a disqualified debt instrument, section 163(l)(1) disallows Y's interest deduction for interest payable on Loan A. In addition, the value of the Z stock is not reduced under paragraph (f)(1) of this section because the use of the Loan A proceeds to acquire the stock of Z is not the cause of Y's interest deduction being disallowed. Rather, the Loan A terms allowing interest to be paid in stock of Z is the cause of Y's interest deduction being disallowed under section 163(l). Therefore, no adjustment is made to Y's adjusted basis in the stock of Z for purposes of allocating the interest expense of X and Y.

(g) *Special rules for FSCs.* For further guidance, see § 1.861–12T(g) through (j).

(h) [Reserved]

(i) [Reserved]

* * * * *

(k) *Applicability date*—(1) Except as provided in paragraph (k)(2) of this section, this section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraph (f) this section applies to taxable years that end on or after December 16, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and before December 16, 2019, see § 1.861–12T(f) as contained in 26 CFR part 1 revised as of April 1, 2019.

■ **Par. 8.** Section 1.861–12T is amended by revising paragraph (f)

§ 1.861–12T Characterization rules and adjustments or certain assets (Temporary regulations).

* * * * *

(f) *Assets connected with capitalized, deferred, or disallowed interest.* For further guidance, see § 1.861–12(f).

* * * * *

■ **Par. 9.** Section 1.861–14 is amended by:

■ 1. Removing the last sentence in paragraph (d)(1).

■ 2. Revising paragraphs (d)(3) and (4).

■ 3. Revising paragraphs (e)(1) through (5).

■ 4. Redesignating paragraph (e)(6)(i) as paragraph (e)(6) and removing paragraph (e)(6)(ii).

■ 5. Revising paragraphs (f) through (k).

The revisions read as follows:

§ 1.861–14 Special rules for allocating and apportioning certain expenses (other than interest expense) of an affiliated group of corporations.

* * * * *

(d) * * *

(3) *Inclusion of financial corporations.* For further guidance, see § 1.861–14T(d)(3) through (d)(4).

(4) [Reserved]

(e) *Expenses to be allocated and apportioned under this section*—(1) *Expenses not directly allocable to specific income producing activities or property*—(i) The expenses that are required to be allocated and apportioned under the rules of this section are expenses that are not directly allocable to specific income producing activities or property solely of the member of the affiliated group that incurred the expense, including (but not limited to) certain expenses related to supportive functions, research and experimental expenses, stewardship expenses, legal and accounting expenses, and litigation damages awards, prejudgment interest, and settlement payments. Interest expense of members of an affiliated group of corporations is allocated and apportioned under § 1.861–11T and not under the rules of this section. Expenses that are included in inventory costs or that are capitalized are not subject to allocation and apportionment under the rules of this section.

(ii) For further guidance, see § 1.861–14T(e)(1)(ii).

(2) *Research and experimental expenditures.* R&E expenditures (as defined in § 1.861–17(a)) in the case of an affiliated group are allocated and apportioned under the rules of § 1.861–17 as if all members of the affiliated group were a single taxpayer. Thus, R&E expenditures are allocated to all gross intangible income of all members of the affiliated group reasonably connected with the relevant broad SIC code category. If fewer than all members of the affiliated group derive gross intangible income reasonably connected with that relevant broad SIC code category, then such expenditures are apportioned under the rules of this paragraph (e)(2) only among those members, as if those members were a single taxpayer.

(3) *Expenses related to supportive functions.* For further guidance, see § 1.861–14T(e)(3).

(4) *Stewardship expenses.* Stewardship expenses are allocated and apportioned in accordance with the rules of § 1.861–8(e)(4). In general, stewardship expenses are considered definitely related and allocable to dividends and inclusions received or accrued, or to be received or accrued, from a related corporation. If members of the affiliated group, other than the member that incurred the stewardship expense, receive or may receive dividends or accrue or may accrue inclusions from the related corporation, such expense must be allocated and apportioned in accordance with the rules of paragraph (c) of this section as if all such members of the affiliated group that receive or may receive dividends were a single corporation. Such expenses must be apportioned between statutory and residual groupings of income within the appropriate class of gross income by reference to the apportionment factors contributed by the members of the affiliated group treated as a single corporation.

(5) *Legal and accounting fees and expenses; damages awards, prejudgment interest, and settlement payments.* Legal and accounting fees and expenses, as well as litigation or arbitral damages awards, prejudgment interest, and settlement payments, are allocated and apportioned under the rules of § 1.861–8(e)(5). To the extent that under § 1.861–14T(c)(2) and (e)(1)(ii) of this section such expenses are not directly allocable to specific income-producing activities or property of one or more members of the affiliated group, such expenses must be allocated and apportioned as if all members of the affiliated group were a single corporation. Specifically, such expenses must be allocated to a class of gross income that takes into account the gross income which is generated, has been generated, or is reasonably expected to be generated by the other members of the affiliated group. If the expenses relate to the gross income of fewer than all members of the affiliated group as determined under § 1.861–14T(c)(2), then those expenses must be apportioned under the rules of § 1.861–14T(c)(2), as if those fewer members were a single corporation. Such expenses must be apportioned taking into account the apportionment factors contributed by the members of the group that are treated as a single corporation.

* * * * *

(f) *Computation of FSC or DISC combined taxable income.* For further guidance, see § 1.861–14T(f) through (g).

(g) [Reserved]

(h) *Allocation of section 818(f) expenses.* Life insurance company expenses specified in section 818(f)(1) are allocated and apportioned on a separate entity basis, including with regard to members of a consolidated group. Those expenses are not allocated and apportioned on a life-nonlife group or a life subgroup basis. See also § 1.861–8(e)(16) for rules on the allocation of reserve expenses with respect to dividends received by a life insurance company.

(i) through (j) [Reserved]

(k) *Applicability date.* This section applies to taxable years ending on or after December 16, 2019.

■ **Par. 10.** Section 1.861–14T is amended by revising paragraphs (e)(1)(i), (e)(2)(i) and (ii), (e)(4) and (5), and (h) to read as follows:

§ 1.861–14T Special rules for allocating and apportioning certain expenses (other than interest expense) of an affiliated group of corporations. (Temporary).

* * * * *

(e)(1)(i) For further guidance, see § 1.861–14(e)(1)(i).

* * * * *

(2)(i) For further guidance, see § 1.861–14(e)(2)(i) through § 1.861–14(e)(2)(ii).

(ii) [Reserved]

* * * * *

(4) *Stewardship expenses.* For further guidance, see § 1.861–14(e)(4) through § 1.861–14(e)(5).

(5) [Reserved]

* * * * *

(h) *Allocation of section 818(f) expenses.* For further guidance, see § 1.861–14(h).

* * * * *

■ **Par. 11.** Section 1.861–17 is revised to read as follows:

§ 1.861–17 Allocation and apportionment of research and experimental expenditures.

(a) *Scope.* This section provides rules for the allocation and apportionment of research and experimental expenditures that a taxpayer deducts, or amortizes and deducts, in a taxable year under section 174 or section 59(e) (applicable to expenditures that are allowable as a deduction under section 174(a)) (*R&E expenditures*). R&E expenditures do not include any expenditures that are not deductible by reason of the second sentence under § 1.482–7(j)(3)(i) (relating to CST Payments (as defined in § 1.482–7(b)(1)) owed to a controlled participant in a cost sharing arrangement), because nondeductible amounts are not allocated and apportioned under §§ 1.861–8 through 1.861–17.

(b) *Allocation*—(1) *In general.* The method of allocation and apportionment of R&E expenditures set forth in this section recognizes that research and experimentation is an inherently speculative activity, that findings may contribute unexpected benefits, and that the gross income derived from successful research and experimentation must bear the cost of unsuccessful research and experimentation. In addition, the method set forth in this section recognizes that successful R&E expenditures ultimately result in the creation of intangible property that will be used to generate income. Therefore, R&E expenditures ordinarily are considered deductions that are definitely related to gross intangible income (as defined in paragraph (b)(2) of this section) reasonably connected with the relevant SIC code category (or categories) of the taxpayer and therefore allocable to gross intangible income as a class related to the SIC code category (or categories) and apportioned under the rules in this section. For purposes of this allocation, a taxpayer's SIC code category (or categories) are determined in accordance with the provisions of paragraph (b)(3) of this section. For purposes of this section, the term *intangible property* means intangible property, as defined in section 367(d)(4), that is derived from R&E expenditures.

(2) *Definition of gross intangible income.* The term *gross intangible income* means all gross income earned by a taxpayer that is attributable (in whole or in part) to intangible property and includes gross income from sales or leases of products or services derived (in whole or in part) from intangible property, income from sales of intangible property, income from platform contribution transactions described in § 1.482–7(b)(1)(ii), royalty

income from the licensing of intangible property, and amounts taken into account under section 367(d) by reason of a transfer of intangible property. Gross intangible income also includes a distributive share of any amounts described in the previous sentence, but does not include dividends or any amounts included in income under sections 951, 951A, or 1293.

(3) *SIC code categories*—(i) *Allocation based on SIC code categories.* Ordinarily, a taxpayer's R&E expenditures are incurred to produce gross intangible income that is reasonably connected with one or more relevant SIC code categories. Where research and experimentation is conducted with respect to more than one SIC code category, the taxpayer may aggregate the categories for purposes of allocation and apportionment. However, the taxpayer may not subdivide any categories. Where research and experimentation is not clearly related to any SIC code category (or categories), it will be considered conducted with respect to all of the taxpayer's SIC code categories.

(ii) *Use of three digit standard industrial classification codes.* A taxpayer determines the relevant SIC code categories by reference to the three digit classification of the Standard Industrial Classification Manual (SIC code). The SIC Manual is available at *https://www.osha.gov/pls/imis/sic_manual.html.*

(iii) *Consistency.* Once a taxpayer selects a SIC code category for the first taxable year for which this section applies to the taxpayer, it must continue to use that category in following years unless the taxpayer establishes to the satisfaction of the Commissioner that, due to changes in the relevant facts, a change in the category is appropriate.

(iv) *Wholesale trade and retail trade categories.* A taxpayer must use a SIC code category within the divisions of ''wholesale trade'' or ''retail trade'' if it is engaged solely in sales-related activities with respect to a particular category of products. In the case of a taxpayer that conducts material non-sales-related activities with respect to a particular category of products, all R&E expenditures related to sales of the products must be allocated and apportioned as if the expenditures were reasonably connected to the most closely related three digit SIC code category other than those within the wholesale and retail trade divisions. For example, if a taxpayer engages in both the manufacturing and assembling of cars and trucks (SIC Code 371) and in a wholesaling activity related to motor vehicles and motor vehicle parts and supplies (SIC Code 501), the taxpayer must allocate and apportion all R&E expenditures related to both activities as if they relate solely to the manufacturing SIC Code 371. By contrast, if the taxpayer engages only in the wholesaling activity related to motor vehicles and motor vehicle parts and supplies, the taxpayer must allocate and apportion all R&E expenditures to the wholesaling SIC Code 501.

(c) *Exclusive apportionment.* Solely for purposes of applying this section to section 904 as the operative section, an amount equal to fifty percent of a taxpayer's R&E expenditures in a SIC code category (or categories) is apportioned exclusively to the residual grouping of U.S. source gross intangible income if research and experimentation that accounts for at least fifty percent of such R&E expenditures was performed in the United States. Similarly, an amount equal to fifty percent of a taxpayer's R&E expenditures in a SIC code category (or categories) is apportioned exclusively to the statutory grouping (or groupings) of foreign source gross intangible income in that SIC code category if research and experimentation that accounts for more than fifty percent of such R&E expenditures was performed outside the United States. If there are multiple separate categories with foreign source gross intangible income in the SIC code category, the fifty percent of R&E expenditures apportioned under the previous sentence is apportioned ratably to foreign source gross intangible income based on the relative amounts of gross receipts from gross intangible income in the SIC code category in each separate category, as determined under paragraph (d) of this section.

(d) *Apportionment based on gross receipts from sales of products or services*—(1) *In general.* A taxpayer's R&E expenditures not apportioned under paragraph (c) of this section are apportioned between the statutory grouping (or among the statutory groupings) within the class of gross intangible income and the residual grouping within such class according to the rules in paragraph (d)(1)(i) through (iv) of this section. See paragraph (b) of this section for defining the class of gross intangible income in relation to SIC code categories.

(i) A taxpayer's R&E expenditures not apportioned under paragraph (c) of this section are apportioned in the same proportions that:

(A) The amounts of the taxpayer's gross receipts from sales and leases of products (as measured by gross receipts without regard to cost of goods sold) or services that are related to gross intangible income within the statutory grouping (or statutory groupings) and in the residual grouping bear, respectively, to

(B) The total amount of such gross receipts in the class.

(ii) For purposes of this paragraph (d), the amount of the gross receipts used to apportion R&E expenditures also includes gross receipts from sales and leases of products or services of any controlled or uncontrolled party to the extent described in paragraph (d)(3) and (4) of this section.

(iii) The statutory grouping (or groupings) or residual grouping to which the gross receipts are assigned is the grouping to which the gross intangible income related to the sale, lease, or service is assigned. In cases where the gross intangible income of the taxpayer is income not described in paragraph (d)(3) or (4) of this section, the grouping to which the taxpayer's gross receipts and the gross intangible income are assigned is the same. In cases where the taxpayer's gross intangible income is related to sales, leases, or services described in paragraphs (d)(3) or (4) of this section, the gross receipts that will be used for purposes of this paragraph (d) are the gross receipts of the controlled or uncontrolled parties that are exploiting the taxpayer's intangible property. The grouping to which the controlled or uncontrolled parties' gross receipts are assigned is determined based on the grouping of the taxpayer's gross intangible income attributable to the license, sale, or other transfer of intangible property to such controlled or uncontrolled party as described in paragraph (d)(3)(i) or (d)(4)(i) of this section, and not the grouping to which the gross receipts would be assigned if the assignment were based on the income earned by the controlled or uncontrolled party. *See* paragraph (g)(1) of this section (*Example 1*).

(iv) For purposes of applying this section to section 904 as the operative section, because a United States person's gross intangible income cannot include income assigned to the section 951A category, no R&E expenditures of a United States person are apportioned to foreign source income in the section 951A category.

(2) *Apportionment in excess of gross income.* Amounts apportioned under this section may exceed the amount of gross income related to the SIC code category within the statutory or residual grouping. In such case, the excess is applied against other gross income within the statutory or residual grouping. See § 1.861–8(d)(1) for applicable rules where the

apportionment results in an excess of deductions over gross income within the statutory or residual grouping.

(3) *Sales or services of uncontrolled parties*—(i) *In general.* For purposes of the apportionment within a class under paragraph (d)(1) of this section, the gross receipts of each uncontrolled party from particular products or services incorporating intangible property that was licensed, sold, or transferred by the taxpayer to such uncontrolled party (directly or indirectly) are taken into account for determining the taxpayer's apportionment if the taxpayer can reasonably be expected to license, sell, or transfer to that uncontrolled party, directly or indirectly, intangible property that would arise from the taxpayer's current R&E expenditures. If the taxpayer has previously licensed, sold, or transferred intangible property related to a SIC code category to an uncontrolled party, the taxpayer is presumed to expect to license, sell, or transfer to that uncontrolled party all future intangible property related to the same SIC code category.

(ii) *Definition of uncontrolled party.* For purposes of this paragraph (d)(3), the term *uncontrolled party* means a party that is not a person with a relationship to the taxpayer specified in section 267(b), or is not a member of a controlled group of corporations to which the taxpayer belongs (within the meaning of section 993(a)(3)).

(iii) *Sales of components.* In the case of a sale or lease of a product by an uncontrolled party that is derived from the taxpayer's intangible property but is incorporated as a component of a larger product (for example, where the product incorporating the intangible property is a component of a large machine), only the portion of the gross receipts from the larger product that are attributable to the component derived from the intangible property is included. For purposes of the preceding sentence, a reasonable estimate based on the principles of section 482 must be made. *See* paragraph (g)(4)(ii)(B)(*3*) of this section (*Example 4*).

(iv) *Reasonable estimates of gross receipts.* If the amount of gross receipts of an uncontrolled party is unknown, a reasonable estimate of gross receipts must be made annually. Appropriate economic analyses, based on the principles of section 482, must be used to estimate gross receipts. *See* paragraph (g)(5)(B)(*3*)(*ii*) of this section (*Example 5*).

(4) *Sales or services of controlled corporations*—(i) *In general.* For purposes of the apportionment within a class under paragraph (d)(1) of this section, the gross receipts from sales, leases, or services of a controlled corporation are taken into account if the taxpayer can reasonably be expected to license, sell, or transfer to that controlled corporation, directly or indirectly, intangible property that would arise from the taxpayer's current R&E expenditures. Except to the extent provided in paragraph (d)(4)(iv) of this section, if the taxpayer has previously licensed, sold, or transferred intangible property related to a SIC code category to a controlled corporation, the taxpayer is presumed to expect to license, sell, or transfer to that controlled corporation all future intangible property related to the same SIC code category.

(ii) *Definition of a corporation controlled by the taxpayer.* For purposes of this paragraph (d)(4), the term *controlled corporation* means any corporation that has a relationship to the taxpayer specified in section 267(b) or is a member of a controlled group of corporations to which the taxpayer belongs (within the meaning of section 993(a)(3)). Because an affiliated group is treated as a single taxpayer, a member of an affiliated group is not a controlled corporation. *See* paragraph (e) of this section.

(iii) *Gross receipts not to be taken into account more than once.* Sales, leases, or services between controlled corporations or between a controlled corporation and the taxpayer are not taken into account more than once; in such a situation, the amount of gross receipts of the selling corporation must be subtracted from the gross receipts of the buying corporation.

(iv) *Effect of cost sharing arrangements.* If the controlled corporation has entered into a cost sharing arrangement, in accordance with the provisions of § 1.482–7, with the taxpayer for the purpose of developing intangible property, then the taxpayer is not reasonably expected to license, sell, or transfer to that controlled corporation, directly or indirectly, intangible property that would arise from the taxpayer's share of the R&E expenditures with respect to the cost shared intangibles as defined in § 1.482–7(j)(1)(i). Therefore, solely for purposes of apportioning a taxpayer's R&E expenditures (which does not include the amount of CST Payments received by the taxpayer; see paragraph (a) of this section) that are intangible development costs (as defined in § 1.482–7(d)) with respect to a cost sharing arrangement, the controlled corporation's gross receipts are not taken into account for purposes of paragraphs (d)(1) and (d)(4)(i) of this section.

(5) *Application of section 864(e)(3).* Section 864(e)(3) and § 1.861–8(d)(2)(ii) do not apply for purposes of this section.

(e) *Affiliated groups. See* § 1.861–14(e)(2) for rules on allocating and apportioning R&E expenditures of an affiliated group (as defined in § 1.861–14(d)).

(f) *Special rules for partnerships*—(1) *R&E expenditures.* For purposes of applying this section, if R&E expenditures are incurred by a partnership in which the taxpayer is a partner, the taxpayer's R&E expenditures include the taxpayer's distributive share of the partnership's R&E expenditures.

(2) *Purpose and location of expenditures.* In applying exclusive apportionment under paragraph (c) of this section, a partner's distributive share of R&E expenditures incurred by a partnership is treated as incurred by the partner for the same purpose and in the same location as incurred by the partnership.

(3) *Apportionment based on gross receipts.* In applying the remaining apportionment under paragraph (d) of this section, a taxpayer's gross receipts from a SIC code category include the full amount of any gross receipts from the SIC code category of any partnership not described in paragraph (d)(3)(ii) of this section in which the taxpayer is a direct or indirect partner if the gross receipts would have been included had the partnership been a corporation.

(g) *Examples.* The following examples illustrate the application of the rules in this section.

(1) *Example 1*—(i) *Facts.* X, a domestic corporation, is a manufacturer and distributor of small gasoline engines for lawnmowers. Gasoline engines are a product within the category, Engines and Turbines (SIC Industry Group 351). Y, a wholly owned foreign subsidiary of X, also manufactures and sells these engines abroad. X owns no other foreign subsidiaries. During Year 1, X incurred R&E expenditures of $60,000x, which it deducts under section 174 as a current expense, to invent and patent a new and improved gasoline engine. All of the research and experimentation was performed in the United States. Also in Year 1, the domestic gross receipts of X of gasoline engines total $500,000x and foreign gross receipts of Y total $300,000x. X provides technology for the manufacture of engines to Y through a license that requires the payment of an arm's length royalty. In Year 1, X's gross income is $200,000x, of which $140,000x is U.S. source income from domestic sales of gasoline engines, $40,000x is income included under section 951A all of which relates to Y's foreign source income from sales of gasoline engines, $10,000x is foreign source royalties from Y, and $10,000x is U.S. source interest income. None of the

foreign source royalties are allocable to passive category income of Y, and therefore, under §§ 1.904–4(d) and 1.904–5(c)(3), the foreign source royalties are general category income to X.

(ii) *Analysis*—(A) *Allocation.* The R&E expenditures were incurred in connection with developing intangible property related to small gasoline engines and they are definitely related to the items of gross intangible income related to the SIC code category 351, namely gross income from the sale of small gasoline engines in the United States and royalties received from subsidiary Y, a foreign manufacturer of gasoline engines. Accordingly, under paragraph (b) of this section, the R&E expenditures are allocable to the class of gross intangible income related to SIC code category 351, all of which is general category income of X. X's U.S. source interest income and income included under section 951A are not within this class of gross intangible income and, therefore, no portion of the R&E expenditures are allocated to the U.S. source interest income or foreign source income in the section 951A category.

(B) *Apportionment*—(*1*) *In general.* For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment.* Under paragraph (c) of this section, because at least 50% of X's research and experimental activity was performed in the United States, 50% of the R&E expenditures, or $30,000x ($60,000x × 50%), is apportioned exclusively to the residual grouping of U.S. source gross intangible income. The remaining 50% of the R&E expenditures is then apportioned between the statutory and residual groupings on the basis of the relative amounts of gross receipts from sales of small gasoline engines by X and Y that are related to the U.S. source sales income and foreign source royalty income, respectively.

(*3*) *Apportionment based on gross receipts.* After taking into account exclusive apportionment, X has $30,000x ($60,000x − $30,000x) of R&E expenditures that must be apportioned between the residual and statutory groupings. Because Y is a controlled corporation of X, its gross receipts within the SIC code are taken into account in apportioning X's R&E expenditures if X is reasonably expected to license, sell, or transfer intangible property that would arise from the R&E expenditures that result in the $60,000x deduction. Because Y has licensed the intangible property developed by X related to the SIC code, it is presumed it is reasonably expected to license the intangible property that would be developed from the current research and experimentation. Therefore, under paragraphs (d)(1) and (5) of this section, $11,250x ($30,000x × $300,000x/($500,000x + $300,000x)) is apportioned to the statutory grouping of X's gross intangible income attributable to its license of intangible property to Y, or foreign source general category income. No portion of the gross receipts by X or Y are disregarded under section 864(e)(3), regardless of whether the income related to those sales is eligible for a deduction under section 250(a)(1)(A). The remaining $18,750x ($30,000x × $500,000x/($500,000x + $300,000x)) is apportioned to the residual grouping of gross intangible income, or U.S. source income.

(*4*) *Summary.* Accordingly, for purposes of the foreign tax credit limitation, $11,250x of X's R&E expenditures are apportioned to foreign source general category income, and $48,750x ($30,000x + $18,750x) of X's R&E expenditures are apportioned to U.S. source income.

(2) *Example 2*—(i) *Facts.* The facts are the same as in paragraph (g)(1)(i) of this section (the facts in *Example 1*) except that X also spends $30,000x in Year 1 for research on steam turbines, all of which is performed in the United States, and X has steam turbine gross receipts in the United States of $400,000x. X's foreign subsidiary Y neither manufactures nor sells steam turbines. The steam turbine research is in addition to the $60,000x in R&E expenditures incurred by X on gasoline engines for lawnmowers. X thus has $90,000x of R&E expenditures. X's gross income is $250,000x, of which $140,000x is U.S. source income from domestic sales of gasoline engines, $50,000x is U.S. source income from domestic sales of steam turbines, $40,000x is income included under section 951A all of which relates to foreign source income derived from Y's sales of gasoline engines, $10,000x is foreign source royalties from Y, and $10,000x is U.S. source interest income.

(ii) *Analysis*—(A) *Allocation.* X's R&E expenditures generate gross intangible income from sales of small gasoline engines and steam turbines. Both of these products are in the same three digit SIC code category, Engines and Turbines (SIC Industry Group 351). Therefore, under paragraph (a) of this section, X's R&E expenditures are definitely related to all items of gross intangible income attributable to SIC code category 351. These items of X's gross intangible income are gross income from the sale of small gasoline engines and steam turbines in the United States and royalties from foreign subsidiary Y, a foreign manufacturer and seller of small gasoline engines. X's U.S. source interest income and income included under section 951A is not within this class of gross intangible income and, therefore, no portion of X's R&E expenditures are allocated to the U.S. source interest income or income in the section 951A category.

(B) *Apportionment*—(*1*) *In general.* For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment.* Under paragraph (c) of this section, because at least 50% of X's research and experimental activity was performed in the United States, 50% of the R&E expenditures, or $45,000x ($90,000x × 50%), are apportioned exclusively to the residual grouping of U.S. source gross intangible income. The remaining 50% of the R&E expenditures is then apportioned between the residual and statutory groupings on the basis of the relative amounts of gross receipts of small gasoline engines and steam turbines by X and Y with respect to which gross intangible income is foreign source general category income and U.S. source income.

(*3*) *Apportionment based on* gross receipts. After taking into account exclusive apportionment, X has $45,000x ($90,000x − $45,000x) of R&E expenditures that must be apportioned between the residual and statutory groupings. Even though a portion of the R&E expenditures that must be apportioned are attributable to research performed with respect to steam turbines, and Y does not sell steam turbines, because Y previously licensed intangible property related to SIC code category 351, it is presumed that X expects to license all intangible property related to SIC code category 351, including intangible property related to steam turbines. Therefore, under paragraph (d)(1) of this section, $11,250x ($45,000x × $300,000x/($500,000x + $400,000x + $300,000x)) is apportioned to the statutory grouping of gross intangible income of the royalty income to which the gross receipts by Y were related, or foreign source general category income. The remaining $33,750x ($45,000x × ($500,000x + $400,000x)/($500,000x + $400,000x + $300,000x)) is apportioned to the residual grouping of gross intangible income, or U.S. source gross income.

(*4*) *Summary.* Accordingly, for purposes of the foreign tax credit limitation, $11,250x of X's R&E expenditures are apportioned to foreign source general category income and $78,750x ($45,000x + $33,750x) of X's R&E expenditures are apportioned to U.S. source gross income.

(3) *Example 3*—(i) *Facts*—(A) *Acquisitions and transfers by X.* The facts are the same as in paragraph (g)(1)(i) of this section (the facts in *Example 1*) except that, in Year 2, X and Y terminate the license for the manufacture of engines that was in place in Year 1 and enter into an arm's length cost-sharing arrangement, in accordance with the provisions of § 1.482–7, to share the funding of all of X's research activity. In Year 2, Y makes a PCT Payment (as defined in § 1.482–7(b)(1)) of $50,000x that is sourced as a royalty and a CST Payment of $25,000x under the cost sharing arrangement.

(B) *Gross receipts and R&E expenditures.* In Year 2, X and Y continue to sell gasoline engines, with gross receipts of $600,000x in the United States and $400,000x abroad by Y. X incurs research costs of $85,000x in Year 2 for research activities conducted in the United States, but cannot deduct $25,000x of that amount by reason of the second sentence under § 1.482–7(j)(3)(i) (relating to CST Payments).

(C) *Gross income of X.* In Year 2, X's gross income is $350,000x, of which $200,000x is U.S. source income from domestic sales of gasoline engines, $50,000x is foreign source income attributable to the PCT Payment, and $100,000x is income included under section 951A all of which relates to foreign source income derived from engine sales by Y.

(ii) *Analysis*—(A) *Allocation.* The $60,000x of R&E expenditures were incurred in connection with small gasoline engines and they are definitely related to the items of gross intangible income related to the SIC code category, namely gross income from the sale of small gasoline engines in the United States and PCT Payments from Y. Accordingly, under paragraph (a) of this section, the R&E expenditures are allocable to this class of gross intangible income. X's income included under section 951A is not within this class of gross intangible income and, therefore, no portion of X's R&E expenditures is allocated to X's section 951A category income.

(B) *Apportionment*—(*1*) *In general.* For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income, and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment.* Under paragraph (c) of this section, because at least 50% of X's research and experimentation was performed in the United States, 50% of the R&E expenditures, or $30,000x ($60,000x × 50%), is apportioned exclusively to the residual grouping of gross intangible income, U.S. source gross income.

(*3*) *Apportionment based on gross receipts.* Under paragraph (d)(5)(v) of this section, none of Y's gross receipts are taken into account because they are attributable to the cost shared intangible under the valid cost sharing arrangement. Because all of the gross receipts from sales that are taken into account under paragraph (d)(1) of this section relate to gross intangible income that is included in the residual grouping, $30,000x is apportioned to the residual grouping of gross intangible income, or U.S. source gross income.

(*4*) *Summary.* Accordingly, for purposes of the foreign tax credit limitation, $60,000x of X's R&E expenditures are apportioned to U.S. source income.

(4) *Example 4*—(i) *Facts*—(A) *X's R&E expenditures.* X, a domestic corporation, is engaged in continuous research and experimentation to improve the quality of the products that it manufactures and sells, which are floodlights, flashlights, fuse boxes, and solderless connectors. X incurs $100,000x of R&E expenditures in Year 1 that was performed exclusively in the United States. As a result of this research activity, X acquires patents that it uses in its own manufacturing activity.

(B) *License to Y and Z.* In Year 1, X licenses its floodlight patent to Y and Z, uncontrolled foreign corporations, for use in their own territories, Countries Y and Z, respectively. Corporation Y pays X a royalty of $3,000x plus $0.20x for each floodlight sold. Gross receipts from sales of floodlights by Y for the taxable year are $135,000x (at $4.50x per unit) or 30,000x units, and the royalty is $9,000x ($3,000x + $0.20x × 30,000x). Y has sales of other products of $500,000x. Z pays X a royalty of $3,000x plus $0.30x for each unit sold. Z manufactures 30,000x floodlights in the taxable year, and the royalty is $12,000x ($3,000x + $0.30x × 30,000x). The dollar value of Z's gross receipts from floodlight sales is not known because, in this case, the floodlights are not sold separately by Z but are instead used as a component in Z's manufacture of lighting equipment for theaters. However, a reasonable estimate of Z's gross receipts attributable to the floodlights, based on the principles of section 482, is $120,000x. The gross receipts from sales of all Z's products, including the lighting equipment for theaters, are $1,000,000x.

(C) *X's gross receipts and gross income.* X's gross receipts from sales of floodlights for the taxable year are $500,000x and its sales of its other products (flashlights, fuse boxes, and solderless connectors) are $400,000x. X has gross income of $500,000x, consisting of U.S. source gross income from domestic sales of floodlights, flashlights, fuse boxes, and solderless connectors of $479,000x, and foreign source royalty income of $9,000x and $12,000x from foreign corporations Y and Z respectively. The royalty income is general category income to X under section 904(d)(2)(A)(ii) and § 1.904–4(b)(2)(ii).

(ii) *Analysis*—(A) *Allocation.* X's R&E expenditures are definitely related to all of the gross intangible income from the products that it produces, which are floodlights, flashlights, fuse boxes, and solderless connectors. All of these products are in the same three digit SIC code category, Electric Lighting and Wiring Equipment (SIC Industry Group 364). Therefore, under paragraph (b) of this section, X's R&E expenditures are definitely related to the class of gross intangible income related to SIC code category 354 and to all items of gross intangible income attributable to the class. These items of X's gross intangible income are gross income from the sale of floodlights, flashlights, fuse boxes, and solderless connectors in the United States and royalties from Corporations Y and Z.

(B) *Apportionment*—(*1*) *In general.* For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income, and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment.* Under paragraph (c) of this section, because at least 50% of X's research and experimentation was performed in the United States, 50% of the R&E expenditures, or $50,000x ($100,000x × 50%), is apportioned exclusively to the residual grouping of U.S. source gross intangible income.

(*3*) *Apportionment based on gross receipts.* After taking into account exclusive apportionment, X has $50,000x ($100,000x − $50,000x) of R&E expenditures that must be apportioned between the residual and statutory groupings. Gross receipts from sales of Y and Z are taken into account in apportioning the R&E expenditures if X is reasonably expected to license, sell, or transfer the intangible property that would arise from the research and experimentation that results in the $100,000x deduction. Because X licensed intangible property related to the SIC code in Year 1, it is presumed that it would continue to license the intangible property that would be developed from the current research and experimentation. Under paragraph (d)(3)(i) of this section, because Y and Z are uncontrolled parties with respect to X, only gross receipts from their sales of the licensed product, floodlights, are included for purposes of apportionment. In addition, under paragraph (d)(3)(iii) of this section, only the portion of Z's gross receipts that are attributable to the floodlights that incorporate the intangible property licensed from X, rather than Z's total gross receipts, are used for purposes of apportionment. All of X's gross receipts from sales in the entire SIC code category are included for purposes of apportionment on the basis of gross intangible income attributable to those sales. Under paragraph (d)(1) of this section, $11,039x ($50,000x × ($135,000x + $120,000x)/($900,000x + $135,000x + $120,000x)) is apportioned to the statutory grouping of gross intangible income, or foreign source general category income. The remaining $38,961x ($50,000x × $900,000x/($900,000x + $135,000x + $120,000x)) is apportioned to the residual grouping of gross intangible income, or U.S. source gross income.

(*4*) *Summary.* Accordingly, for purposes of the foreign tax credit limitation, $11,039x of X's R&E expenditures are apportioned to foreign source general category income and $88,961x ($50,000x + $38.961x) of X's R&E expenditures are apportioned to U.S. source gross income.

(5) *Example 5*—(i) *Facts.* X, a domestic corporation, is a cloud storage service provider. Cloud storage services are a service within the category, Computer Programming, Data Processing, and other Computer Related Services (SIC Industry Group 737). During Year 1, X incurred R&E expenditures of $50,000x to invent and copyright new storage monitoring and management software. All of the research and experimentation was performed in the United States. X uses this software in its own business to provide services to customers. X also licenses a version of the software that can be used by other businesses that provide cloud storage services. X licenses the software to uncontrolled party U, which sub-licenses the software to other businesses that provide cloud storage services to customers. U does not use the software except to sublicense it. As a part of the licensing agreement with U, U and its sub-licensees are only permitted to use the software in certain countries outside of the United States. Under the contract with U, U pays X a royalty of 50% on the amount it receives from its sub-licensees that use the software to provide services to customers. In Year 1, X earns $300,000x of gross receipts from providing cloud storage services within the U.S. Further, in Year 1 U receives $10,000x of royalty income from its sub-licensees and pays a royalty of $5,000x to X. Thus, X also earns $5,000x of foreign source royalty income from licensing its software to U for use outside of the United States.

(ii) *Analysis*—(A) *Allocation.* The R&E expenditures were incurred in connection with the development of cloud computing software and they are definitely related to the items of gross intangible income related to the SIC Code category, namely gross income from the storage monitoring and management software in the United States and royalties received from U. Accordingly, under paragraph (b) of this section, the R&E expenditures are allocable to this class of gross intangible income, all of which is general category income of X.

(B) *Apportionment*—(*1*) *In general.* For purposes of applying this section to section 904 as the operative section, the statutory grouping of gross intangible income is foreign source general category income, and the residual grouping of gross intangible income is U.S. source income.

(*2*) *Exclusive apportionment.* Under paragraph (c) of this section, because at least 50% of X's research and experimental activity was performed in the United States, 50% of the R&E expenditures, or $25,000x ($50,000x × 50%), is apportioned exclusively to the residual grouping of U.S. source gross intangible income.

(*3*) *Apportionment based on gross receipts*—(*i*) *In general.* After taking into account exclusive apportionment, X has $25,000x ($50,000x − $25,000x) of R&E expenditures that must be apportioned between the statutory and residual groupings. Because U's sub-licensees' gross receipts incorporate intangible property licensed by X, U's sub-licensees' gross receipts from services incorporating the licensed intangible property are taken into account in apportioning X's R&E expenditures if X is reasonably expected to license, sell, or transfer intangible property that would arise from the R&E expenditures incurred in Year 1. Because U has licensed and the sub-licensees have sublicensed the intangible property developed by X related to the SIC code, it is presumed that U would continue to license the intangible property that would be developed from the current research and experimentation.

(*ii*) *Determination of U's sub-licensee's gross receipts.* Under paragraph (d)(3)(iv) of this section, X can make a reasonable estimate of the gross receipts of U's sub-licensees from services incorporating the intangible property licensed by X by estimating, after an appropriate economic analysis, that U would charge a 5% royalty on the sub-licensee's sales. U received a royalty of $10,000x from the sub-licensees. X then determines U's sub-licensees' foreign sales by dividing the total royalty payments received by U by the royalty estimated rate ($10,000x/.05x = $200,000x).

(*iii*) *Results of apportionment based on gross receipts.* Therefore, under paragraphs (d)(1) and (3) of this section, $10,000x ($25,000x × $200,000x/($300,000x + $200,000x)) is apportioned to the statutory grouping of gross intangible income, or foreign source general category income. The remaining $15,000x ($25,000x × $300,000x/($300,000x + $200,000x)) is apportioned to the residual grouping of gross intangible income, or U.S. source income.

(*4*) *Summary.* Accordingly, for purposes of the foreign tax credit limitation, $10,000x of X's R&E expenditures are apportioned to foreign source general category income and $40,000x ($25,000x + $15,000x) of X's R&E expenditures are apportioned to U.S. source income.

(h) *Applicability date.* This section applies to taxable years beginning after December 31, 2019.

■ **Par 12.** Section 1.861–20 is added to read as follows:

§ 1.861–20 Allocation and apportionment of foreign income taxes.

(a) *Scope.* This section provides rules for the allocation and apportionment of foreign income taxes, including allocating and apportioning foreign income taxes to separate categories for purposes of the foreign tax credit. The rules of this section apply except as modified under the rules for an operative section. See, for example, §§ 1.704–1(b)(4)(viii)(*d*)(*1*), 1.904–6, 1.960–1(d)(3)(ii), and 1.965–5(b)(2). Paragraph (b) of this section provides definitions for the purposes of this section. Paragraph (c) of this section provides the general rule for allocation and apportionment of foreign income taxes. Paragraph (d) of this section provides rules for assigning foreign gross income to statutory and residual groupings. Paragraph (e) of this section provides rules for allocating and apportioning foreign law deductions to foreign gross income in the statutory and residual groupings. Paragraph (f) of this section provides rules for apportioning foreign income taxes among statutory and residual groupings. Paragraph (g) of this section provides examples that illustrate the application of this section. Paragraph (h) of this section provides the applicability dates for this section.

(b) *Definitions.* The following definitions apply for purposes of this section.

(1) *Corporation.* The term *corporation* has the same meaning as set forth in § 301.7701–2(b), except that it does not include a reverse hybrid.

(2) *Corresponding U.S. item.* The term *corresponding U.S. item* means the item of U.S. gross income or U.S. loss, if any, that arises from the same transaction or other realization event from which an item of foreign gross income also arises. An item of U.S. gross income or U.S. loss is a corresponding U.S. item even if the item of foreign gross income that arises from the same transaction or realization event differs in amount from the item of U.S. gross income or U.S. loss. A corresponding U.S. item does not include an item of gross income that is exempt, excluded or eliminated from U.S. gross income, nor does it include an item of U.S. gross income or U.S. loss that is not realized, recognized or taken into account by the taxpayer in the U.S. taxable year in which the taxpayer paid or accrued the foreign income tax.

(3) *Foreign capital gain amount.* The term *foreign capital gain amount* means the portion of a distribution that under foreign law gives rise to gross income of a type described in section 301(c)(3)(A).

(4) *Foreign dividend amount.* The term *foreign dividend amount* means the portion of a distribution that is taxable as a dividend under foreign law.

(5) *Foreign gross income.* The term *foreign gross income* means the items of gross income included in the base upon which a foreign income tax is imposed. This includes all items of foreign gross income included in the foreign tax base, even if the foreign taxable year begins in the U.S. taxable year that precedes the U.S. taxable year in which the taxpayer pays or accrues the foreign income tax.

(6) *Foreign income tax.* The term *foreign income tax* means an income, war profits, or excess profits tax within the meaning of § 1.901–2(a) that is a separate levy within the meaning of § 1.901–2(d).

(7) *Foreign law CFC.* The term *foreign law CFC* means a foreign corporation certain of the earnings of which are taxable to its shareholder under a foreign law subpart F regime.

(8) *Foreign law distribution.* The term *foreign law distribution* has the meaning provided in paragraph (d)(3)(i)(C) of this section.

(9) *Foreign law subpart F income.* The term foreign law subpart F income means the items of a foreign law CFC, computed under foreign law, that give rise to an inclusion in a taxpayer's foreign gross income by reason of a foreign law subpart F regime.

(10) *Foreign law subpart F regime.* A foreign law subpart F regime is a foreign law tax regime similar to the subpart F regime described in sections 951 through 959 that imposes a tax on a shareholder of a corporation based on an inclusion in the shareholder's taxable income of certain of the corporation's current earnings that are of a type that is similar to subpart F income, whether or not the foreign law deems the corporation's earnings to be distributed.

(11) *Foreign taxable income.* The term *foreign taxable income* means foreign gross income reduced by the deductions that are allowed under foreign law.

(12) *Foreign taxable year.* The term *foreign taxable year* has the meaning set forth in section 7701(a)(23), applied by substituting ''under foreign law'' for the phrase ''under subtitle A.''

(13) *Reverse hybrid.* The term *reverse hybrid* means an entity that is described in § 301.7701–2(b) and that is a fiscally transparent entity (under the principles of § 1.894–1(d)(3)) or a branch under the laws of a foreign country imposing tax on the income of the entity.

(14) *Taxpayer.* The term *taxpayer* has the meaning described in § 1.901–2(f)(1).

(15) *U.S. capital gain amount.* The term *U.S. capital gain amount* means the portion of a distribution to which section 301(c)(3)(A) applies.

(16) *U.S. dividend amount.* The term *U.S. dividend amount* means the portion of a distribution that is made out of earnings and profits under Federal income tax law or out of previously taxed earnings and profits described in section 959(a) or (b). It also includes amounts included in gross income as a dividend by reason of section 1248 or section 964(e).

(17) *U.S. gross income.* The term *U.S. gross income* means the items of gross income that a taxpayer recognizes and includes in taxable income under Federal income tax law for its U.S. taxable year.

(18) *U.S. loss.* The term *U.S. loss* means the item of loss that a taxpayer recognizes and includes in taxable income under Federal income tax law for its U.S. taxable year.

(19) *U.S. return of capital amount.* The term *U.S. return of capital amount* means the portion of a distribution to which section 301(c)(2) applies.

(20) *U.S. taxable year.* The term *U.S. taxable year* has the same meaning as that of the term *taxable year* set forth in section 7701(a)(23).

(c) *General rule.* A foreign income tax is allocated or apportioned to the statutory and residual groupings that include the items of foreign gross income included in the base on which the tax is imposed. Each foreign income tax (that is, each separate levy) is allocated and apportioned separately under the rules in this section. A foreign income tax is allocated and apportioned to or among the statutory and residual groupings under the following steps:

(1) First, by assigning the items of foreign gross income to the groupings under the rules of paragraph (d) of this section;

(2) Second, by allocating and apportioning the deductions that are allowed under foreign law to the foreign gross income in the groupings under the rules of paragraph (e) of this section; and

(3) Third, by allocating and apportioning the foreign income tax by reference to the foreign taxable income in the groupings under the rules of paragraph (f) of this section.

(d) *Assigning items of foreign gross income to the statutory and residual groupings*—(1) *In general.* Each item of foreign gross income is assigned to a statutory or residual grouping. The amount of the item is determined under foreign law. However, Federal income tax law applies to characterize the item and the transaction or other realization event from which the item arose, and to assign it to a grouping. Except as provided in paragraph (d)(3) of this section, if a taxpayer pays or accrues a foreign income tax that is imposed on foreign taxable income that includes an item of foreign gross income in a U.S. taxable year in which the taxpayer also realizes, recognizes, or takes into account a corresponding U.S. item, then the item of foreign gross income is assigned to the grouping to which the corresponding U.S. item is assigned. If the corresponding U.S. item is a U.S. loss (or zero), the foreign gross income is assigned to the grouping to which a gain would be assigned had the transaction or other realization event given rise to a gain, rather than a U.S. loss (or zero), for Federal income tax purposes, and not (if different) to the grouping to which the U.S. loss is allocated and apportioned in computing U.S. taxable income. Paragraph (d)(3) of this section provides special rules regarding the assignment of the item of foreign gross income in particular circumstances.

(2) *Items of foreign gross income with no corresponding U.S. item.* Except as provided in paragraph (d)(3) of this section, the rules in paragraphs (d)(2)(i) and (ii) of this section apply for purposes of characterizing an item of foreign gross income and assigning it to a grouping if the taxpayer does not realize, recognize, or take into account a corresponding U.S. item in the same U.S. taxable year in which the taxpayer pays or accrues foreign income tax that is imposed on foreign taxable income that includes the item of foreign gross income.

(i) *Foreign gross income from U.S. nonrecognition event, or U.S. recognition event that falls in a different U.S. taxable year.* If a taxpayer recognizes an item of foreign gross income arising from a transaction or other foreign realization event that does not result in the recognition of gross income or loss under Federal income tax law in the same U.S. taxable year in which the foreign income tax is paid or accrued, then the item of foreign gross income is characterized and assigned to the grouping to which the corresponding U.S. item would be assigned if the event giving rise to the foreign gross income resulted in the recognition of gross income or loss under Federal income tax law in that U.S. taxable year. For example, if a foreign gross income item of gain arises from a distribution of property that is treated as a taxable disposition of the property under foreign law, and the realization event under foreign law does not cause the recognition of gain or loss under Federal income tax law, the foreign gross income item of gain is assigned to the grouping to which a corresponding U.S. item of gain or loss on a taxable disposition of the property would be assigned. However, foreign gross income arising from the receipt of the distribution is assigned under the rules of paragraphs (d)(3)(i) and (ii) of this section. As another example, if a taxpayer pays or accrues a foreign income tax that is imposed on foreign taxable income that includes an item of foreign gross income by reason of a transaction or other realization event that also gave rise to an item of U.S. gross income or U.S. loss, but the U.S. and foreign taxable years end on different dates and the event occurred in the last U.S. taxable year that ends before the end of the foreign taxable year, then the item of foreign gross income is characterized and assigned to the grouping to which the corresponding U.S. item would be assigned if the item of U.S. gross income or U.S. loss were taken into account under Federal income tax law in the U.S. taxable year in which the foreign income tax is paid or accrued.

(ii) *Foreign gross income of a type that is recognized but excluded from U.S. gross income*—(A) *In general.* If a taxpayer recognizes an item of foreign gross income that is a type of recognized gross income that Federal income tax law excludes from U.S. gross income, then the item of foreign gross income is assigned to the grouping to which the item of gross income would be assigned if it were included in U.S. gross income. Notwithstanding the previous sentence, foreign gross income that is attributable to a base difference is assigned under paragraph (d)(2)(ii)(B) of this section.

(B) *Base differences.* If a taxpayer recognizes an item of foreign gross income that is attributable to a base difference, then the item of foreign gross income is assigned to the residual grouping. *But see* § 1.904–6(b)(1) (assigning foreign gross income attributable to a base difference to foreign source income in the separate category described in section 904(d)(2)(H)(i) for purposes of applying section 904 as the operative section). An item of foreign gross income is attributable to a base difference under this paragraph (d)(2)(ii)(B) only if it is one of the following items:

(*1*) Death benefits described in section 101;

(*2*) Gifts and inheritances described in section 102;

(*3*) Contributions to capital described in section 118;

(*4*) The receipt of money or other property in exchange for stock described in section 1032 (including by reason of a transfer described in section 351(a));

(*5*) The receipt of money or other property in exchange for a partnership interest described in section 721;

(*6*) The portion of a distribution of property by a corporation to its shareholder with respect to its stock that is described in section 301(c)(2); and

(*7*) A distribution to a partner described in section 733.

(3) *Special rules for assigning certain items of foreign gross income to a statutory or residual grouping*—(i) *Items of foreign gross income included by a taxpayer in its capacity as a shareholder*—(A) *Scope.* The rules of this paragraph (d)(3)(i) apply to assign to a statutory or residual grouping an item of foreign gross income that a taxpayer includes in foreign taxable income in its capacity as a shareholder of a corporation as a result of a distribution, a foreign law distribution, an inclusion, or gain with respect to the stock of the corporation (as determined under foreign law).

(B) *Characterizing and assigning foreign gross income items that arise from a distribution*—(*1*) *In general.* If there is a distribution by a corporation that is recognized for both foreign law and Federal income tax purposes, a taxpayer first applies the rules of paragraph (d)(3)(i)(B)(*2*) of this section, and then (if necessary) applies the rules of paragraph (d)(3)(i)(B)(*3*) of this section to determine the amount and the character of the items of foreign gross income that arise from the distribution. Foreign gross income arising from any portion of a distribution that is not recognized as a distribution for Federal income tax purposes is characterized under the rules for foreign law distributions in paragraph (d)(3)(i)(C) of this section. *See* § 1.960–1(d)(3)(ii) for rules for assigning foreign gross income arising from a distribution described in this paragraph to income groups or PTEP groups for purposes of section 960 as the operative section.

(*2*) *Characterizing and assigning the foreign dividend amount.* The foreign dividend amount is, to the extent of the U.S. dividend amount, assigned to the same statutory and residual groupings from which a distribution of the U.S. dividend amount is made under Federal income tax law. If the foreign dividend amount exceeds the U.S. dividend amount, the excess foreign dividend amount is an item of foreign gross income that is, to the extent of the U.S. return of capital amount, treated as attributable to a base difference described in paragraph (d)(2)(ii)(B)(*6*) of this section. Any additional excess of the foreign dividend amount over the sum of the U.S. dividend amount and the U.S. return of capital amount is an item of foreign gross income that is assigned to the statutory or residual grouping (or ratably to the groupings) to which the U.S. capital gain amount is assigned.

(*3*) *Characterizing and assigning the foreign capital gain amount.* The foreign capital gain amount is, to the extent of the U.S. capital gain amount, assigned to the statutory and residual groupings to which the U.S. capital gain amount is assigned under Federal income tax law. If the foreign capital gain amount exceeds the U.S. capital gain amount, the excess is, to the extent of the U.S. return of capital amount, treated as attributable to a base difference described in paragraph (d)(2)(ii)(B)(*6*) of this section. Any additional excess of the foreign capital gain amount over the sum of the U.S. capital gain amount and the U.S. return of capital amount is assigned ratably to the statutory and residual groupings to which the U.S. dividend amount is assigned.

(C) *Foreign gross income items arising from a foreign law distribution.* An item of foreign gross income that arises from an event that foreign law treats as a taxable distribution (other than by reason of a foreign law subpart F regime) but that Federal income tax law does not treat as a distribution of property (for example, a stock dividend described in section 305 or a foreign law consent dividend) (a *foreign law distribution*) is assigned under the rules of paragraph (d)(3)(i)(B) of this section to the same statutory or residual groupings to which the foreign gross income would be assigned if a distribution of property in the amount of the foreign law distribution were made for Federal income tax purposes in the U.S. taxable year in which the taxpayer paid or accrued the foreign income tax.

(D) *Foreign gross income from an inclusion under a foreign law subpart F regime.* An item of foreign gross income that a taxpayer includes under foreign law in its capacity as a shareholder of a foreign law CFC under a foreign law subpart F regime is assigned to the same statutory and residual groupings as the item of foreign law subpart F income of the foreign law CFC that gives rise to the item of foreign gross income of the taxpayer. The assignment is made by treating the items of foreign gross income of the taxpayer attributable to the foreign law subpart F regime inclusion as the items of foreign gross income of the foreign law CFC and applying the rules in this paragraph (d) by treating the foreign law CFC as the taxpayer in its U.S. taxable year with or within which its foreign taxable year (under the law of the foreign jurisdiction imposing the shareholder-level tax) ends. See § 1.904–6(f) for special rules with respect to items of foreign gross income relating to items of the foreign law CFC that give rise to inclusions under section 951A for purposes of applying section 904 as the operative section.

(ii) *Tax imposed on disregarded payments*—(A) *Disregarded payments made by a foreign branch.* Except as provided in paragraph (d)(3)(ii)(C) of this section, an item of foreign gross income that a taxpayer includes by reason of the receipt of a disregarded payment made by a disregarded entity or other foreign branch is assigned to the statutory or residual grouping to which the income out of which the payment is made is assigned. For purposes of this paragraph (d)(3)(ii), a disregarded payment is considered to be made ratably out of all of the accumulated after-tax income of the foreign branch, as computed for Federal income tax purposes. The accumulated after-tax income of the foreign branch is deemed to have arisen in the statutory and residual groupings in the same ratio as the tax book value of the assets of the branch in the groupings, determined in accordance with § 1.987–6(b)(2), unless the payment was made with a principal purpose of avoiding the purposes of an operative section, or results in a material distortion in the association of foreign income tax with U.S. gross income in the same statutory or residual grouping as the foreign gross income from the payment. For purposes of applying § 1.987–6(b)(2) under this paragraph (d)(3)(ii), assets of the foreign branch include stock held by the foreign branch. *But see* § 1.904–6(b)(2)(i) (assigning certain items based on the separate category to which the U.S. gross income to which the disregarded payment is allocable is assigned under § 1.904–4(f)(2)(vi)(A) for purposes of applying section 904 as the operative section).

(B) *Disregarded payments made by an owner.* Except as provided in paragraph (d)(3)(ii)(C) of this section, an item of foreign gross income that a taxpayer includes by reason of the receipt of a disregarded payment made to a foreign branch by a foreign branch owner is assigned to the residual grouping. *But see* § 1.904–6(b)(2)(ii) (assigning certain items to the foreign branch category for purposes of applying section 904 as the operative section).

(C) *Disregarded payments in connection with disregarded sales or exchanges of property.* An item of foreign gross income attributable to gain recognized under foreign law by reason of a disregarded payment received in exchange for property is characterized and assigned under the rules of paragraph (d)(2)(i) of this section.

(D) *Definitions.* For purposes of this paragraph (d)(3)(ii) and paragraph (g) of this section, the terms *disregarded entity*, *disregarded payment*, *foreign branch*, and *foreign branch owner* have the same meaning given to those terms in § 1.904–4(f)(3). A foreign branch owner can include a foreign corporation. *See* § 1.904–4(f)(3)(viii).

(iii) *Reverse hybrids.* An item of foreign gross income that a taxpayer includes in foreign taxable income in its capacity as the owner of a reverse hybrid is assigned to a statutory or residual grouping by treating the taxpayer's items of foreign gross income included from the reverse hybrid as the foreign gross income of the reverse hybrid, and applying the rules in this paragraph (d) by treating the reverse hybrid as the taxpayer in the reverse hybrid's U.S. taxable year with or within which its foreign taxable year (under the law of the foreign jurisdiction imposing the owner-level tax) ends. See § 1.904–6(f) for special rules that apply for purposes of section 904 with respect to items of foreign gross income that under this paragraph (d)(3)(iii) would be assigned to a separate category that includes income that gives rise to inclusions under section 951A.

(iv) *Gain on sale of disregarded entity.* An item of foreign gross income arising from gain recognized on the disposition of a disregarded entity that is characterized as a disposition of assets for Federal income tax purposes is assigned to statutory and residual groupings in the same proportion as the gain that would be treated as foreign gross income in each grouping if the transaction were treated as a disposition of assets for foreign tax law purposes.

(e) *Allocating and apportioning deductions (allowed under foreign law) to foreign gross income in a grouping*—(1) *Application of foreign law expense allocation rules.* In order to determine foreign taxable income in each statutory grouping, or the residual grouping, foreign gross income in each grouping is reduced by deducting any expenses, losses, or other amounts that are deductible under foreign law that are specifically allocable to the items of foreign gross income in the grouping under the laws of that foreign country. If expenses are not specifically allocated under foreign law, then the expenses are allocated and apportioned among the groupings under the principles of foreign law. Thus, for example, if foreign law provides that expenses will be apportioned on a gross income basis, the foreign law deductions are apportioned on the basis of the relative amounts of foreign gross income assigned to each grouping.

(2) *Application of U.S. expense allocation rules in the absence of foreign law rules.* If foreign law does not provide rules for the allocation or apportionment of expenses, losses or other deductions to particular items of foreign gross income, then the principles of the section 861 regulations (as defined in § 1.861–8(a)(1)) apply in allocating and apportioning such expenses, losses, or other deductions to foreign gross income. For example, in the absence of foreign law expense allocation rules, the principles of the section 861 regulations apply to allocate definitely related expenses to particular categories of foreign gross income and provide the methods for apportioning foreign law expenses that are definitely related to more than one statutory grouping or that are not definitely related to any statutory grouping. For this purpose, the apportionment of expenses required to be made under the principles of the section 861 regulations need not be made on other than a separate company basis. If the taxpayer applies the principles of the section 861 regulations for purposes of allocating foreign law deductions under this paragraph (e), the taxpayer must apply the principles in the same manner as the taxpayer applies such principles in determining the income or earnings and profits for Federal income tax purposes of the taxpayer (or of the foreign branch, controlled foreign corporation, or other entity that paid or accrued the foreign taxes, as the case may be). For example, a taxpayer must use the modified gross income method under § 1.861–9T when applying the principles of that section for purposes of this paragraph (e) to determine the amount of foreign taxable income in each grouping if the taxpayer applies the modified gross income method in determining the income and earnings and profits of a controlled foreign corporation for Federal income tax purposes.

(f) *Apportionment of foreign income tax among groupings.* If foreign taxable income is assigned to more than one grouping, then the foreign income tax is apportioned among the statutory and residual groupings by multiplying the foreign income tax by a fraction, the numerator of which is the foreign taxable income in a grouping and the denominator of which is all foreign taxable income on which the foreign income tax is imposed. If foreign law, including by reason of an income tax convention, exempts certain types of income from tax, or if foreign taxable income is reduced to or below zero by foreign law deductions, then no foreign income tax is allocated and apportioned to that income. A withholding tax (as defined in section 901(k)(1)(B)) is allocated and apportioned to the foreign gross income from which it is withheld. If foreign law, including by reason of an income tax convention, provides for a specific rate of tax with respect to certain types of income (for example, capital gains), or allows credits only against tax on particular items or types of income (for example, credit for foreign withholding taxes), then such provisions are taken into account in determining the amount of foreign tax imposed on such foreign taxable income.

(g) *Examples.* The following examples illustrate the application of this section and § 1.904–6.

(1) *Presumed facts.* Except as otherwise provided, the following facts are assumed for purposes of the examples:

(i) USP and US2 are domestic corporations, which are unrelated;

(ii) USP elects to claim a foreign tax credit under section 901;

(iii) CFC, CFC1, and CFC2 are controlled foreign corporations organized in Country A, and are not reverse hybrids;

(iv) All parties have a U.S. dollar functional currency and a U.S. taxable year and foreign taxable year that corresponds to the calendar year;

(v) No party has expenses for Country A tax purposes or expenses for U.S. tax purposes (other than foreign income tax expense); and

(vi) Section 904 is the operative section, and terms have the meaning provided in this section or §§ 1.904–4 and 1.904–5.

(2) *Example 1: Corresponding U.S. item*—(i) *Facts.* USP conducts business in Country A that gives rise to a foreign branch. In Year 1, for Country A tax purposes, USP earns $600x of gross income from the sale of Asset X and incurs foreign income tax of $80x. Also in Year 1, for Federal income tax purposes, USP earns $800x of foreign branch category income from the sale of Asset X.

(ii) *Analysis.* For purposes of allocating and apportioning the $80x of Country A foreign income tax, the $600x of Country A gross income from the sale of Asset X is first assigned to separate categories. The $800x of foreign branch category income from the sale of Asset X is the corresponding U.S. item to the Country A item of gross income. Under paragraph (d)(1) of this section, because USP recognizes a corresponding U.S. item with respect to the Country A item of gross income in the same U.S. taxable year, the $600x of Country A gross income is assigned to the same separate category as the corresponding U.S. item. This is the case even though the amount of gross income recognized for

Federal income tax purposes differs from the amount recognized for Country A tax purposes. Accordingly, the $600x of Country A gross income is assigned to the foreign branch category. Additionally, because all of the Country A taxable income is assigned to a single separate category, the $80x of Country A tax is also allocated to the foreign branch category. No apportionment of the $80x is necessary because the class of gross income to which the tax is allocated consists entirely of a single statutory grouping, foreign branch category income.

(3) *Example 2: Characterization of transactions*—(i) *Facts.* USP owns all of the outstanding stock of CFC, which conducts business in Country A. In Year 1, USP sells all of the stock of CFC to US2. For Country A tax purposes, USP recognizes $800x of gain on which Country A imposes $80x of foreign income tax based on its rules for taxing capital gains of nonresidents. For Federal income tax purposes, USP recognizes $800x of gain on the sale of the stock of CFC, all of which is included in the gross income of USP as a dividend under section 1248(a). Under §§ 1.904–4(d) and 1.904–5(c)(4), the $800x is general category income to USP.

(ii) *Analysis.* For purposes of allocating and apportioning the $80x of Country A foreign income tax, the $800x of Country A gross income from the sale of the stock of CFC is first assigned to separate categories. The $800x of general category income from the sale of the stock of CFC is the corresponding U.S. item to the Country A item of gross income. Under paragraph (d)(1) of this section, because USP recognizes a corresponding U.S. item with respect to the Country A gross income in the same U.S. taxable year, the $800x of Country A gross income is assigned to the same separate category as the corresponding U.S. item. Accordingly, the $800x of Country A gross income is assigned to the general category. This is the case even though for Country A tax purposes the $800x of Country A gross income is characterized as gain from the sale of stock, which would be passive category income under section 904(d)(2)(B)(i), because the income is assigned to a separate category based on the characterization of the gain as a dividend under Federal income tax law. Additionally, because all of the Country A taxable income is assigned to a single separate category, the $80x of Country A tax is also allocated to the general category. No apportionment of the $80x is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, general category income.

(4) *Example 3: No corresponding U.S. item because of a timing difference*—(i) *Facts.* USP owns all of the outstanding stock of CFC, which conducts business in Country A. CFC sells Asset X. For Country A tax purposes, the sale of Asset X occurs in Year 1, CFC recognizes $400x of foreign gross income and incurs $80x of foreign income tax. For Federal income tax purposes, the sale of Asset X occurs in Year 2 and CFC recognizes $500x of general category income.

(ii) *Analysis.* For purposes of allocating and apportioning the $80x of Country A foreign income tax in Year 1, the $400x of Country A gross income from the sale of Asset X is first assigned to separate categories. There is no corresponding U.S. item because the U.S. gross income related to the sale is recognized in a different U.S. taxable year than the item of foreign gross income. Under paragraph (d)(2)(i) of this section, because there would be a corresponding U.S. item if the realization event occurred in the same U.S. taxable year for U.S. and foreign tax purposes, the item of foreign gross income (the $400x from the sale of Asset X) is characterized and assigned to the groupings to which the corresponding U.S. item would be assigned if it were recognized for Federal income tax purposes in the same U.S. taxable year in which the item of foreign gross income is recognized. This is the case even though the amount of gross income recognized for Federal income tax purposes differs from the amount recognized for Country A tax purposes. Accordingly, the $400x of Country A gross income is assigned to the general category. Additionally, because all of the Country A taxable income is assigned to a single separate category, the $80x of Country A tax is also allocated to the general category. No apportionment of the $80x is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, general category income.

(5) *Example 4: No corresponding U.S. item because excluded from gross income*—(i) *Facts.* USP conducts business in Country A. In Year 1, USP earns $200x of interest income on a State or local bond. For Country A tax purposes, the $200x of income is included in gross income and incurs $10x of foreign income tax. For Federal income tax purposes, the $200x is excluded from gross income under section 103.

(ii) *Analysis.* For purposes of allocating and apportioning the $10x of Country A foreign income tax, the $200x of Country A gross income is first assigned to separate categories. There is no corresponding U.S. item because the interest income is excluded from U.S. gross income. Thus, the rules of paragraph (d)(2) of this section apply to characterize and assign the foreign gross income to the groupings to which a corresponding U.S. item would be assigned if it were recognized under Federal income tax law in that U.S. taxable year. The interest income is excluded from U.S. gross income, but is otherwise described or identified by section 103. Accordingly, under paragraph (d)(2)(ii)(A) of this section, the $200x of Country A gross income is assigned to the separate category to which the interest income would be assigned under Federal income tax law if the income were included in gross income. Under section 904(d)(2)(B)(i), the interest income would be passive category income. Accordingly, the $200x of Country A gross income is assigned to the passive category. Additionally, because all of the Country A taxable income is assigned to a single separate category, the $10x of Country A tax is also allocated to the passive category (subject to the rules in § 1.904–4(c)). No apportionment of the $10x is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, passive category income.

(6) *Example 5: Actual distribution*—(1) *Facts.* USP owns all of the outstanding stock of CFC1, which in turn owns all of the outstanding stock of CFC2. CFC1 and CFC2 conduct business in Country A. In Year 1, CFC2 distributes $300x to CFC1. For Country A tax purposes, $100x of the distribution is the foreign dividend amount, $160x is treated as a nontaxable return of capital, and the remaining $40x is the foreign capital gain amount. CFC1 incurs $20x of foreign income tax with respect to the foreign dividend amount and $4x of foreign income tax with respect to the foreign capital gain amount. The $20x and $4x of foreign income tax are each a separate levy. For Federal income tax purposes, $150x of the distribution is the U.S. dividend amount, $100x is the U.S. return of capital amount, and the remaining $50x is the U.S. capital gain amount. Under section 904(d)(3)(D) and §§ 1.904–4(d) and 1.904–5(c)(4), the $150x of U.S. dividend amount consists solely of general category income in the hands of CFC1. Under section 904(d)(2)(B)(i) and § 1.904–4(b)(2)(i)(A), the $50x of U.S. capital gain amount is passive category income to CFC1.

(ii) *Analysis*—(A) *In general.* Because the $20x of Country A foreign income tax and the $4x of Country A foreign income tax are separate levies, the taxes are allocated and apportioned separately. For purposes of allocating and apportioning each foreign income tax, the relevant item of Country A gross income (the foreign dividend amount or foreign capital gain amount) is first assigned to separate categories. The U.S. dividend amount and U.S. capital gain amount are corresponding U.S. items. However, paragraph (d)(3)(i)(B) of this section (and not paragraph (d)(1) of this section) applies to assign the items of foreign gross income arising from the distribution.

(B) *Foreign dividend amount.* Under paragraph (d)(3)(i)(B)(*2*) of this section, the foreign dividend amount ($100x) is, to the extent of the U.S. dividend amount ($150x), assigned to the same separate category from which the distribution of the U.S. dividend amount is made under Federal income tax law. Thus, $100x of foreign gross income that is the foreign dividend amount is assigned to the general category. Additionally, because all of the Country A taxable income included in the base on which the $20x of foreign income tax is imposed is assigned to a single separate category, the $20x of Country A tax on the foreign dividend amount is also allocated to the general category. No apportionment of the $20x is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, general category income.

(C) *Foreign capital gain amount.* Under paragraph (d)(3)(i)(B)(*3*) of this section, the foreign capital gain amount ($40x) is, to the extent of the U.S. capital gain amount ($50x), assigned to the same separate category to which the U.S. capital gain is assigned under Federal income tax law. Thus, the $40x of foreign gross income that is the foreign capital gain amount is assigned to the passive category. Additionally, because all of the

Country A taxable income in the base on which the $4x of foreign income tax is imposed is assigned to a single separate category, the $4x of Country A tax on the foreign dividend amount is also allocated to the passive category. No apportionment of the $4x is necessary because the class of gross income to which the deduction is allocated consists entirely of a single statutory grouping, passive category income.

(7) *Example 6: Foreign law distribution*—(i) *Facts.* USP owns all of the outstanding stock of CFC. In Year 1, for Country A tax purposes, CFC distributes $1,000x of its stock that is treated as a dividend to USP, and Country A imposes a withholding tax on USP of $150x with respect to the $1,000x of foreign gross income. For Federal income tax purposes, the distribution is treated as a stock dividend described in section 305(a) and USP recognizes no U.S. gross income. At the time of the distribution, CFC has $800x of section 965(a) PTEP (as defined in § 1.960–3(c)(2)(vi)) in a single annual PTEP account (as defined in § 1.960–3(c)(1)), and $500x of earnings and profits described in section 959(c)(3). Section 965(g) is the operative section for purposes of applying this section. *See* § 1.965–5(b)(2).

(ii) *Analysis.* For purposes of allocating and apportioning the $150x of Country A foreign income tax, the $1,000x of Country A gross income is first assigned to the relevant statutory and residual groupings for purposes of applying section 965(g) as the operative section. Under § 1.965–5(b)(2), the statutory grouping is the portion of the distribution that is attributable to section 965(a) previously taxed earnings and profits and the residual grouping is the portion of the distribution attributable to other earnings and profits. There is no corresponding U.S. item because under section 305 USP recognizes no U.S. gross income with respect to the distribution. Under paragraph (d)(3)(i)(C) of this section, the item of foreign gross income (the $1,000x distribution) is assigned under the rules of paragraph (d)(3)(i)(B) of this section to the same statutory or residual groupings to which the foreign gross income would be assigned if a distribution of the same amount were made for Federal income tax purposes in Year 1. Under paragraph (d)(3)(i)(B)(*2*) of this section, the foreign dividend amount ($1,000x) is, to the extent of the U.S. dividend amount ($1,000x), assigned to the same statutory or residual groupings from which a distribution of the U.S. dividend amount would be made under Federal income tax law. Thus, $800x of foreign gross income related to the foreign dividend amount is assigned to the statutory grouping for the portion of the distribution attributable to section 965(a) previously taxed earnings and profits and $200x of foreign gross income is assigned to the residual grouping. Under paragraph (f) of this section, $120x ($150x × $800x/$1,000x) of the Country A foreign income tax is apportioned to the statutory grouping and $30x ($150x × $200x/$1,000x) of the Country A foreign income tax is apportioned to the residual grouping. See section 965(g) and § 1.965–5(b) for application of the applicable percentage (as defined in § 1.965–5(d)) to the foreign income tax allocated and apportioned to the statutory grouping.

(8) *Example 7: Foreign law subpart F regime, CFC shareholder*—(i) *Facts.* USP owns all of the outstanding stock of CFC1, which in turn owns all of the outstanding stock of CFC2. CFC2 is organized and conducts business in Country B. Country A has a foreign law subpart F regime that imposes a tax on CFC1 for certain earnings of CFC2, a foreign law CFC. In Year 1, CFC2 earns $400x of interest income and $200x of royalty income. CFC2 incurs no foreign income tax. For Country A tax purposes, the $400x of interest income and $200x of royalty income are each an item of foreign law subpart F income of CFC2 that are included in the gross income of CFC1. CFC1 incurs $150x of Country A foreign income tax with respect to the foreign law subpart F income. For Federal income tax purposes, with respect to CFC2, the $400x of interest income is passive category income under section 904(d)(2)(B)(i) and the $200x of royalty income is general category income under § 1.904–4(b)(2)(iii).

(ii) *Analysis.* For purposes of allocating and apportioning CFC1's $150x of Country A foreign income tax, the $600x of Country A gross income is first assigned to separate categories. The $600x of foreign gross income is not included in the U.S. gross income of CFC1, and thus, there is no corresponding U.S. item. Under paragraph (d)(3)(i)(D) of this section, each item of foreign law subpart F income that is included in CFC1's foreign gross income is assigned to the same separate category as the item of foreign law subpart F income of CFC2. With respect to CFC2, the $400x of interest income and the $200x of royalty income would be corresponding U.S. items if CFC2 were the taxpayer. Accordingly, $400x of CFC1's foreign gross income is assigned to the passive category and $200x of CFC1's foreign gross income is assigned to the general category. Under paragraph (f) of this section, $100x ($150x × $400x/$600x) of the Country A foreign income tax is apportioned to the passive category and $50x ($150x × $200x/$600x) of the Country A foreign income tax is apportioned to the general category.

(9) *Example 8: Foreign law subpart F regime, U.S. shareholder*—(i) *Facts.* The facts are the same as in paragraph (g)(8)(i) of this section (the facts in *Example 7*), except that both CFC1 and CFC2 are organized and conduct business in Country B, all of the outstanding stock of CFC1 is owned by Individual X, a U.S. citizen resident in Country A, and Country A imposes tax of $150x on foreign gross income of $600x under its foreign law subpart F regime on Individual X, rather than on CFC1. For Federal income tax purposes, in the hands of CFC2, the $400x of interest income is passive category subpart F income and the $200x of royalty income is general category tested income (as defined in § 1.951A–2(b)(1)). CFC2's $400x of interest income gives rise to a passive category subpart F inclusion under section 951(a)(1)(A), and its $200x of tested income gives rise to a GILTI inclusion amount (as defined in § 1.951A–1(c)(1)) of $200x, with respect to Individual X.

(ii) *Analysis.* The analysis is the same as in paragraph (g)(8)(ii) of this section (the analysis in *Example 7*) except that under § 1.904–6(f), because $50x of the Country A foreign income tax is allocated and apportioned under paragraph (d)(3)(i)(D) of this section to CFC2's general category tested income group to which Individual X's inclusion under section 951A is attributable, the $50x of Country A foreign income tax is allocated and apportioned in the hands of Individual X to the section 951A category.

(10) *Example 9: Disregarded payment*—(i) *Facts.* USP owns all of the outstanding stock of CFC1. CFC1 owns all of the interests in FDE, a disregarded entity organized in Country A. FDE owns all of the outstanding stock of CFC2. In Year 1, FDE pays $400x of interest to CFC1. For Country A tax purposes, CFC1 includes the $400x of interest income in gross income and incurs foreign income tax of $80x. For Federal income tax purposes, the $400x payment is a disregarded payment and results in no income to CFC1. The tax book value of the assets of FDE, including the stock of CFC2, in each separate category (determined in accordance with § 1.987–6(b)(2)) is as follows: $750x of general category assets and $250x of passive category assets. The payment of the $400x of interest is not made with the principal purpose of avoiding the purposes of section 904, and does not result in a material distortion of the association of foreign income tax with U.S. gross income in a separate category.

(ii) *Analysis.* For purposes of allocating and apportioning CFC1's $80x of foreign income tax, the $400x of Country A gross income is first assigned to separate categories. The $400x of foreign gross income is not included in the U.S. gross income of CFC1, and thus, there is no corresponding U.S. item. Under paragraph (d)(3)(ii)(A) of this section, the $400x payment is considered to be made ratably out of all of the accumulated after-tax income of FDE, which is deemed to have arisen in the separate categories in the same ratio of the tax book value of the assets in the separate categories (as determined under § 1.987–6(b)(2)). Accordingly, $300x ($400x × $750x/$1,000x) of the Country A gross income is assigned to the general category and $100x ($400x × $250x/$1,000x) of the Country A gross income is assigned to the passive category. Under paragraph (f) of this section, $60x ($80x × $300x/$400x) of the Country A foreign income tax is apportioned to the general category and $20x ($80x × $100x/$400x) of the Country A foreign income tax is apportioned to the passive category.

(11) *Example 10: Disregarded transfer of built-in gain property*—(i) *Facts.* USP owns FDE, a foreign branch operating in Country A. FDE transfers Asset F, equipment used in FDE's trade or business in Country A, for no consideration to USP in a transaction that is disregarded for Federal income tax purposes but treated as a distribution of Asset F from a foreign corporation to its U.S. shareholder for Country A tax purposes. Asset F has a fair market value of $250x at the time of transfer and an adjusted basis of $100x for both Federal income tax and Country A tax purposes. Country A imposes $30x of tax on FDE with respect to the $150x of built-in gain on a deemed sale of Asset F, which is recognized for Country A tax purposes by reason of the transfer to USP. If FDE had sold

Asset F for $250x in a transaction that was regarded for Federal income tax purposes, FDE would also have recognized gain of $150x for Federal income tax purposes, and that gain would have been characterized as foreign branch category income as defined in § 1.904–4(f). Country A also imposes $25x of withholding tax on USP by reason of the distribution of Asset F, valued at $250x, to USP.

(ii) *Analysis*—(A) *Net basis tax on built-in gain.* For purposes of allocating and apportioning the $30x of Country A foreign income tax imposed on FDE by reason of the deemed sale of Asset F, the $150x of Country A gross income from the deemed sale of Asset F is first assigned to a separate category. Because the transaction is disregarded for Federal income tax purposes, there is no corresponding U.S. item. However, FDE would have recognized gain of $150x, which would have been a corresponding U.S. item, if the deemed sale had been recognized for Federal income tax purposes. Therefore, under paragraph (d)(2)(i) of this section the item of foreign gross income is characterized and assigned to the grouping to which such corresponding U.S. item would have been assigned if the deemed sale were recognized under Federal income tax law. Because the sale of Asset F in a regarded transaction would have resulted in foreign branch category income, the foreign gross income is characterized as foreign branch category income. Because all of the Country A foreign taxable income is assigned to a single separate category, the $30x of Country A tax is also allocated to the foreign branch category. No apportionment of the $30x is necessary because the class of gross income to which the tax is allocated consists entirely of a single statutory grouping, foreign branch category income.

(B) *Withholding tax on distribution.* For purposes of allocating and apportioning the $25x of Country A withholding tax imposed on USP by reason of the transfer of Asset F, the $250x of Country A gross income from the distribution of Asset F is first assigned to a separate category. The transfer is a remittance from FDE to USP that is disregarded for Federal income tax purposes (as described in § 1.904–4(f)(2)(vi)(C)(*2*) and § 1.904–4(f)(3)(ix)) and thus there is no corresponding U.S. item. Under paragraph (d)(3)(ii)(A) of this section the item of foreign gross income is assigned to the groupings to which the income out of which the payment is made is assigned, and the payment is considered to be made ratably out of all of the accumulated after-tax income of FDE, as computed for Federal income tax purposes. The accumulated after-tax income of FDE is deemed to have arisen in the statutory and residual groupings in the same ratio as the tax book value of the FDE's assets in the groupings, determined in accordance with § 1.987–6(b)(2). Because all of FDE's assets produce foreign branch category income, the foreign gross income is characterized as foreign branch category income. Because all of the Country A foreign taxable income from which the tax is withheld is assigned to a single separate category, under paragraph (f) of this section the $25x of Country A withholding tax is also allocated to the foreign branch category. No apportionment of the $25x is necessary because the class of gross income to which the tax is allocated consists entirely of a single statutory grouping, foreign branch category income.

(12) *Example 11: Sale of disregarded entity*—(i) *Facts.* USP sells FDE, a disregarded entity that is organized and operates in Country A, for $500x. FDE owns Asset X and Asset Y, each having a fair market value of $250x. For Country A tax purposes, FDE has a basis in Asset X of $100x and a basis in Asset Y of $200x; USP's basis in FDE is $100x; and the sale is treated as a sale of stock. Country A imposes foreign income tax of $40x on USP on the Country A gross income of $400x resulting from the sale of FDE, based on its rules for taxing capital gains of nonresidents. For Federal income tax purposes, USP has a basis of $150x in Asset X, which produces passive category income, and a basis of $150x in Asset Y, which produces general category income that would not be foreign personal holding company income if earned by a CFC. For Federal income tax purposes USP recognizes $100x of passive category income and $100x of general category income from the sale of FDE.

(ii) *Analysis.* For purposes of allocating and apportioning USP's $40x of Country A foreign income tax, the $400x of Country A gross income resulting from the sale of FDE is first assigned to separate categories. Under paragraph (d)(3)(iv) of this section, USP's $400x of Country A gross income is assigned among the statutory groupings in the same percentages as the foreign gross income in each category that would have resulted if the sale of FDE were treated as an asset sale for Country A tax purposes. Because for Country A tax purposes Asset X had a built-in gain of $150x and Asset Y had a built-in gain of $50x, $300x ($400x × $150x/$200x) of the Country A gross income is assigned to the passive category and $100x ($400x × $50x/$200x) is assigned to the general category. Under paragraph (f) of this section, $30x ($40x × $300x/$400x) of the Country A foreign income tax is apportioned to the passive category, and $10x ($40x x $100x/$400x) of the Country A foreign income tax is apportioned to the general category.

(h) *Applicability date.* This section applies to taxable years beginning after December 31, 2019.

■ **Par. 13.** Section 1.904–4 is amended by:

■ 1. Revising paragraph (c)(7)(i).

■ 2. Revising the third and fourth sentences of paragraph (c)(7)(ii).

■ 3. Revising paragraph (c)(7)(iii).

■ 4. Adding paragraphs (c)(8)(v) through (viii).

■ 5. Revising paragraphs (e)(1)(ii) and (e)(2).

■ 6. Removing paragraphs (e)(3) and (4).

■ 7. Removing the language ''§ 1.904–6(b)'' in paragraph (o) and adding the language ''1.904–6(e)'' in its place.

■ 8. Revising paragraph (q).

The revisions and additions read as follows:

§ 1.904–4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(c) * * *

(7) * * * (i) *In general.* If the effective rate of tax imposed by a foreign country on income of a foreign corporation that is included in a taxpayer's gross income is reduced under foreign law on distribution of such income, the rules of this paragraph (c) apply at the time that the income is included in the taxpayer's gross income, without regard to the possibility of a subsequent reduction of foreign tax on the distribution. If the inclusion is considered to be high-taxed income, then the taxpayer must initially treat the inclusion as general category income, section 951A category income or income in a specified separate category as provided in paragraph (c)(1) of this section. When the foreign corporation distributes the earnings and profits to which the inclusion was attributable and the foreign tax on the inclusion is reduced, then if a redetermination of U.S. tax liability is required under § 1.905–3(b)(2), the taxpayer must redetermine whether the revised inclusion (if any) should be considered to be high-taxed income. *See* § 1.905–3(b)(2)(ii) (requiring a redetermination of the amount of the inclusion, the application of the high-tax exception under section 954(b)(4), and the amount of foreign taxes deemed paid). If, taking into account the reduction in foreign tax, the inclusion would not have been considered high-taxed income, then the taxpayer, in redetermining its U.S. tax liability for the year or years affected, must treat the inclusion and the associated taxes (as reduced on the distribution) as passive category income and taxes. For this purpose, the foreign tax on an inclusion under section 951(a)(1) or 951A(a) is considered reduced on distribution of the earnings and profits associated with the inclusion if the total taxes paid and deemed paid on the inclusion and the distribution (taking into account any reductions in tax and any withholding taxes) is less than the total taxes deemed paid in the year of inclusion. Therefore, any foreign currency gain associated with the earnings and profits that are distributed with respect to the inclusion is not taken into account in determining whether there is a reduction of tax requiring a redetermination of whether the inclusion is high-taxed income.

(ii) * * * If, however, foreign law does not attribute a reduction in taxes to a particular year or years, then the reduction in taxes shall be attributable, on an annual last in-first out (LIFO) basis, to foreign taxes potentially subject to reduction that are associated with previously taxed income, then on a LIFO basis to foreign taxes associated with income that under paragraph (c)(7)(iii) of this section remains as passive income but that was excluded from subpart F income or tested income under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), and finally on a LIFO basis to foreign taxes associated with other earnings and profits. Furthermore, in applying the ordering rules of section 959(c), distributions shall be considered made on a LIFO basis first out of earnings described in section 959(c)(1) and (2), then on a LIFO basis out of earnings and profits associated with income that remains passive income under paragraph (c)(7)(iii) of this section but that was excluded from subpart F income or tested income under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), and finally on a LIFO basis out of other earnings and profits. * * *

(iii) *Treatment of income excluded under section 954(b)(4) or section 951A(c)(2)(A)(i)(III).* If the effective rate of tax imposed by a foreign country on income of a foreign corporation is reduced under foreign law on distribution of that income, the rules of section 954(b)(4) (including for purposes of determining tested income under section 951A(c)(2)(A)(i)(III)) are applied in the year of inclusion without regard to the possibility of a subsequent reduction of foreign tax. *See* § 1.954–1(d)(3)(iii) and § 1.951A–2(c)(6)(iv). If a taxpayer excludes passive income from a controlled foreign corporation's foreign personal holding company income or tested income under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), then, notwithstanding the general rule of § 1.904–5(d)(2), the income is considered to be passive category income until distribution of that income. At that time, if after the redetermination of U.S. tax liability required under § 1.905–3(b)(2) the taxpayer still elects to exclude the passive income under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), the rules of this paragraph (c)(7)(iii) apply to determine whether the income is high-taxed income upon distribution and, therefore, income in another separate category. For purposes of determining whether a reduction in tax is attributable to taxes on income excluded under section 954(b)(4) or section 951A(c)(2)(A)(i)(III), the rules of paragraph (c)(7)(ii) of this section apply. The rules of paragraph (c)(7)(ii) of this section also apply for purposes of ordering distributions to determine whether such distributions are out of earnings and profits associated with such excluded income. For an example illustrating the operation of this paragraph (c)(7)(iii), see paragraph (c)(8)(vi) of this section (*Example 6*).

(8) * * *

(v) *Example 5*—CFC, a controlled foreign corporation, is a wholly-owned subsidiary of USP, a domestic corporation. USP and CFC are calendar year taxpayers. In Year 1, CFC's only earnings consist of $200x of pre-tax passive income that is foreign personal holding company income that is earned in foreign Country X. Under Country X's tax system, the corporate tax on particular earnings is reduced on distribution of those earnings and no withholding tax is imposed. In Year 1, CFC pays $100x of foreign tax with respect to its passive income. USP does not elect to exclude this income from subpart F under section 954(b)(4) and includes $200x in gross income ($100x of net foreign personal holding company income and $100x of the amount under section 78 (the ''section 78 dividend'')). At the time of the inclusion, the income is considered to be high-taxed income under paragraphs (c)(1) and (c)(6)(i) of this section and is general category income to USP ($100x > $42x (21% × $200x)). CFC does not distribute any of its earnings in Year 1. In Year 2, CFC has no additional earnings. On December 31, Year 2, CFC distributes the $100x of earnings from Year 1. At that time, CFC receives a $60x refund from Country X attributable to the reduction of the Country X corporate tax imposed on the Year 1 earnings. The refund is a foreign tax redetermination under § 1.905–3(a) that under § 1.905–3(b)(2) and § 1.954–1(d)(3)(iii) requires a redetermination of CFC's Year 1 subpart F income and the application of section 954(b)(4), as well as a redetermination of USP's Year 1 inclusion under section 951(a)(1), its deemed paid taxes under section 960(a), and its Year 1 U.S. tax liability. As recomputed taking into account the $60x refund, CFC's Year 1 passive category net foreign personal holding company income is increased by $60x to $160x, CFC's foreign income taxes attributable to that income are reduced from $100x to $40x, and the income still qualifies to be excluded from CFC's subpart F income under section 954(b)(4) ($40x > $37.80x (90% × 21% × $200x)). Assuming USP does not change its Year 1 election, USP's Year 1 inclusion under section 951(a)(1) is increased by $60x to $160x, and the associated deemed paid tax and section 78 dividend are reduced by $60x to $40x. Under paragraph (c)(7)(i) of this section, in connection with the adjustments required under section 905(c), USP must redetermine whether the adjusted Year 1 inclusion is high-taxed income of USP. Taking into account the $60x refund, the inclusion is not considered high-taxed income of USP ($40x < $42x (21% × $200x)). Therefore, USP must treat the $200x of income ($160x inclusion plus $40x section 78 amount) and the $40x of taxes associated with the inclusion in Year 1 as passive category income and taxes. USP must also follow the appropriate procedures under § 1.905–4.

(vi) *Example 6.* The facts are the same as in paragraph (c)(8)(v) of this section (the facts in *Example 5*), except that in Year 1, USP elects to apply section 954(b)(4) to exclude CFC's passive income from its subpart F income, both before and after the recomputation of CFC's Year 1 subpart F income and USP's Year 1 U.S. tax liability that is required by reason of the Year 2 $60x foreign tax redetermination. Although the income is not considered to be subpart F income, under paragraph (c)(7)(iii) of this section it remains passive category income until distribution. In Year 2, the $100x distribution is a dividend to USP, because CFC has $160x of accumulated earnings and profits described in section 959(c)(3) (the $100x of earnings in Year 1 increased by the $60x refund received in Year 2 that under § 1.905–3(b)(2) is taken into account in Year 1). Under paragraph (c)(7)(iii) of this section, USP must determine whether the dividend income is high-taxed income to USP in Year 2. The treatment of the dividend as passive category income may be relevant in determining deductions allocable or apportioned to such dividend income or related stock that are excluded in the computation of USP's foreign tax credit limitation under section 904(a) in Year 2. *See* section 904(b)(4). Under paragraph (c)(1) of this section, the dividend income is passive category income to USP because the foreign taxes paid and deemed paid by USP ($0x) with respect to the dividend income do not exceed the highest U.S. tax rate on that income.

(vii) *Example 7.* The facts are the same as in paragraph (c)(8)(v) of this section (the facts in *Example 5*), except that the distribution in Year 2 is subject to a withholding tax of $25x. Under paragraph (c)(7)(i) of this section, USP must redetermine whether its Year 1 inclusion should be considered high-taxed income of USP because there is a net $35x reduction ($60x refund of foreign corporate tax − $25x withholding tax) of foreign tax. By taking into account both the reduction in foreign corporate tax and the additional withholding tax, the inclusion continues to be considered high-taxed income of USP in Year 1 ($65x > $42x (21% × $200). USP must follow the appropriate section 905(c) procedures. USP must redetermine its U.S. tax liability for Year 1, but the Year 1 inclusion and the $65x taxes ($40x of deemed paid tax in Year 1 and $25x withholding tax in Year 2) will continue to be treated as general category income and taxes.

(viii) *Example 8*—(A) CFC, a controlled foreign corporation operating in Country G, is a wholly-owned subsidiary of USP, a domestic corporation. USP and CFC are calendar year taxpayers. Country G imposes a tax of 50% on CFC's earnings. Under Country G's system, the foreign corporate tax on particular earnings is reduced on distribution of those earnings to 30% and no withholding tax is imposed. Under Country G's law, distributions are treated as made out of a pool of undistributed earnings subject to the 50% tax rate. For Year 1, CFC's only earnings consist of passive income that is foreign personal holding company income that is earned in foreign Country G. CFC has taxable income of $110x for Federal income tax purposes and $100x for Country G purposes. Country G, therefore, imposes a tax of $50x on the Year 1 earnings of CFC. USP does not elect to exclude this income from subpart F under section 954(b)(4) and includes $110x in gross income ($60x of net foreign personal holding company income under section 951(a) and $50x of the section 78 dividend). The highest rate of tax under section 11 in Year 1 is 34%. Therefore, at the time of the section 951(a) inclusion, the income is considered to be high-taxed income under paragraph (c) of this section and is general category income to USP. CFC does not distribute any of its earnings in Year 1.

(B) In Year 2, CFC earns general category income that is not subpart F income or tested income. CFC again has $110x in taxable income for Federal income tax purposes and $100x in taxable income for Country G purposes, and CFC pays $50x of tax to foreign Country G. In Year 3, CFC has no taxable income or earnings. On December 31, Year 3, CFC distributes $60x of its total $120x of earnings and receives a refund of foreign tax of $24x. The $24x refund is a foreign tax redetermination under § 1.905–3(a) that under § 1.905–3(b)(2) requires a redetermination of CFC's Year 1 subpart F income and USP's deemed paid taxes and Year 1 U.S. tax liability. Country G treats the distribution of earnings as out of the 50% tax rate pool of $200x of earnings accumulated in Year 1 and Year 2, as calculated for Country G tax purposes. However, under paragraph (c)(7)(ii) of this section, the distribution, and, therefore, the reduction of tax is treated as first attributable to the $60x of passive category earnings attributable to income previously taxed in Year 1, and none of the distribution is treated as made out of the $60x of earnings accumulated in Year 2 (which is not previously taxed). Because 40 percent (the reduction in tax rates from 50 percent to 30 percent is a 40 percent reduction in the tax) of the $50x of foreign taxes attributable to the $60x of Year 1 passive income as calculated for Federal income tax purposes is refunded, $20x of the $24x foreign tax refund reduces foreign taxes on CFC's Year 1 passive income from $50x to $30x. The other $4x of the tax refund reduces the taxes imposed in Year 2 on CFC's general category income from $50x to $46x.

(C) Under paragraph (c)(7) of this section, in connection with the section 905(c) adjustment USP must redetermine whether its Year 1 subpart F inclusion should be considered high-taxed income. By taking into account the reduction in foreign tax, the inclusion is increased by $20x to $80x, the deemed paid taxes are reduced by $20x to $30x, and the inclusion is not considered high-taxed income ($30x < 34% × $110x). Therefore, USP must treat the revised section 951(a) inclusion and the taxes associated with the section 951(a) inclusion as passive category income and taxes in Year 1. USP must follow the appropriate procedures under § 1.905–4.

* * * * *

(e) * * * (1) * * *

(ii) *Definition of financial services income.* The term *financial services income* means income derived by a financial services entity, as defined in paragraph (e)(2) of this section, that is:

(A) Income derived in the active conduct of a banking, financing, or similar business under section 954(h)(3)(A)(i);

(B) Income that is of a kind that would be insurance income as defined in section 953(a)(1) (including related person insurance income as defined in section 953(c)(2) and without regard to the exception in section 953(a)(2) for income that is exempt insurance income under section 953(e));

(C) Income from the investment by an insurance company of its unearned premiums or reserves ordinary and necessary to the proper conduct of the insurance business; or

(D) Passive income as defined in section 904(d)(2)(B) and paragraph (b) of this section as determined before the application of the exception for high-taxed income but after the application of the exception for export financing interest.

* * * * *

(2) *Financial services entities*—(i) *Definition of financial services entity*—(A) *In general.* The term *financial services entity* means an individual or corporation that is predominantly engaged in the active conduct of a banking, insurance, financing, or similar business (active financing business) within the meaning of paragraphs (e)(2)(i)(A)(*1*) through (*4*) of this section for any taxable year. Except as provided in paragraph (e)(2)(ii) of this section, a determination of whether an individual or corporation is a financial services entity is done on an individual or entity-by-entity basis. An individual or corporation is predominantly engaged in the active financing business for any year if for that year:

(*1*) It is predominantly engaged in the active conduct of a banking, financing, or similar business under section 954(h)(2)(B) (substituting the reference to ''controlled foreign corporation'' with ''individual or corporation'');

(*2*) It is an insurance company meeting the requirements of section 953(e)(3)(A) and (C) provided that the company's foreign personal holding company income does not exceed the amount that would be treated as derived in the active conduct of an insurance business under section 954(i) if all of the insurance and annuity contracts issued or reinsured by the company had qualified as exempt contracts under section 953(e)(2);

(*3*) It is a qualifying insurance corporation as defined in section 1297(f) that is engaged in the active conduct of an insurance business under section 1297(b)(2)(B) (but without regard to whether the corporation is a foreign corporation); or

(*4*) It is a domestic corporation, or a corporation that has elected to be treated as a domestic corporation under section 953(d), that is subject to Federal income tax under subchapter L on its net income and is subject to regulation as an insurance (or reinsurance) company in its jurisdiction of organization.

(B) *Certain gross income included and excluded.* For purposes of applying the rules in paragraph (e)(2)(i)(A) of this section (including by reason of paragraph (e)(2)(ii) of this section), gross income includes interest on State and local bonds described in section 103(a), but does not include income from a distribution of previously taxed earnings and profits described in section 959(a) or (b).

(C) *Treatment of partnerships and other pass-through entities.* For purposes of applying the rules in paragraph (e)(2)(i)(A) of this section (including by reason of paragraph (e)(2)(ii) of this section) with respect to an individual or corporation that is a direct or indirect partner in a partnership, the partner's distributive share of partnership income is characterized as if each partnership item of gross income were realized directly by the partner. For example, in applying section 954(h)(2)(B) under paragraph (e)(2)(i)(A) of this section, a customer with respect to a partnership is treated as a related person with respect to an individual or corporation that is a partner in the partnership if the customer is related to the individual or corporation under section 954(d)(3). Similar principles apply for an individual or corporation's share of income from any other pass-through entities.

(ii) *Financial services group.* A corporation that is a member of a financial services group is deemed to be a financial services entity regardless of whether it is a financial services entity under paragraph (e)(2)(i) of this section. For purposes of this paragraph (e)(2)(ii), a financial services group means an affiliated group as defined in section 1504(a) (but determined without regard to paragraphs (2) or (3) of section 1504(b)) if the affiliated group as a whole meets the requirements of section 954(h)(2)(B)(i) (except that the reference to ''controlled foreign corporation'' is substituted with ''affiliated group'' in section 954(h)(2)(B)(i)). For purposes of determining whether an affiliated group is a financial services group under the previous sentence, only the income of group members that are domestic corporations or foreign corporations that are controlled foreign corporations in which U.S. members of the affiliated group own, directly or indirectly, at least 80 percent of the total voting power and value of the stock is included. In addition, indirect ownership is determined under section 318 and the regulations under that section, and the income of the group does not include any income from transactions with other members of the group.

(iii) *Examples.* The following examples illustrate the application of paragraph (e)(2) of this section.

(A) *Example 1*—(*1*) *Facts.* USP is a domestic corporation that is the parent of a consolidated group which includes B (a domestic corporation that is primarily engaged in a manufacturing business), C (a domestic corporation whose primary function is to manage the treasury operations of the consolidated group), and D (a domestic corporation that is engaged in the active and regular conduct of financing purchases by unrelated customers of B's products). USP also owns a 20% partnership interest in PS, a domestic partnership that is engaged in the active and regular conduct of making loans to customers that are not related persons with respect to it or USP. The other 80% of PS is owned by USX, a domestic corporation unrelated to USP (or any other member of the USP consolidated group). B has gross income of $170x consisting of income from its manufacturing operations. C has gross income of $20x consisting of interest income from loans to B. D has gross income of $100x consisting of interest income from making loans to unrelated customers that purchase B's products. PS has gross income of $50x consisting of interest on loans that it makes to customers in the ordinary course of its business, $10x of which is attributable to loans to C, $30x of which is attributable to loans to Z (a wholly owned subsidiary of USX), and $10 of which is attributable to loans to customers unrelated to either the USP or USX affiliated groups. USP, B, C, and D have no other items of gross income and no other intercompany transactions.

(*2*) *Analysis*—(*i*) *Entity test.* Under paragraph (e)(2)(i)(A) of this section, B and C are not financial services entities because neither meets the requirements of being predominantly engaged in the active conduct of a banking, finance, insurance, or similar business. B does not meet the requirements because all of its income is derived from manufacturing. C does not meet the requirements because it lends solely to related persons. Under paragraph (e)(2)(i)(A)(*1*) of this section, D is a financial services entity because all of its gross income is derived from making loans to unrelated customers in the ordinary course of its lending business in a manner that meets the requirements of section 954(h)(2)(B)(i). Under paragraph (e)(2)(i)(C) of this section, USP's distributive share of partnership income from PS is characterized as if each item of PS's gross income were realized directly by USP. Thus, USP includes a $10x distributive share of income from PS, $2x of which is from related party loans to C and $8x of which is from loans to persons that are not related persons with respect to USP. Under paragraph (e)(2)(i)(A)(*1*) of this section, USP is a financial services entity because more than 70% of its gross income is derived from making loans to unrelated customers in the ordinary course of a lending business ($8x/$10x > 70% × $10x) and meets the requirements of section 954(h)(2)(B)(i).

(*ii*) *Affiliated group test.* Under paragraph (e)(2)(ii) of this section, a corporation that is a member of a financial services group is deemed to be a financial services entity regardless of whether it is a financial services entity under paragraph (e)(2)(i) of this section. This would apply if the USP, B, C, and D affiliated group as a whole meets the requirements of section 954(h)(2)(B)(i). The USP affiliated group derives $108x ($100x by D and $8x by USP) from loans to unrelated customers and derives $278x of total gross income after making the adjustments provided in paragraph (e)(2)(ii) of this section ($300x total gross income minus $20x interest on intercompany loan from C to B and $2x interest on loan from PS to C). Because the gross income USP's affiliated group derives directly from the active and regular conduct of a lending or finance business from transactions with customers which are not related persons is 39% ($108x divided by $278x), the USP affiliated group does not satisfy the more than 70% of gross income test of section 954(h)(2)(B)(i), and the USP affiliated group is not a financial services group. USP and D are financial services entities under paragraph (e)(2)(i)(A) of this section. B and C are not financial services entities under either of paragraphs (e)(2)(i) or (ii) of this section.

(B) *Example 2*—(*1*) *Facts.* The facts are the same as in paragraph (e)(2)(iii)(A)(*1*) of this section (the facts in *Example 1*) except that USX is the parent of a consolidated group, which includes Y (a domestic corporation that is a U.S. licensed bank), and Z (a domestic corporation that is a non-bank lender that is engaged in the active and regular conduct of making loans to customers unrelated to USX or its affiliates). Y has gross income of $200x, consisting of $190x from making loans to unrelated customers in the ordinary course of its banking business and $10x of other income not described in section 954(h)(4). Z has gross income of $160x, consisting of interest income from making loans to unrelated customers. USX, Y, and Z have no other items of gross income and no other intercompany transactions.

(*2*) *Analysis*—(*i*) *Entity test.* Under paragraph (e)(2)(i)(A) of this section, Y and Z are financial services entities. Y is a financial services entity because it satisfies the requirements of section 954(h)(2)(B)(ii). Z is a financial services entity because all of its gross income is derived from making loans to unrelated customers in the ordinary course of its lending business in a manner that meets the requirements of section 954(h)(2)(B)(i). Under paragraph (e)(2)(i)(C) of this section, USX's distributive share of partnership income from PS is characterized as if each item of PS's gross income were realized directly by USX. Thus, USX includes a $40x distributive share of income from PS, $24x of which is from related party loans to Z and $16x of which is from loans to unrelated parties. Under paragraph (e)(2)(i)(A)(*1*) of this section, USX is not a financial services entity because only 60% ($24x divided by $40x) of its gross income is derived from making loans to unrelated customers in the ordinary course of a lending business and, therefore, USX does not meet the more than 70% of gross income test of section 954(h)(2)(B)(i).

(*ii*) *Affiliated group test.* Under paragraph (e)(2)(ii) of this section, a corporation that is a member of a financial services group is deemed to be a financial services entity regardless of whether it is a financial services entity under paragraph (e)(2)(i) of this section. This would apply if the USX, Y, and Z affiliated group as a whole meets the requirements of section 954(h)(2)(B)(i). The USX affiliated group derives $366x ($190x by Y, $160x by Z, and $16x by USP) from loans to unrelated customers and derives $376x of total gross income after making the adjustments provided in paragraph (e)(2)(ii) of this section ($400x total gross income minus $24x interest on loans from PS to Z). Because the gross income USX's affiliated group derives directly from the active and regular conduct of a lending or finance business from transactions with customers which are not related persons is 97% ($366x divided by $376x), the USX affiliated group satisfies the more than 70% of gross income test of section 954(h)(2)(B)(i), and the USX affiliated group is a financial services group. Y and Z are financial services entities under paragraph (e)(2)(i)(A). USX is a financial services entity under paragraph (e)(2)(ii) of this section.

* * * * *

(q) *Applicability date*—(1) Except as provided in paragraph (q)(2) and (3) of this section, this section applies for taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraphs (c)(7)(i), (c)(7)(iii), (c)(8)(v) through (viii) apply to taxable years ending on or after December 16, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also end before December 16, 2019, see § 1.904–4(c)(7)(i) and (c)(7)(iii) as in effect on December 17, 2019.

(3) Paragraphs (e)(1)(ii) and (e)(2) of this section apply to taxable years ending on or after the date the final regulations are filed with the **Federal Register**. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also end before the date the final regulations are filed with the **Federal Register**, see § 1.904–4(e)(1)(i) and (e)(2) as in effect on December 17, 2019.

■ **Par. 14.** § 1.904–6 is amended by:

■ 1. Revising the section heading.

■ 2. Revising paragraph (a).

■ 3. Redesignating paragraph (b) as paragraph (e) and adding a new paragraph (b).

■ 4. Adding paragraph (c) and revising paragraph (d).

■ 5. Removing the language ''paragraph (b)(4)(ii)'' in newly-redesignated paragraph (e)(4)(i) and adding the language ''paragraph (e)(4)(ii)'' in its place.

■ 6. Removing the language ''paragraph (b)(4)(ii)(B)'' in newly-redesignated paragraph (e)(4)(ii)(C) and adding the language ''paragraph (e)(4)(ii)(B)'' in its place.

■ 7. Adding paragraphs (f) through (h).

The revisions and additions read as follows:

§ 1.904–6 Allocation and apportionment of foreign income taxes.

(a) *In general.* The amount of foreign income taxes paid or accrued with respect to a separate category (as defined in § 1.904–5(a)(4)(v)) of income (including U.S. source income assigned to the separate category) includes only those foreign income taxes that are allocated and apportioned to the separate category under the rules of § 1.861–20 (as modified by this section). In applying the foreign tax credit limitation under sections 904(a) and (d) to general category income described in section 904(d)(2)(A)(ii) and § 1.904–4(d), the general category is a statutory grouping. However, the general category income is the residual grouping of income for purposes of assigning foreign income taxes to separate categories. In addition, in determining the numerator of the foreign tax credit limitation under sections 904(a) and (d), where U.S. source income is the residual grouping, the amount of foreign income taxes paid or accrued for which a deduction is allowed, for example, under section 901(k)(7), with respect to foreign source income in a separate category includes only those foreign income taxes that are allocated and apportioned to foreign source income in the separate category under the rules of § 1.861–20 (as modified by this section). For purposes of this section, unless otherwise stated, terms have the same meaning as provided in § 1.861–20(b).

(b) *Assigning an item of foreign gross income to a separate category.* For purposes of assigning an item of foreign gross income to a separate category or categories (or foreign source income in a separate category) under § 1.861–20, the rules of this paragraph (b) apply.

(1) *Base differences.* Any item of foreign gross income that is attributable to a base difference described in § 1.861–20(d)(2)(ii)(B) is assigned to the separate category described in section 904(d)(2)(H)(i), and to foreign source income in that category.

(2) *Certain disregarded payments*—(i) *Certain disregarded payments made by a foreign branch.* Except in the case of disregarded payments in exchange for property described in § 1.861–20(d)(3)(ii)(C), if in connection with a disregarded payment made by a foreign branch to another foreign branch or to a foreign branch owner that is described in § 1.861–20(d)(3)(ii)(A), U.S. gross income that would otherwise be attributable to a foreign branch is attributed to another foreign branch or to the foreign branch owner under § 1.904–4(f)(2)(vi)(A) (including by reason of § 1.904–4(f)(2)(vi)(D)), the item of foreign gross income that arises by reason of the disregarded payment is assigned to the same separate category as the reattributed U.S. gross income.

(ii) *Certain disregarded payments made by a foreign branch owner.* Except in the case of disregarded payments in exchange for property described in § 1.861–20(d)(3)(ii)(C), an item that a United States person includes in foreign gross income solely by reason of the receipt of a disregarded payment that is described in § 1.861–20(d)(3)(ii)(B) (payment to a foreign branch by a foreign branch owner) is assigned to the foreign branch category (or a specified separate category associated with the foreign branch category), or, in the case of a foreign branch owner that is a partnership, to the partnership's general category income that is attributable to the foreign branch. See § 1.960–1(d)(3)(ii)(A) and (e) for rules providing that foreign income tax on a disregarded payment by a foreign branch owner that is a controlled foreign corporation is assigned to the residual grouping and cannot be deemed paid under section 960.

(3) *Disposition of property resulting in reattribution of U.S. gross income to or from a foreign branch.* If a disposition of property results in the recognition of U.S. gross income that is reattributed under § 1.904–4(f)(2)(vi)(A) by reason of a disregarded payment described in § 1.904–4(f)(2)(vi)(B)(*2*) (or by reason of § 1.904–4(f)(2)(vi)(D)), any foreign gross income arising from that disposition of property under foreign law is assigned to a separate category under the rules in § 1.861–20(d)(1) applied without regard to the reattribution of U.S. gross income under § 1.904–4(f)(2)(vi)(A).

(c) *Allocating and apportioning deductions.* For purposes of applying § 1.861–20(e) to allocate and apportion deductions allowed under foreign law to foreign gross income in the separate categories, before undertaking the steps outlined in § 1.861–20(e), foreign gross income in the passive category is first reduced by any related person interest expense that is allocated to the income under the principles of section 954(b)(5) and § 1.904–5(c)(2)(ii)(C). In allocating and apportioning expenses not specifically allocated under foreign law, the principles of foreign law are applied only after taking into account the reduction of passive income by the application of section 954(b)(5). In allocating and apportioning expenses when foreign law does not provide rules for the allocation or apportionment of expenses, losses or other deductions to particular items of foreign gross income, then the principles of section 954(b)(5), in addition to the principles of the section 861 regulations (as defined in § 1.861–8(a)(1)), apply to allocate and apportion expenses, losses or other foreign law deductions to foreign gross income after reduction of passive income by the amount of related person interest expense allocated to passive income under section 954(b)(5) and § 1.904–5(c)(2)(ii)(C).

(d) *Apportionment of taxes for purposes of applying the high-tax income tests.* If taxes have been allocated and apportioned to passive income under the rules of paragraph (a) this section, the taxes must further be apportioned to the groups of income described in § 1.904–4(c)(3), (4) and (5) for purposes of determining if the group is high-taxed income that is recharacterized as income in another separate category under the rules of § 1.904–4(c). *See also* § 1.954–1(c)(1)(iii)(B) (defining a single item of passive category foreign personal holding company income by reference to the grouping rules under § 1.904–4(c)(3), (4) and (5)). Taxes are related to income in a particular group under the same rules as those in paragraph (a) of this section except that those rules are applied by apportioning foreign income taxes to the groups described in § 1.904–4(c)(3), (4) and (5) instead of separate categories.

* * * * *

(f) *Treatment of certain foreign income taxes paid or accrued by United States shareholders.* Some or all of the foreign gross income of a United States shareholder of a controlled foreign corporation that is a foreign law CFC described in § 1.861–20(d)(3)(i)(D) or a reverse hybrid described in § 1.861–20(d)(3)(iii) is assigned to the section 951A category if, were the controlled foreign corporation the taxpayer that recognizes the foreign gross income, the foreign gross income would be assigned to the controlled foreign corporation's tested income group (as defined in § 1.960–1(b)(33)) within the general category to which an inclusion under section 951A is attributable. The amount of the United States shareholder's foreign gross income that is assigned to the section 951A category (or a specified separate category associated with the section 951A category) is based on the inclusion percentage (as defined in § 1.960–2(c)(2)) of the United States shareholder. For example, if a United States shareholder has an inclusion percentage of 60 percent, then 60 percent of the foreign gross income of a United States shareholder that would be assigned (under § 1.861–20(d)(3)(iii)) to the tested income group within the general category income of a reverse hybrid that is a controlled foreign corporation to which an inclusion under section 951A is attributable is assigned to the section 951A category or the specified separate category for income resourced under a tax treaty, and not to the general category.

(g) *Examples.* For examples illustrating the application of this section, see § 1.861–20(g).

(h) *Applicability date.* This section applies to taxable years beginning after December 31, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also begin before January 1, 2020, see § 1.904–6 as in effect on December 17, 2019.

■ **Par. 15.** Section 1.904(b)–3 is amended by adding paragraph (d)(2) and revising paragraph (f) to read as follows:

§ 1.904(b)–3 Disregard of certain dividends and deductions under section 904(b)(4).

* * * * *

(d) * * *

(2) *Net operating losses.* If the taxpayer has a net operating loss in the current taxable year, then solely for purposes of determining the source and separate category of the net operating loss, the overall foreign loss rules in section 904(f) and the overall domestic loss rules in section 904(g) are applied without taking into account the adjustments required under section 904(b) and this section.

* * * * *

(f) *Applicability dates*—(1) Except as provided in paragraph (f)(2) of this section, this section applies to taxable years beginning after December 31, 2017.

(2) Paragraph (d)(2) of this section applies to taxable years ending on or after December 16, 2019.

■ **Par. 16.** Section 1.904(g)–3 is amended by:

■ 1. Adding a sentence at the end of paragraph (b)(1).

■ 2. Adding paragraph (j) and revising paragraph (l).

The addition and revisions read as follows:

§ 1.904(g)–3 Ordering rules for the allocation of net operating losses, net capital losses, U.S. source losses, and separate limitation losses, and for the recapture of separate limitation losses, overall foreign losses, and overall domestic losses.

* * * * *

(b) * * * (1) * * * See §§ 1.861–8(e)(8), 1.904(b)–3(d)(2), and 1.1502–4(c)(1)(iii) for rules to determine the source and separate category components of a net operating loss.

* * * * *

(j) *Step Nine: Dispositions that result in additional income recognition under the branch loss recapture and dual consolidated loss recapture rules*—(1) *In general.* If, after any gain is required to be recognized under section 904(f)(3) on a transaction that is otherwise a nonrecognition transaction, an additional amount of income is recognized under section 91(d), section 367(a)(3)(C) (as applicable to losses incurred before January 1, 2018), or § 1.1503(d)–6, and that additional income amount is determined by taking into account an offset for the amount of gain recognized under section 904(f)(3) and so is not initially taken into account in applying paragraph (b) of this section, then paragraphs (b) through (h) of this section are applied to determine the allocation of any additional net operating loss deduction and other deductions or losses and the applicable increases in the taxpayer's overall foreign loss, separate limitation loss, and overall domestic loss accounts, as well as any additional recapture and reduction of the taxpayer's separate limitation loss, overall foreign loss, and overall domestic loss accounts.

(2) *Rules for additional recapture of loss accounts.* For the purpose of recapturing and reducing loss accounts under paragraph (j)(1) of this section, the taxpayer also takes into account any creation of or addition to loss accounts that result from the application of paragraphs (b) through (i) of this section in the current tax year. If any of the additional income described in paragraph (j)(1) of this section is foreign source income in a separate category for which there is a remaining balance in an OFL account after applying paragraph (i) of this section, the section 904(f)(1) recapture amount under § 1.904(f)–2(c) for that additional income is determined by first computing a hypothetical recapture amount as it would have been determined prior to the application of paragraph (i) of this section but taking into account the additional foreign source income described in this paragraph (j)(2) and then subtracting the actual OFL recapture determined prior to the application of paragraph (i) of this section (that did not take into account the additional foreign source income). The remainder is the OFL recapture amount with respect to the additional foreign source income described in this paragraph (j)(2).

* * * * *

(l) *Applicability date.* This section applies to taxable years ending on or after the date the final regulations are filed with the **Federal Register**.

■ **Par. 17.** Section 1.905–3 is amended by:

■ 1. Revising the section heading and the first sentence of paragraph (a).

■ 2. Adding paragraphs (b)(2) and (3).

■ 3. Revising paragraph (d).

The revisions and additions read as follows:

§ 1.905–3 Adjustments to U.S. tax liability and to current earnings and profits as a result of a foreign tax redetermination.

(a) * * * For purposes of this section and § 1.905–4, the term foreign tax redetermination means a change in the liability for foreign income taxes, as defined in § 1.960–1(b)(5), or certain other changes described in this paragraph (a) that may affect a taxpayer's U.S. tax liability, including by reason of a change in the amount of its foreign tax credit, the amount of its distributions or inclusions under sections 951, 951A, or 1293, the application of the high-tax exception described in section 954(b)(4) (including for purposes of determining tested income under section 951A(c)(2)(A)(i)(III)), or the amount of tax determined under sections 1291(c)(2) and 1291(g)(1)(C)(ii). * * *

(b) * * *

(2) *Foreign income taxes paid or accrued by foreign corporations*—(i) *In general.* A redetermination of U.S. tax liability is required to account for the effect of a redetermination of foreign income taxes taken into account by a foreign corporation in the year accrued, or a refund of foreign income taxes taken into account by the foreign corporation in the year paid.

(ii) *Required adjustments.* If a redetermination of U.S. tax liability is required for any taxable year under paragraph (b)(2)(i) of this section, the foreign corporation's taxable income, earnings and profits, and current year taxes (as defined in § 1.960–1(b)(4)) must be adjusted in the year to which the redetermined tax relates (or, in the case of a foreign corporation that receives a refund of foreign income tax and uses the cash basis of accounting, in the year the tax was paid). The redetermination of U.S. tax liability is made by treating the redetermined amount of foreign tax as the amount of tax paid or accrued by the foreign corporation in such year. For example, in the case of a refund of foreign income taxes taken into account in the year accrued, the foreign corporation's subpart F income, tested income, and earnings and profits are increased, as appropriate, in the year to which the foreign tax relates to reflect the functional currency amount of the foreign income tax refund. The required redetermination of U.S. tax liability must account for the effect of the foreign tax redetermination on the characterization and amount of distributions or inclusions under sections 951, 951A, or 1293 taken into account by each of the foreign corporation's United States shareholders, on the application of the high-tax exception described in section 954(b)(4) (including for purposes of determining tested income under section 951A(c)(2)(A)(i)(III)), and the amount of tax determined under sections 1291(c)(2) and 1291(g)(1)(C)(ii), as well as on the amount of foreign taxes deemed paid under section 960 in such year, regardless of whether any such shareholder chooses to deduct or credit its foreign income taxes in any taxable year. In addition, a redetermination of U.S. tax liability is required for any subsequent taxable year in which the characterization or amount of a United States shareholder's distribution or inclusion from the foreign corporation is affected by the foreign tax redetermination, up to and including the taxable year in which the foreign tax redetermination occurs, as well as any year to which unused foreign taxes from such year were carried under section 904(c).

(iii) *Reduction of corporate level tax on distribution of earnings and profits.* If a United States shareholder of a controlled foreign corporation receives a distribution out of previously taxed earnings and profits described in section 959(c)(1) and (2) and a foreign country has imposed tax on the income of the controlled foreign corporation, which tax is reduced on distribution of the earnings and profits of the corporation (resulting in a foreign tax redetermination), then the United States shareholder must redetermine its U.S. tax liability for the year or years affected.

(iv) *Foreign tax redeterminations relating to taxable years beginning before January 1, 2018.* In the case of a foreign tax redetermination of a foreign corporation that relates to a taxable year of the foreign corporation beginning before January 1, 2018, a redetermination of U.S. tax liability is required under the rules of § 1.905–5.

(v) *Examples.* The following examples illustrate the application of this paragraph (b)(2).

(A) *Presumed Facts.* Except as otherwise provided, the following facts are assumed for purposes of the examples:

(*1*) All parties are accrual basis taxpayers that use the calendar year as their taxable year both for Federal income tax purposes and for foreign tax purposes and use the average exchange rate to translate accrued foreign income taxes;

(*2*) CFC, CFC1, and CFC2 are controlled foreign corporations organized in Country X that use the ''u'' as their functional currency;

(*3*) No income adjustment is required to reflect exchange gain or loss (within the meaning of § 1.988–1(e)) with respect to the disposition of nonfunctional currency attributable to a refund of foreign income taxes received by any CFC, because all foreign income taxes are denominated and paid in the CFC's functional currency;

(*4*) The highest rate of U.S. tax in section 11 and the rate applicable to USP in all years is 21 percent; and

(*5*) USP's foreign tax credit limitation under section 904(a) exceeds the amount of foreign income taxes it is deemed to pay.

(B) *Example 1: Refund of tested foreign income taxes*—(*1*) *Facts.* CFC is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns 3,660u of general category gross tested income and accrues and pays 300u of foreign income taxes with respect to that income. CFC has no allowable deductions other than the foreign income tax expense. Accordingly, CFC has tested income of 3,360u in Year 1. CFC has no qualified business asset investment (within the meaning of section 951A(d) and § 1.951A–3(b)). In Year 1, no portion of USP's deduction under section 250 (''section 250 deduction'') is reduced by reason of section 250(a)(2)(B)(ii). USP's inclusion percentage (as defined in § 1.960–2(c)(2)) is 100%. In Year 1, USP earns no other income and has no other expenses. The average exchange rate used to translate USP's inclusion under section 951A and CFC's foreign income taxes into dollars for Year 1 is $1x:1u. *See* section 989(b)(3) and §§ 1.951A–1(d)(1) and 1.986(a)–1(a)(1). Accordingly, for Year 1, USP's tested foreign income taxes (as defined in § 1.960–2(c)(3)) with respect to CFC are $300x. In Year 3, CFC carries back a loss for foreign tax purposes and receives a refund of foreign tax of 100u that relates to Year 1.

(*2*) *Analysis*—(*i*) *Result in Year 1.* In Year 1, CFC has tested income of 3,360u and tested foreign income taxes of $300x. Under section 951A(a) and § 1.951A–1(c)(1), USP has a GILTI inclusion amount of $3,360x (3,360u translated at $1x:1u). Under section 960(d) and § 1.960–2(c), USP is deemed to have paid $240x (80% × 100% × $300x) of foreign income taxes. Under section 78 and § 1.78–1(a), USP is treated as receiving a dividend of $300x (a ''section 78 dividend''). USP's section 250 deduction is $1,830x (50% × ($3,360x + $300x)). Accordingly, for Year 1, USP has taxable income of $1,830x ($3,360x + $300x − $1,830x) and pre-credit U.S. tax liability of $384.3x (21% × $1,830x). Accordingly, USP pays U.S. tax of $144.3x ($384.3x − $240x).

(*ii*) *Result in Year 3.* The refund of 100u to CFC in Year 3 is a foreign tax redetermination under paragraph (a) of this section. Under paragraph (b)(2)(ii) of this section, USP must account for the effect of the foreign tax redetermination on its GILTI inclusion amount and foreign taxes deemed paid in Year 1. In redetermining USP's U.S. tax liability for Year 1, USP must increase CFC's tested income and its earnings and profits in Year 1 by the refunded tax amount of 100u, must determine the effect of that increase on its GILTI inclusion amount, and must adjust the amount of foreign taxes deemed paid and the section 78 dividend to account for CFC's refund of foreign tax. Under § 1.986(a)–1(c), the refund is translated into dollars at the exchange rate that was used to translate such amount when initially accrued. As a result of the foreign tax redetermination, for Year 1, CFC has tested income of 3,460u (3,360u + 100u) and tested foreign income taxes of $200x ($300x − $100x). Under section 951A(a) and § 1.951A–1(c)(1), USP has a redetermined GILTI inclusion amount of $3,460x (3,460u translated at $1x:1u). Under section 960(d) and § 1.960–2(c), USP is deemed to have paid $160x (80% × 100% × $200x) of foreign income taxes. Under section 78 and § 1.78–1(a), USP's section 78 dividend is $200x. USP's redetermined section 250 deduction is $1,830x (50% × ($3,460x + $200x)). Accordingly, USP's redetermined taxable income is $1,830x ($3,460x + $200x − $1,830x) and its pre-credit U.S. tax liability is $384.3x (21% × $1,830x). Therefore, USP's redetermined U.S. tax liability is $224.3x ($384.3x − $160x), an increase of $80x ($224.3x − $144.3x).

(C) *Example 2: High tax exception election following a foreign tax redetermination*—(*1*) *Facts.* CFC is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns 1,000u of general category gross foreign base company sales income and accrues and pays 100u of foreign income taxes with respect to that income. CFC has no allowable deductions other than the foreign income tax expense. The average exchange rate used to translate USP's subpart F inclusion and CFC's foreign income taxes into dollars for Year 1 is $1x:1u. *See* section 989(b)(3) and § 1.986(a)–1(a)(1). In Year 1, USP earns no other income and has no other expenses. In Year 5, pursuant to a Country X audit CFC accrues and pays additional foreign income tax of 80u with respect to its 1,000u of general category foreign base company sales income earned in Year 1. The spot rate (as defined in § 1.988–1(d)) on the date of payment of the tax in Year 5 is $1x:0.8u. The foreign income taxes accrued and paid in Year 1 and Year 5 are properly attributable to CFC's foreign base company sales income that is included in income by USP under section 951(a)(1)(A) (''subpart F inclusion'') in Year 1 with respect to CFC.

(*2*) *Analysis*—(*i*) *Result in Year 1.* In Year 1, CFC has subpart F income of 900u (1,000u − 100u). Accordingly, USP has a $900x (900u translated at $1x:1u) subpart F inclusion. Under section 960(a) and § 1.960–2(b), USP is deemed to have paid $100x (100u translated at $1x:1u) of foreign income taxes. Under section 78 and § 1.78–1(a), USP's section 78 dividend is $100x. Accordingly, for Year 1, USP has taxable income of $1,000x ($900x + $100x) and pre-credit U.S. tax liability of $210x (21% × $1,000x). Accordingly, USP's U.S. tax liability is $110x ($210x − $100x).

(*ii*) *Result in Year 5.* CFC's payment of 80u of additional foreign income tax in Year 5 with respect to Year 1 is a foreign tax redetermination as defined in paragraph (a) of this section. Under paragraph (b)(2)(ii) of this section, USP must reduce CFC's subpart F income and its earnings and profits in Year 1 by the additional tax amount of 80u. Further, USP must reduce its subpart F inclusion, adjust the amount of foreign taxes deemed paid, and adjust the amount of the section 78 dividend to account for CFC's additional payment of foreign tax. Under section 986(a)(1)(B)(i) and § 1.986(a)–1(a)(2)(i), because CFC's payment of additional tax occurs more than 24 months after the close of the taxable year to which it relates, the additional tax is translated into dollars at the spot rate on the date of payment ($1x:0.8u). Therefore, CFC has foreign income taxes of $200x (100u translated at $1x:1u plus 80u translated at $1x:0.8u) that are properly attributable to CFC's foreign base company sales income that gives rise to USP's subpart F inclusion in Year 1. As a result of the foreign tax redetermination, for Year 1, USP has a subpart F inclusion of $820x (1,000u − 180u = 820u translated at $1x:1u). Under section 960(a) and § 1.960–2(b), USP is deemed to have paid $200x of foreign income taxes. Under section 78 and § 1.78–1(a), USP's section 78 dividend is $200x. For purposes of section 954(b)(4), the effective tax rate on the general category foreign base company sales income is determined by dividing $200x, the U.S. dollar amount of the foreign taxes deemed paid, by the U.S. dollar amount of the net item of foreign base company sales income ($820x) plus the amount of the foreign income tax ($200x). Thus, the effective rate imposed on the general category foreign base company sales income in Year 1 is 19.6% ($200x/$1020x), which exceeds 18.9% (90% of 21%, the highest tax rate in section 11). Therefore, after the foreign tax redetermination, USP is eligible to elect to exclude the item of subpart F income under section 954(b)(4) and § 1.954–1(d). If USP makes the election under § 1.954–1(d), USP's taxable income, pre-credit U.S. tax liability, and allowable foreign tax credit is zero, resulting in a decrease in USP's U.S. tax liability of $110x. If USP does not make the election under § 1.954–1(d), then USP's redetermined U.S. taxable income is $1020x ($820x + $200x) and its pre-credit U.S. tax liability is $214.2x (21% × $1020x). Therefore, USP's redetermined U.S. tax liability is $14.20x ($214.2x − $200x), a decrease of $95.80x ($110x − $14.20x). If USP makes a timely refund claim within the time period allowed by section 6511, USP will be entitled to a refund of any overpayment resulting from the redetermination of U.S. tax liability.

(D) *Example 3: Two-year rule*—(*1*) *Facts.* CFC is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns 1,000u of general category gross foreign base company sales income and accrues 210u of foreign income taxes with respect to that income. In Year 1, USP earns no other income and has no other expenses. The average exchange rate used to translate USP's subpart F inclusion and CFC's foreign income taxes into dollars for Year 1 is $1x:1u. *See* sections 989(b)(3) and 986(a)(1)(A) and § 1.986(a)–1(a)(1). USP does not elect to treat CFC's subpart F income as high taxed income under section 954(b)(4). CFC does not pay its foreign income taxes for Year 1 until September 1, Year 5, when the spot rate is $0.8x:1u. The foreign income taxes accrued and paid in Year 1 and Year 5, respectively, are properly attributable to CFC's foreign base company sales income that gives rise to USP's subpart F inclusion in Year 1 with respect to CFC.

(*2*) *Analysis*—(*i*) *Result in Year 1.* In Year 1, CFC has subpart F income of 790u (1,000u − 210u). Accordingly, USP has a $790x (790u translated at $1x:1u) subpart F inclusion. Under section 960(a) and § 1.960–2(b), USP is deemed to have paid $210x (210u translated at $1x:1u) of foreign income taxes. Under section 78 and § 1.78–1(a), USP's section 78 dividend is $210x. Accordingly, for Year 1, USP has taxable income of $1,000x ($790x + $210x) and pre-credit U.S. tax liability of $210x (21% × $1,000x). Accordingly, USP owes no U.S. tax ($210x − $210x = 0).

(*ii*) *Result in Year 3.* CFC's failure to pay the tax by the end of Year 3 results in a foreign tax redetermination under paragraph (a) of this section. Because the taxes are not paid on or before the date 24 months after the close of the taxable year to which the tax relates, under paragraph (a) of this section CFC must account for the redetermination as if the unpaid 210u of taxes were refunded on the last day of Year 3. Under paragraph (b)(2)(ii) of this section, USP must increase CFC's subpart F income and its earnings and profits in Year 1 by the unpaid tax amount of 210u. Further, USP must increase its subpart F inclusion, and decrease the amount of foreign taxes deemed paid and the amount of the section 78 dividend to account for the unpaid taxes. As a result of the foreign tax redetermination, for Year 1, USP has a subpart F inclusion of $1,000x (1,000u translated at $1x:1u). Under section 960(a) and § 1.960–2(b), USP is deemed to have paid no foreign income taxes. Under section 78 and § 1.78–1(a), USP has no section 78 dividend. Accordingly, USP's redetermined taxable income is $1,000x and its pre-credit U.S. tax liability is unchanged at $210x (21% × $1,000x). However, USP has no foreign tax credits. Therefore, USP's redetermined U.S. tax liability for Year 1 is $210x, an increase of $210x.

(*iii*) *Result in Year 5.* CFC's payment of the Year 1 tax liability of 210u on September 1, Year 5, results in a second foreign tax redetermination under paragraph (a) of this section. Under paragraph (b)(2)(ii) of this section, USP must decrease CFC's subpart F income and its earnings and profits in Year 1 by the tax paid amount of 210u. Further, USP must reduce its subpart F inclusion, and increase the amount of foreign taxes deemed paid and the amount of the section 78 dividend to account for CFC's payment of foreign tax. Under section 986(a)(1)(B)(i) and § 1.986(a)–1(a)(2)(i), because the tax was paid more than 24 months after the close of the year to which the tax relates, CFC must translate the 210u of tax at the spot rate on the date of payment of the foreign taxes in Year 5. Therefore, CFC has foreign income taxes of $168x (210u translated at $0.8x:1u) that are properly attributable to CFC's foreign base company sales income that gives rise to USP's subpart F inclusion in Year 1. As a result of the foreign tax redetermination, for Year 1, USP has a subpart F inclusion of $790x (1,000u − 210u = 790u translated at $1x:1u). Under section 960(a) and § 1.960–2(b), USP is deemed to have paid $168x of foreign income taxes. Under section 78 and § 1.78–1(a), USP's section 78 dividend is $168x. Accordingly, USP's redetermined taxable income is $958x ($790x + $168x) and its pre-credit U.S. tax liability is $201.18x (21% × $958x). Under section 904(a), USP's foreign tax credit limitation is $201.18x ($201.18x × $958x/$958x) and exceeds the $168x of foreign income tax that USP is deemed to have paid. Therefore USP's redetermined U.S. tax liability is $33.18 ($201.18x − $168x), a decrease of $176.82x ($210x − $33.18x).

(E) *Example 4: Contested tax*—(*1*) *Facts.* CFC is a wholly-owned subsidiary of USP, a domestic corporation. In Year 1, CFC earns 360u of general category gross tested income and accrues and pays 160u of current year taxes with respect to that income. CFC has no allowable deductions other than the foreign income tax expense. Accordingly, CFC has tested income of 200u in year 1. CFC has no qualified business asset investment (within the meaning of section 951A(d) and § 1.951A–3(b)). In Year 1, no portion of USP's section 250 deduction is reduced by reason of section 250(a)(2)(B)(ii). USP's inclusion percentage (as defined in § 1.960–2(c)(2)) is 100%. In Year 1, USP earns no other income and has no other expenses. The average exchange rate used to translate USP's section 951A inclusion and CFC's foreign income taxes into dollars for Year 1 is $1x:1u. *See* section 989(b)(3) and §§ 1.951A–1(d)(1) and 1.986(a)–1(a)(1). Accordingly, for Year 1, USP's tested foreign income taxes (as defined in § 1.960–2(c)(3)) with respect to CFC are $160x. In Year 3, Country X assessed an additional 30u of tax with respect to CFC's Year 1 income. CFC did not pay the additional 30u of tax and contested the assessment. After exhausting all effective and practical remedies to reduce, over time, its liability for foreign tax, CFC settled the contest with Country X in Year 4 for 20u, which CFC did not pay until January 15, Year 5, when the spot rate was $1.1x:1u. CFC did not earn any other income or accrue any other foreign income taxes in Years 2 through 6 and made no distributions to USP. The additional taxes paid in Year 5 are also tested foreign income taxes of USP with respect to CFC.

(*2*) *Analysis*—(*i*) *Result in Year 1.* In Year 1, CFC has tested income of 200u and tested foreign income taxes of $160x. Under section 951A(a) and § 1.951A–1(c)(1), USP has a GILTI inclusion amount of $200x (200u translated at $1x:1u). Under section 960(d) and § 1.960–2(c), USP is deemed to have paid $128x (80% × 100% × $160x) of foreign income taxes. Under section 78 and § 1.78–1(a), USP's section 78 dividend is $160x. USP's section 250 deduction is $180x (50% × ($200x + $160x)). Accordingly, for Year 1, USP has taxable income of $180x ($200x + $160x − $180x) and a pre-credit U.S. tax liability of $37.8x (21% $180x). Under section 904(a), because all of USP's income is section 951A category income (see § 1.904–4(g)), USP's foreign tax credit limitation is $37.8 ($37.8x × $180x/$180x), which is less than the $128x of foreign income tax that USP is deemed to have paid. Accordingly, USP owes no U.S. tax ($37.8x − $37.8x = 0).

(*ii*) *Result in Year 5.* CFC's accrual and payment of the additional 20u of foreign income tax with respect to Year 1 is a foreign tax redetermination under paragraph (a) of this section. Under § 1.461–4(g)(6)(iii)(B), the additional taxes accrue when the tax contest is resolved, that is, in Year 4. However, because the taxes, which relate to Year 1, were not paid on or before the date 24 months after close of CFC's taxable year to which the tax relates, that is, Year 1, under section 905(c)(2) and paragraph (a) of this section CFC cannot take these taxes into account when they accrue in Year 4. Instead, the taxes are taken into account when they are paid in Year 5. Under paragraph (b)(2)(ii) of this section, USP must decrease CFC's tested income and its earnings and profits in Year 1 by the additional tax amount of 20u. Further, USP must adjust its GILTI inclusion amount, the amount of foreign taxes deemed paid, and the amount of the section 78 dividend to account for CFC's additional payment of tax. Under section 986(a)(1)(B)(i) and § 1.986(a)–1(a)(2)(i), because CFC's payment of additional tax occurs more than 24 months after the close of the taxable year to which it relates, the additional tax is translated into dollars at the spot rate on the date of payment ($1.1x:1u). Therefore, CFC has tested foreign income taxes of $182x (160u translated at $1x:1u plus 20u translated at $1.1x:1u). As a result of the foreign tax redetermination, for Year 1, CFC has tested income of 180u (200u − 20u). Under section 951A(a) and § 1.951A–1(c)(1), USP has a redetermined GILTI inclusion amount of $180x (180u, translated at $1x:1u). Under section 960(d) and § 1.960–2(c), USP is deemed to have paid $145.6x (80% × 100% × $182x) of foreign income taxes. Under section 78 and § 1.78–1(a), USP's section 78 dividend is $182x. USP's redetermined section 250 deduction is $181x (50% × ($180x + $182x)). Accordingly, USP's redetermined taxable income is $181x ($180x + $182x − $181x) and its pre-credit U.S. tax liability is $38.01x (21% × $181x). Under section 904(a), USP's foreign tax credit limitation is $38.01x ($38.01x × $181x/$181x), which is less than the $145.6x of foreign tax credits that USP is deemed to have paid. Therefore, USP's redetermined U.S. tax liability is zero ($38.01x − $38.01x).

(3) *Foreign tax redeterminations of successors or transferees.* If at the time of a foreign tax redetermination the person with legal liability for the tax (or in the case of a refund, the legal right to such refund) (the ''successor'') is a different person than the person that had legal liability for the tax in the year to which the redetermined tax relates (the ''original taxpayer''), the required redetermination of U.S. tax liability is made as if the foreign tax redetermination occurred in the hands of the original taxpayer. Federal income tax principles apply to determine the tax consequences if the successor remits (or receives a refund of) a tax that in the year to which the redetermined tax relates was the legal liability of, and thus under § 1.901–2(f) is considered paid by, the original taxpayer.

* * * * *

(d) *Applicability dates.* This section applies to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019, and to foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a United States shareholder ending on or after December 16, 2019 and that relate to taxable years of foreign corporations beginning after December 31, 2017.

■ **Par. 18.** Section 1.905–4, as proposed to be added at 72 FR 62805 (November 7, 2007), is further revised to read as follows:

§ 1.905–4 Notification of foreign tax redetermination.

(a) *Application of this section.* The rules of this section apply if, as a result of a foreign tax redetermination (as defined in § 1.905–3(a)), a redetermination of U.S. tax liability is required under section 905(c) and § 1.905–3(b).

(b) *Time and manner of notification*—(1) *Redetermination of U.S. tax liability*—(i) *In general.* Except as provided in paragraphs (b)(1)(v) and (b)(2) through (b)(4) of this section, any taxpayer for which a redetermination of U.S. tax liability is required must notify the Internal Revenue Service (IRS) of the foreign tax redetermination by filing an amended return, Form 1118 (Foreign Tax Credit—Corporations) or Form 1116 (Foreign Tax Credit), and the statement described in paragraph (c) of this section for the taxable year with respect to which a redetermination of U.S. tax liability is required. Such notification must be filed within the time prescribed by this paragraph (b) and contain the information described in paragraph (c) of this section. If a foreign tax redetermination requires an individual to redetermine the individual's U.S. tax liability, and if, after taking into account such foreign tax redetermination, the amount of creditable foreign taxes (as defined in section 904(j)(3)(B)) that are paid or accrued by such individual during the taxable year does not exceed the applicable dollar limitation in section 904(j), the individual is not required to file Form 1116 with the amended return for such taxable year if the individual satisfies the requirements of section 904(j).

(ii) *Increase in amount of U.S. tax liability.* Except as provided in paragraphs (b)(1)(iv) and (b)(2) through (b)(4) of this section, for each taxable year of the taxpayer with respect to which a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination that increases the amount of U.S. tax liability, for example, by reason of a downward adjustment to the amount of foreign income taxes paid or accrued by the taxpayer or a foreign corporation with respect to which the taxpayer computes an amount of foreign taxes deemed paid, the taxpayer must file a separate notification by the due date (with extensions) of the original return for the taxpayer's taxable year in which the foreign tax redetermination occurs.

(iii) *Decrease in amount of U.S. tax liability.* Except as provided in paragraphs (b)(1)(iv) and (b)(2) through (b)(4) of this section, for each taxable year of the taxpayer with respect to which a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination that decreases the amount of U.S. tax liability and results in an overpayment, for example, by reason of an increase in the amount of foreign income taxes paid or accrued by the taxpayer or a foreign corporation with respect to which the taxpayer computes an amount of foreign taxes deemed paid, the taxpayer must file a claim for refund with the IRS within the period provided in section 6511. See section 6511(d)(3)(A) for the special refund period for refunds attributable to an increase in foreign tax credits.

(iv) *Multiple redeterminations of U.S. tax liability for same taxable year.* The rules of this paragraph (b)(1)(iv) apply except as provided in paragraphs (b)(1)(v), (b)(2) through (b)(4) of this section. If more than one foreign tax redetermination requires a redetermination of U.S. tax liability for the same affected taxable year of the taxpayer and those foreign tax redeterminations occur within the same taxable year or within two consecutive taxable years of the taxpayer, the taxpayer may file for the affected taxable year one amended return, Form 1118 or Form 1116, and the statement described in paragraph (c) of this section that reflects all such foreign tax redeterminations. If the taxpayer chooses to file one notification for such redeterminations, one or more of such redeterminations would increase the U.S. tax liability, and the net effect of all such redeterminations is to increase the U.S. tax liability for the affected taxable year, the taxpayer must file such notification by the due date (with extensions) of the original return for the taxpayer's taxable year in which the first foreign tax redetermination that would result in an increased U.S. tax liability occurred. If the taxpayer chooses to file one notification for such redeterminations, one or more of such redeterminations would decrease the U.S. tax liability, and the net effect of all such redeterminations is to decrease the total amount of U.S. tax liability for the affected taxable year, the taxpayer must file such notification as provided in paragraph (b)(1)(iii) of this section, within the period provided by section 6511. If a foreign tax redetermination with respect to the taxable year for which a redetermination of U.S. tax liability is required occurs after the date for providing such notification, more than one amended return may be required with respect to that taxable year.

(v) *Amended return required only if there is a change in amount of U.S. tax due.* If a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination, but does not change the amount of U.S. tax due for any taxable year, the taxpayer may, in lieu of applying the applicable rules of paragraphs (b)(1)(i) through (iv) of this section, notify the IRS of such redetermination by attaching a statement to the original return for the taxpayer's taxable year in which the foreign tax redetermination occurs. Such statement must be filed by the due date (with extensions) of the original return for the taxpayer's taxable year in which the foreign tax redetermination occurs and contain the information described in § 1.904–2(f). If a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination (either alone, or if the taxpayer chooses to apply paragraph (b)(1)(iv) of this section, in combination with other foreign tax redeterminations, as provided therein) and the redetermination of U.S. tax liability results in a change to the amount of U.S. tax due for a taxable year, but does not change the amount of U.S. tax due for other taxable years, for example, because of a carryback or carryover of an unused foreign tax under section 904(c), the notification requirements for such other taxable years are deemed to be satisfied if the taxpayer complies with the applicable rules of paragraphs (b)(1)(i) through (iv) of this section with respect to each taxable year for which the foreign tax redetermination changes the amount of U.S. tax due.

(2) *Notification with respect to a change in the amount of foreign tax reported to an owner by a pass-through entity*—(i) *In general.* If a partnership, trust, or other pass-through entity that reports to its beneficial owners (or to any intermediary on behalf its beneficial owners), including partners, shareholders, beneficiaries, or similar persons, an amount of creditable foreign income taxes, such pass-through entity must notify both the IRS and its owners of any foreign tax redetermination described in § 1.905–3(a) with respect to the foreign tax so reported. For purposes of this paragraph (b)(2), whether or not a redetermination has occurred within the meaning of § 1.905–3(a) is determined as if the pass-through entity were a domestic corporation which had elected to and claimed foreign tax credits in the amount reported for the year to which such foreign taxes relate. The notification required under this paragraph (b)(2) must include the statement described in paragraph (c) of this section along with any information necessary for the owners to redetermine their U.S. tax liability.

(ii) *Partnerships subject to subchapter C of chapter 63.* Except as provided in paragraph (b)(4) of this section, if a redetermination of U.S. tax liability that is required under § 1.905–3(b) by reason of a foreign tax redetermination described in § 1.905–3(a) would require a partnership adjustment as defined in § 301.6241–1(a)(6) of this chapter, the partnership must file an administrative adjustment request under section 6227 and make any adjustments required under section 6227. See § 301.6227–2 and § 301.6227–3 of this chapter for procedures for making adjustments with respect to an administrative adjustment request. An administrative adjustment request required under this paragraph (b)(2)(ii) must be filed by the due date (with extensions) of the original return for the partnership's taxable year in which the foreign tax redetermination occurs, and the restrictions in section 6227(c) do not apply to such filing. However, unless the administrative adjustment request may otherwise be filed after applying the limitations contained in section 6227(c), such a request is limited to adjustments that are required to be made under section 905(c). The requirements of paragraph (b)(2)(i) of this section are deemed to be satisfied with respect to any item taken into account in an administrative adjustment request filed under this paragraph (b)(2)(ii).

(3) *Alternative notification requirements.* An amended return and Form 1118 (Foreign Tax Credit—Corporations) or Form 1116 (Foreign Tax Credit), is not required to notify the IRS of the foreign tax redetermination and redetermination of U.S. tax liability if the taxpayer satisfies alternative notification requirements that may be prescribed by the IRS through forms, instructions, publications, or other guidance.

(4) *Taxpayers under examination within the jurisdiction of the Large Business and International Division*—(i) *In general.* The alternative notification requirements of this paragraph (b)(4) apply if all of the following conditions are satisfied:

(A) A foreign tax redetermination occurs while the taxpayer is under examination within the jurisdiction of the Large Business and International Division (or a successor division);

(B) The foreign tax redetermination results in a downward adjustment to the amount of foreign income taxes paid or accrued by the taxpayer or a foreign corporation with respect to which the taxpayer computes an amount of foreign income taxes deemed paid;

(C) The foreign tax redetermination requires a redetermination of U.S. tax liability and accordingly, but for this paragraph (b)(4), the taxpayer would be required to notify the IRS of such foreign tax redetermination under paragraph (b)(1)(ii) of this section (determined without regard to paragraphs (b)(1)(iv) and (v) of this section) or (b)(2)(ii) of this section;

(D) The return for the taxable year for which a redetermination of U.S. tax liability is required is under examination; and

(E) The due date specified in paragraph (b)(1)(ii) or (b)(2) of this section for providing notice of such foreign tax redetermination is not before the later of the opening conference or the hand-delivery or postmark date of the opening letter concerning an examination of the return for the taxable year for which a redetermination of U.S.

tax liability is required by reason of such foreign tax redetermination.

(ii) *Notification requirements*—(A) *Foreign tax redetermination occurring before commencement of the examination.* If a foreign tax redetermination described in paragraph (b)(4)(i)(B) and (C) of this section occurs before the later of the opening conference or the hand-delivery or postmark date of the opening letter and if the condition provided in paragraph (b)(4)(i)(E) of this section with respect to such foreign tax redetermination is met, the taxpayer, in lieu of applying the rules of paragraph (b)(1)(i) and (ii) of this section (requiring the filing of an amended return, Form 1118, and the statement described in paragraph (c) of this section) or (b)(2)(ii) of this section (requiring the filing of an administrative adjustment request), must notify the IRS of such redetermination by providing the statement described in paragraph (b)(4)(iii) of this section to the examiner no later than 120 days after the later of the date of the opening conference of the examination, or the hand-delivery or postmark date of the opening letter concerning the examination.

(B) *Foreign tax redetermination occurring within 180 days after commencement of the examination.* If a foreign tax redetermination described in paragraph (b)(4)(i)(B) and (C) of this section occurs on or after the latest of the opening conference or the hand-delivery or postmark date of the opening letter and on or before the date that is 180 days after the later of the opening conference or the hand-delivery or postmark date of the opening letter, the taxpayer, in lieu of applying the rules of paragraph (b)(1)(i) and (ii) of this section or (b)(2) of this section, must notify the IRS of such redetermination by providing the statement described in paragraph (b)(4)(iii) of this section to the examiner no later than 120 days after the date the foreign tax redetermination occurs.

(C) *Foreign tax redetermination occurring more than 180 days after commencement of the examination.* If a foreign tax redetermination described in paragraphs (b)(4)(i)(B) and (C) of this section occurs after the date that is 180 days after the later of the opening conference or the hand-delivery or postmark date of the opening letter, the taxpayer must either apply the rules of paragraphs (b)(1)(i) and (ii) of this section or (b)(2) of this section, or, in lieu of applying paragraphs (b)(1)(i) and (ii) of this section or (b)(2) of this section, provide the statement described in paragraph (b)(4)(iii) of this section to the examiner within 120 days after the date the foreign tax redetermination occurs. However, the IRS, in its discretion, may either accept such statement or require the taxpayer to comply with the rules of paragraphs (b)(1)(i) and (ii) of this section or (b)(2) of this section, as applicable.

(iii) *Statement.* The statement required by paragraphs (b)(4)(ii)(A) and (B) of this section must provide the original amount of foreign income taxes paid or accrued, the revised amount of foreign income taxes paid or accrued, and documentation with respect to the revisions, including exchange rates and dates of accrual or payment, and, if applicable, the information described in paragraph (c)(8) of this section. The statement must include the following declaration signed by a person authorized to sign the return of the taxpayer: ''Under penalties of perjury, I declare that I have examined this written statement, and to the best of my knowledge and belief, this written statement is true, correct, and complete.''

(iv) *Penalty for failure to file notice of a foreign tax redetermination.* A taxpayer subject to the rules of this paragraph (b)(4) must satisfy the rules of paragraph (b)(4)(ii) of this section in order not to be subject to the penalty relating to the failure to file notice of a foreign tax redetermination under section 6689 and § 301.6689–1 of this chapter.

(5) *Examples.* The following examples illustrate the application of paragraph (b) of this section.

(i) *Example 1*—(A) X, a domestic corporation, is an accrual basis taxpayer and uses the calendar year as its U.S. taxable year. X conducts business through a branch in Country M, the currency of which is the m, and also conducts business through a branch in Country N, the currency of which is the n. X uses the average exchange rate to translate foreign income taxes. Assume that X is able to claim a credit under section 901 for all foreign income taxes paid or accrued.

(B) In Year 1, X accrued and paid 100m of Country M income taxes with respect to 400m of foreign source foreign branch category income. The average exchange rate for Year 1 was $1:1m. Also in Year 1, X accrued and paid 50n of Country N income taxes with respect to 150n of foreign source foreign branch category income. The average exchange rate for Year 1 was $1:1n. On its Year 1 Federal income tax return, X claimed a foreign tax credit under section 901 of $150 ($100 (100m translated at $1:1m) + $50 (50n translated at $1:1n)) with respect to its foreign source foreign branch category income. *See* § 1.986(a)–1(a)(1).

(C) In Year 2, X accrued and paid 100n of Country N income taxes with respect to 300n of foreign source foreign branch category income. The average exchange rate for Year 2 was $1.50:1n. On its Year 2 Federal income tax return X claimed a foreign tax credit under section 901 of $150 (100n translated at $1.5:1n). *See* § 1.986(a)–1(a)(1).

(D) On June 15, Year 5, when the spot rate was $1.40:1n, X received a refund of 10n from Country N, and, on March 15, Year 6, when the spot rate was $1.20:1m, X was assessed by and paid Country M an additional 20m of tax. Both payments were with respect to X's foreign source foreign branch category income in Year 1. On May 15, Year 6, when the spot rate was $1.45:1n, X received a refund of 5n from Country N with respect to its foreign source foreign branch category income in Year 2.

(E) Both the refunds and the assessment are foreign tax redeterminations under § 1.905–3(a). Under § 1.905–3(b)(1), X must redetermine its U.S. tax liability for both Year 1 and Year 2. With respect to Year 1, under paragraph (b)(1)(ii) of this section, X must notify the IRS of the June 15, Year 5, refund of 10n from Country N that increased X's U.S. tax liability by filing an amended return, Form 1118, and the statement required in paragraph (c) of this section for Year 1 by the due date of the original return (with extensions) for Year 5. The amended return and Form 1118 reduces the amount of foreign income taxes claimed as a credit under section 901 and increases X's U.S. tax liability by $10 (10n refund translated at the average exchange rate for Year 1, or $1:1n (see § 1.986(a)–1(c)). With respect to the March 15, Year 6, additional assessment of 20m by Country M, under paragraph (b)(1)(iii) of this section, X must notify the IRS within the time period provided by section 6511, increasing the foreign income taxes available as a credit and reducing X's U.S. tax liability by $24 (20m translated at the spot rate on the date of payment, or $1.20:1m). *See* sections 986(a)(1)(B)(i) and 986(a)(2)(A) and § 1.986(a)–1(a)(2)(i). X may so notify the IRS by filing a second amended return, Form 1118, and the statement described in paragraph (c) of this section for Year 1, within the time period provided by section 6511. Alternatively, under paragraph (b)(1)(iv) of this section, when X redetermines its U.S. tax liability for Year 1 to take into account the 10n refund from Country N that occurred in Year 5, X may also take into account the 20m additional assessment by Country M that occurred on March 15, Year 6. If X reflects both foreign tax redeterminations on the same amended return, Form 1118, and in the statement described in paragraph (c) of this section for Year 1, the amount of X's foreign income taxes available as a credit would be reduced by $10 (10n refund translated at $1:1n), and increased by $24 (20m additional assessment translated at the spot rate on the date of payment, March 15, Year 6, or $1.20:1m). The foreign income taxes available as a credit therefore would be increased by $14 ($24 (additional assessment) − $10 (refund)). Because the net effect of the foreign tax redeterminations is to increase the amount of foreign taxes paid or accrued and decrease X's U.S. tax liability, under paragraph (b)(1)(iv) of this section the Year 1 amended return, Form 1118, and the statement required in paragraph (c) of this section reflecting foreign tax redeterminations in both years must be filed within the time period provided by section 6511.

(F) With respect to Year 2, under paragraph (b)(1)(ii) of this section, X must notify the IRS by filing an amended return, Form 1118, and the statement required in paragraph (c) of this section for Year 2 that is separate from that filed for Year 1. The amended return, Form 1118, and the statement required in paragraph (c) of this section for Year 2 must be filed by the due date (with extensions) of X's original return for Year 6. The amended return and Form 1118 reduces the amount of foreign income taxes claimed as a credit under section 901 and increases X's U.S. tax liability by $7.50 (5n refund translated at the average exchange rate for Year 2, or $1.50:1n).

(ii) *Example 2.* X, a taxpayer within the jurisdiction of the Large Business and International Division, uses the calendar year as its U.S. taxable year. On November 15, Year 2, X receives a refund of foreign income taxes that constitutes a foreign tax redetermination and necessitates a redetermination of U.S. tax liability for X's Year 1 taxable year. Under paragraph (b)(1)(ii) of this section, X is required to notify the IRS of the foreign tax redetermination that increased its U.S. tax liability by filing an amended return, Form 1118, and the statement described in paragraph (c) of this section for its Year 1 taxable year by October 15, Year 3 (the due date (with extensions) of the original return for X's Year 2 taxable year). On December 15, Year 3, the IRS hand delivers an opening letter concerning the examination of the return for X's Year 1 taxable year, and the opening conference for such examination is scheduled for January 15, Year 4. Because the date for notifying the IRS of the foreign tax redetermination under paragraph (b)(1)(ii) of this section (October 15, Year 3) is before the date of the opening conference concerning the examination of the return for X's Year 1 taxable year (January 15, Year 4), the condition of paragraph (b)(4)(i)(E) of this section is not met, and so paragraph (b)(4)(i) of this section does not apply. Accordingly, X must notify the IRS of the foreign tax redetermination by filing an amended return, Form 1118, and the statement described in paragraph (c) of this section for the Year 1 taxable year by October 15, Year 3.

(c) *Notification contents.* The statement required by paragraphs (b)(1)(i) through (iv) of this section and (b)(2) of this section must contain information sufficient for the IRS to redetermine U.S. tax liability if such a redetermination is required under section 905(c). The information must be in a form that enables the IRS to verify and compare the original computation of U.S. tax liability, the revised computation resulting from the foreign tax redetermination, and the net changes resulting therefrom. The statement must include the following:

(1) The taxpayer's name, address, identifying number, the taxable year or years of the taxpayer that are affected by the foreign tax redetermination, and, in the case of foreign taxes deemed paid, the name and identifying number, if any, of the foreign corporation;

(2) The date or dates the foreign income taxes were accrued, if applicable; the date or dates the foreign income taxes were paid; the amount of foreign income taxes paid or accrued on each date (in foreign currency) and the exchange rate used to translate each such amount, as provided in § 1.986(a)–1(a) or (b);

(3) Information sufficient to determine any change to the characterization of a distribution, the amount of any inclusion under section 951(a), 951A, or 1293, or the deferred tax amount under section 1291;

(4) Information sufficient to determine any interest due from or owing to the taxpayer, including the amount of any interest paid by the foreign government to the taxpayer and the dates received;

(5) In the case of any foreign income tax that is refunded in whole or in part, the taxpayer must provide the date of each such refund; the amount of such refund (in foreign currency); and the exchange rate that was used to translate such amount when originally claimed as a credit (as provided in § 1.986(a)–1(c)) and the spot rate (as defined in § 1.988–1(d)) for the date the refund was received (for purposes of computing foreign currency gain or loss under section 988);

(6) In the case of any foreign income taxes that are not paid on or before the date that is 24 months after the close of the taxable year to which such taxes relate, the amount of such taxes in foreign currency, and the exchange rate that was used to translate such amount when originally claimed as a credit or added to PTEP group taxes (as defined in § 1.960–3(d)(1));

(7) If a redetermination of U.S. tax liability results in an amount of additional tax due, and the carryback or carryover of an unused foreign income tax under section 904(c) only partially eliminates such amount, the information required in § 1.904–2(f); and

(8) In the case of a pass-through entity, the name, address, and identifying number of each beneficial owner to which foreign taxes were reported for the taxable year or years to which the foreign tax redetermination relates, and the amount of foreign tax initially reported to each beneficial owner for each such year and the amount of foreign tax allocable to each beneficial owner for each such year after the foreign tax redetermination is taken into account.

(d) *Payment or refund of U.S. tax.* The amount of tax, if any, due upon a redetermination of U.S. tax liability is paid by the taxpayer after notice and demand has been made by the IRS. Subchapter B of chapter 63 of the Internal Revenue Code (relating to deficiency procedures) does not apply with respect to the assessment of the amount due upon such redetermination. In accordance with sections 905(c) and 6501(c)(5), the amount of additional tax due is assessed and collected without regard to the provisions of section 6501(a) (relating to limitations on assessment and collection). The amount of tax, if any, shown by a redetermination of U.S. tax liability to have been overpaid is credited or refunded to the taxpayer in accordance with subchapter B of chapter 66 (section 6511 *et seq.*).

(e) *Interest and penalties*—(1) *In general.* If a redetermination of U.S. tax liability is required by reason of a foreign tax redetermination, interest is computed on the underpayment or overpayment in accordance with sections 6601 and 6611. No interest is assessed or collected on any underpayment resulting from a refund of foreign income taxes for any period before the receipt of the refund, except to the extent interest was paid by the foreign country or possession of the United States on the refund for the period before the receipt of the refund. *See* section 905(c)(5). In no case, however, will interest assessed and collected pursuant to the preceding sentence for any period before receipt of the refund exceed the amount that otherwise would have been assessed and collected under section 6601 for that period. Interest is assessed from the time the taxpayer (or the foreign corporation, partnership, trust, or other pass-through entity of which the taxpayer is a shareholder, partner, or beneficiary) receives a refund until the taxpayer pays the additional tax due the United States.

(2) *Imposition of penalty.* Failure to comply with the provisions of this section subjects the taxpayer to the penalty provisions of section 6689 and § 301.6689–1 of this chapter.

(f) *Applicability date.* This section applies to foreign tax redeterminations (as defined in § 1.905–3(a)) occurring in taxable years ending on or after December 16, 2019, and to foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a United States shareholder ending on or after December 16, 2019.

■ **Par. 19.** Section 1.905–5, as proposed to be added at 72 FR 62805 (November 7, 2007), is further revised to read as follows:

§ 1.905–5 Foreign tax redeterminations of foreign corporations that relate to taxable years of the foreign corporation beginning before January 1, 2018.

(a) *In general*—(1) *Effect of foreign tax redetermination of a foreign corporation.* A foreign tax redetermination (as defined in § 1.905–3(a)) of a foreign corporation that relates to a taxable year of the foreign corporation beginning before January 1, 2018, and that may affect a taxpayer's foreign tax credit in any taxable year, must be accounted for by adjusting the foreign corporation's taxable income and earnings and profits, post-1986 undistributed earnings as defined in § 1.902–1(a)(9), and post-1986 foreign income taxes as defined in § 1.902–1(a)(8) (or its pre-1987 accumulated profits as defined in § 1.902–1(a)(10)(i) and pre-1987 foreign income taxes as defined in § 1.902–1(a)(10)(iii), as applicable) in the taxable year of the foreign corporation to which the foreign taxes relate.

(2) *Requirement of U.S. tax redetermination.* A redetermination of U.S. tax liability is required to account for the effect of the foreign tax redetermination on the earnings and profits and taxable income of the foreign corporation, the taxable income of a United States shareholder, and the amount of foreign taxes deemed paid by the United States shareholder under section 902 or 960 (as in effect before December 22, 2017), in the year to which the redetermined foreign taxes relate. For example, in the case of a refund of foreign income taxes, the subpart F income, earnings and profits, and post-1986 undistributed earnings (or pre-1987 accumulated profits, as applicable) of the foreign corporation are increased in the year to which the foreign tax relates to reflect the functional currency amount of the foreign income tax refund. The required redetermination of U.S. tax liability must account for the effect of the foreign tax redetermination on the characterization and amount of distributions or inclusions under sections 951 or 1293 taken into account by each of the foreign corporation's United States shareholders and on the application of the high-tax exception described in section 954(b)(4), as well as on the amount of foreign income taxes deemed paid in such year. In addition, a redetermination of U.S. tax liability is required for any subsequent taxable year in which the United States shareholder received or accrued a distribution or inclusion from the foreign corporation, up to and including the taxable year in which the foreign tax redetermination occurs, as well as any year to which unused foreign taxes from such year were carried under section 904(c).

(b) *Notification requirements*—(1) *In general.* The notification requirements of § 1.905–4, as modified by paragraphs (b)(2) and (3) of this section, apply if a redetermination of U.S. tax liability is required under paragraph (a) of this section.

(2) *Notification relating to post-1986 undistributed earnings and post-1986 foreign income taxes.* In the case of foreign tax redeterminations with respect to taxes included in post-1986 foreign income taxes, in addition to the information required by § 1.905–4(c), the taxpayer must provide the balances of the pools of post-1986 undistributed earnings and post-1986 foreign income taxes before and after adjusting the pools, the dates and amounts of any dividend distributions or other inclusions made out of earnings and profits for the affected year or years, and the amount of earnings and profits from which such dividends were paid or such inclusions were made for the affected year or years.

(3) *Notification relating to pre-1987 accumulated profits and pre-1987 foreign income taxes.* In the case of foreign tax redeterminations with respect to pre-1987 accumulated profits, in addition to the information required by § 1.905–4(c), the taxpayer must provide the following: The dates and amounts of any dividend distributions made out of earnings and profits for the affected year or years; the rate of exchange on the date of any such distribution; and the amount of earnings and profits from which such dividends were paid for the affected year or years.

(c) *Currency translation rules for adjustments to pre-1987 foreign income taxes.* Foreign income taxes paid with respect to pre-1987 accumulated profits that are deemed paid under section 960 (or under section 902 in the case of an amount treated as a dividend under section 1248) are translated into dollars at the spot rate for the date of the payment of the foreign income taxes, and refunds of such taxes are translated into dollars at the spot rate for the date of the refund. Foreign income taxes deemed paid by a taxpayer under section 902 with respect to an actual distribution of pre-1987 accumulated profits and refunds of such taxes are translated into dollars at the spot rate for the date of the distribution of the earnings to which the foreign income taxes relate. *See* section 902(c)(6) (as in effect before December 22, 2017) and § 1.902–1(a)(10)(iii). For purposes of this section, the term *spot rate* has the meaning provided in § 1.988–1(d).

(d) *Adjustments to pools of post-1986 foreign income taxes.* The redetermination of U.S. tax liability required by paragraph (a) of this section is made in accordance with section 905(c) as in effect for those taxable years, without regard to rules that required prospective adjustments to a foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes in the year of the foreign tax redetermination in lieu of redeterminations of U.S. tax liability. No underpayment or overpayment of U.S. tax liability results from a foreign tax redetermination unless the required adjustments change the U.S. tax liability. Consequently, no interest is paid by or to a taxpayer as a result of adjustments, required by reason of a foreign tax redetermination, to a foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes in the year to which the redetermined foreign tax relates that did not result in a change to U.S. tax liability, for example, because no foreign taxes were deemed paid in that year.

(e) *Applicability date.* This section applies to foreign tax redeterminations (as defined in § 1.905–3(a)) of foreign corporations occurring in taxable years that end with or within taxable years of a United States shareholder ending on or after December 16, 2019, and that relate to taxable years of foreign corporations beginning before January 1, 2018.

■ **Par. 20.** Section 1.954–1 is amended by:

■ 1. In paragraph (c)(1)(i)(C) removing the language ''reduced by related person'' and adding the language ''reduced (but not below zero) by related person'' in its place.

■ 2. Adding two sentences to the end of paragraph (d)(3)(iii).

■ 3. Revising paragraph (h)(1).

The revisions and additions read as follows:

§ 1.954–1 Foreign base company income.

* * * * *

(d) * * *

(3) * * *

(iii) * * * In addition, foreign income taxes that have not been paid or accrued because they are contingent on a future distribution of earnings are not taken into account for purposes of this paragraph (d)(3). If, pursuant to section 905(c) and § 1.905–3(b)(2), a redetermination of U.S. tax liability is required to account for the effect of a foreign tax redetermination (as defined in § 1.905–3(a)), this paragraph (d) is applied in the adjusted year taking into account the adjusted amount of the redetermined foreign tax.

* * * * *

(h) * * * (1) *Paragraph (d)(3) of this section.* Paragraph (d)(3) of this section applies to taxable years of a controlled foreign corporation ending on or after December 16, 2019. For taxable years of a controlled foreign corporation ending on or after December 4, 2018, but ending before December 16, 2019, see § 1.954–1(d)(3) as contained in 26 CFR part 1 revised as of April 1, 2019.

* * * * *

■ **Par. 21.** Section 1.954–2 is amended by:

■ 1. Removing the text ''and'' from paragraph (h)(2)(i)(H).

■ 2. Redesignating paragraph (h)(2)(i)(I) as paragraph (h)(2)(i)(J).

■ 3. Adding a new paragraph (h)(2)(i)(I).

■ 4. Adding a sentence to the end of paragraph (i)(2).

The additions read as follows:

§ 1.954–2 Foreign personal holding company income.

* * * * *

(h) * * * (2) * * * (i) * * *

(I) Any guaranteed payments for the use of capital under section 707(c); and

* * * * *

(i) * * *

(2) * * * Paragraph (h)(2)(i)(I) of this section applies to taxable years of controlled foreign corporations ending on or after December 16, 2019, and to taxable years of United States shareholders in which or with which such taxable years end.

■ **Par. 22.** Section 1.960–1 is amended by:

■ 1. Adding a sentence at the end of paragraph (c)(2).

■ 2. Revising the first three sentences, and adding two new sentences after the third sentence, in paragraph (d)(3)(ii)(A).

■ 3. Removing and reserving paragraph (d)(3)(ii)(B).

■ 4. Revising the second, third, and seventh sentences of paragraph (d)(3)(ii)(C).

The addition and revisions read as follows:

§ 1.960–1 Overview, definitions, and computational rules for determining foreign income taxes deemed paid under section 960(a), (b), and (d).

* * * * *

(c) * * *

(2) * * * An item of income with respect to a current taxable year does not include an amount included as subpart F income of a controlled foreign corporation by reason of the recharacterization of a recapture account established in a prior U.S. taxable year (and the corresponding earnings and profits) of the controlled foreign corporation under section 952(c)(2) and § 1.952–1(f).

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(A) * * * A current year tax is allocated and apportioned among the section 904 categories under the rules of § 1.904–6. An amount of the current year tax that is allocated and apportioned to a section 904 category is then allocated and apportioned among the income groups within the section 904 category under § 1.861–20 (as modified by § 1.904–6(c)) by treating each income group as a statutory grouping and treating the residual income group as the residual grouping. Therefore, the portion of a current year tax that is attributable to foreign taxable income arising from a transaction that does not result in the recognition of gross income or loss for Federal income tax purposes in the current taxable year is assigned under § 1.861–20(d)(2)(i) to the section 904 category and income group within a section 904 category to which the corresponding U.S. item would be assigned if the event giving rise to the foreign taxable income resulted in the recognition of income or loss under Federal income tax law in that year. Foreign gross income arising from the receipt of a disregarded payment made by a disregarded entity or other foreign branch to its foreign branch owner that is a controlled foreign corporation is assigned to the income group or groups from which the payment is considered to be made under § 1.861–20(d)(3)(ii)(A). Foreign gross income attributable to a base difference, or resulting from the receipt of a disregarded payment made to a foreign branch, is assigned to the residual income grouping under §§ 1.861–20(d)(2)(ii)(B) and 1.861–20(d)(3)(ii)(B). * * *

* * * * *

(C) * * * In such case, under § 1.861–20, the portion of the foreign gross income (as defined in § 1.861–20(b)(5)) that is characterized under Federal income tax principles as a distribution of previously taxed earnings and profits that results in the increase in the PTEP group in the current taxable year is assigned to that PTEP group. If a PTEP group is not treated as an income group under the first sentence of this paragraph (d)(3)(ii)(C), and the rules of § 1.861–20 would otherwise apply to assign foreign gross income to a PTEP group, that foreign gross income is instead assigned to the subpart F income group or tested income group to which the income that gave rise to the previously taxed earnings and profits would be assigned if the income were recognized by the recipient controlled foreign corporation under Federal income tax principles in the current taxable year. * * * That foreign gross income, however, may be assigned to a subpart F income group or tested income group.

■ **Par. 23.** Section 1.960–2 is amended by adding a sentence at the end of paragraph (b)(3)(iii) to read as follows:

§ 1.960–2 Foreign income taxes deemed paid under sections 960(a) and (d).

* * * * *

(b) * * *

(3) * * *

(iii) * * * *See* § 1.960–1(c)(2) for rule regarding the treatment of an increase in the subpart F income of a controlled foreign corporation by reason of the recharacterization of a recapture account and the corresponding accumulated earnings and profits under section 952(c) and § 1.952–1(f).

■ **Par. 24.** Section 1.960–7 is revised to read as follows:

§ 1.960–7 Applicability dates.

(a) Except as provided in paragraph (b) of this section, §§ 1.960–1 through 1.960–6 apply to each taxable year of a foreign corporation ending on or after December 4, 2018, and to each taxable year of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends.

(b) Section 1.960–1(d)(3)(ii) applies to taxable years of a foreign corporation beginning after December 31, 2019, and to each taxable year of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends. For taxable years of a foreign corporation that end on or after December 4, 2018, and also begin before January 1, 2020, see § 1.960–1(d)(3)(ii) as in effect on December 17, 2019.

■ **Par. 25.** Amend § 1.965–5 by:

■ 1. Redesignating paragraph (b) as paragraph (b)(1).

■ 2. Adding new introductory text for paragraph (b).

■ 3. Revising the heading of newly redesignated paragraph (b)(1).

■ 4. Adding paragraph (b)(2).

The revision and additions read as follows:

§ 1.965–5 Allowance of a credit or deduction for foreign income taxes.

* * * * *

(b) *Rules for foreign income taxes paid or accrued*—(1) *In general.* * * *

(2) *Attributing taxes to section 959(a) distributions of section 965 previously taxed earnings and profits.* For purposes of paragraph (b)(1) of this section, foreign income taxes are attributable to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits if such taxes would be allocated and apportioned to a distribution of such previously taxed earnings and profits under the principles of § 1.904–6(a)(1)(iv), regardless of whether an actual distribution is made or recognized for Federal income tax purposes. Therefore, for example, a credit or deduction for the applicable percentage of foreign income taxes imposed on a United States shareholder that pays foreign tax on a distribution that is not recognized for Federal income tax purposes (for example, in the case of a consent dividend or stock dividend upon which a withholding tax is imposed) is not allowed under paragraph (b)(1) of this section to the extent it is attributable to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits under the principles of § 1.904–6(a)(1)(iv). For taxable years of foreign corporations beginning after December 31, 2019, in lieu of applying the principles of § 1.904–6 under this paragraph (b)(2), the rules in § 1.861–20 apply by treating the portion of a distribution attributable to section 965(a) previously taxed earnings and profits and the portion of a distribution attributable to section 965(b) previously taxed earnings and profits each as a statutory grouping, and the portion of the distribution that is attributable to other earnings and profits as the residual grouping. *See* § 1.861–20(g)(7) (*Example 6*).

* * * * *

■ **Par. 26.** Section 1.965–9 is amended by adding a sentence to the end of paragraph (c) to read as follows:

§ 1.965–9 Applicability dates.

* * * * *

(c) * * * Section 1.965–5(b)(2) applies to taxable years of foreign corporations that end on or after December 16, 2019, and with respect to a United States person, to the taxable years in which or with which such taxable years of the foreign corporations end.

■ **Par. 27.** Section 1.1502–4 is revised to read as follows:

§ 1.1502–4 Consolidated foreign tax credit.

(a) *In general.* The credit under section 901 for taxes paid or accrued to any foreign country or possession of the United States is allowed to the group only if the agent for the group (as defined in § 1.1502–77(a)) chooses to use the credit in the computation of the consolidated tax liability of the group for the consolidated return year. If that choice is made, section 275(a)(4) provides that no deduction against taxable income may be taken on the consolidated return for foreign taxes paid or accrued by any member. However, if section 275(a)(4) does not apply, a deduction against consolidated taxable income may be allowed for certain taxes for which a credit is not allowed, even though the choice is made to claim a credit for other taxes. See, for example, sections 901(j)(3), 901(k)(7), 901(l)(4), 901(m)(6), and 908(b).

(b) *Computation of foreign tax credit.* The foreign tax credit for the consolidated return year is determined on a consolidated basis under the principles of sections 901 through 909 and 960. Taxes paid or accrued to all foreign countries and possessions by members of the group for the year (including those deemed paid under section 960 and paragraph (d) of this section) must be aggregated.

(c) *Computation of limitation on credit.* For purposes of computing the group's limiting fraction under section 904, the following rules apply:

(1) *Computation of taxable income from foreign sources*—(i) *Separate categories.* The group must compute a separate foreign tax credit limitation for income in each separate category (as defined in § 1.904–5(a)(4)(v) for purposes of this section). The numerator of the limiting fraction in any separate category is the consolidated taxable income of the group determined in accordance with § 1.1502–11, taking into account adjustments required under section 904(b), if any, from sources without the United States in that category, determined in accordance with the rules of § 1.904–4, 1.904–5, and the section 861 regulations (as defined in § 1.861–8(a)(1)).

(ii) *Adjustments under sections 904(f) and (g).* The rules for allocation and recapture of separate limitation losses and overall foreign losses under section 904(f) and § 1.1502–9 apply to determine the foreign source and U.S. source taxable income in each separate category of the consolidated group. Similarly, the rules for allocation and recapture of overall domestic losses under section 904(g) and § 1.1502–9 apply to determine the foreign source and U.S. source taxable income in each separate category of the consolidated group. See § 1.904(g)–3 for allocation rules under sections 904(f) and 904(g). The rules of sections 904(f) and 904(g) do not operate to recharacterize foreign income tax attributable to any separate category.

(iii) *Computation of consolidated net operating loss.* The source and separate category of the group's consolidated net operating loss (''CNOL''), as that term is defined in § 1.1502–21(e), for the taxable year, if any, is determined based on the amounts of any separate limitation losses and U.S. source loss that are not allocated to reduce U.S. source income or income in other separate categories under the rules of sections 904(f) and 904(g) in computing the group's consolidated foreign tax credit limitations for the taxable year under paragraphs (c)(1)(i) and (ii) of this section.

(iv) *Characterization of CNOL carried to a separate return year*—(A) *In general.* The total amount of CNOL attributable to a member that is carried to a separate return year is determined under the rules of § 1.1502–21(b)(2). The source and separate category of the portion of the CNOL that is attributable to a member is determined under this paragraph (c)(1)(iv).

(B) *Tentative apportionment.* For the portion of the CNOL that is attributable to the member described in paragraph (c)(1)(iv) of this section, the consolidated group determines a tentative allocation and apportionment to each statutory and residual grouping (as described in § 1.861–8(a)(4) with respect to section 904 as the operative section) under the principles of § 1.1502–9(c)(2)(i), (ii), (iv) and (v) by treating the portion of the group's CNOL in each statutory and residual grouping as if it were a CSLL account, as that term is described in § 1.1502–9(b)(4). This determination is made as of the end of the taxable year of the consolidated group in which the CNOL arose or, if earlier and applicable, when the member leaves the consolidated group.

(C) *Adjustments*—(*1*) If the total tentative apportionment for all statutory and residual groupings exceeds the portion of the CNOL attributable to the member described in paragraph (c)(1)(iv)(A) of this section (the ''excess amount''), then the tentative apportionment in each grouping is reduced by an amount equal to the excess amount multiplied by a fraction, the numerator of which is the tentative apportionment in that grouping, and the denominator of which is the total tentative apportionments in all groupings.

(*2*) If the total tentative apportionment for all statutory and residual groupings is less than the total CNOL attributable to the member described in paragraph (c)(1)(iv)(A) (the ''deficiency''), then the tentative apportionment in each grouping is increased by an amount equal to the deficiency multiplied by a fraction, the numerator of which is the CNOL in that grouping that was not tentatively apportioned, and the denominator of which is the total CNOL in all groupings that was not tentatively apportioned.

(v) *Consolidated net capital losses.* The principles of the rules in paragraphs (c)(1)(i) through (iv) of this section apply for purposes of determining the source and separate category of consolidated net capital losses described in § 1.1502–22(e).

(2) *Computation of consolidated taxable income.* The denominator of the limiting fraction in any separate category is the consolidated taxable income of the group determined in accordance with § 1.1502–11, taking into account adjustments required under section 904(b), if any.

(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 § 1.1502–2(a)(2), (3), (4), (8), and (9), and without regard to any credit against such liability. *See* sections 26(b) and 901(a).

(d) *Carryover and carryback of unused foreign tax*—(1) *Allowance of unused foreign tax as consolidated carryover or carryback.* The consolidated group's carryovers and carrybacks of unused foreign tax (as defined in § 1.904–2(c)(1)) to the taxable year is determined on a consolidated basis under the principles of section 904(c) and § 1.904–2 and is deemed to be paid or accrued to a foreign country or possession for that year. The consolidated group's unused foreign tax carryovers and carrybacks to the taxable year consist of any unused foreign tax of the consolidated group, plus any unused foreign tax of members for separate return years, which may be carried over or back to the taxable year under the principles of section 904(c) and § 1.904–2. The consolidated group's unused foreign tax carryovers and carrybacks do not include any unused foreign taxes apportioned to a corporation for a separate return year pursuant to § 1.1502–79(d). A consolidated group's unused foreign tax in each separate category is the excess of the foreign taxes paid, accrued or deemed paid under section 960 by the consolidated group over the limitation in the applicable separate category for the consolidated return year. *See* paragraph (c) of this section.

(2) *Absorption rules.* For purposes of determining the amount, if any, of an unused foreign tax which can be carried to a taxable year (whether a consolidated or separate return year), the amount of the unused foreign tax that is absorbed in a prior consolidated return year under section 904(c) shall be determined by—

(i) Applying all unused foreign taxes which can be carried to a prior year in the order of the taxable years in which those unused foreign taxes arose, beginning with the taxable year that ends earliest, and

(ii) All the unused foreign taxes which can be carried to such prior year from taxable years ending on the same date on a pro rata basis.

(e) *Example.* The following example illustrates the application of this section:

(1) *Facts*—(i) Domestic corporation P is incorporated on January 1, Year 1. On that same day, P incorporates domestic corporations S and T as wholly owned subsidiaries. P, S, and T file consolidated returns for Years 1 and 2 on the basis of a calendar year. T engages in business solely through a qualified business unit in Country A. S engages in business solely through qualified business units in countries A and B. P does business solely in the United States. During Year 1, T sold an item of inventory to P at a gain of $2,000. Under § 1.1502–13 the intercompany gain has not been taken into account as of the close of Year 1. The taxable income of each member for Year 1 from foreign and U.S. sources, and the foreign taxes paid on such foreign income, are as follows:

TABLE 1 TO PARAGRAPH (e)(1)(i)

Corporation	U.S. source taxable income	Foreign branch category foreign source taxable income	Foreign branch category foreign tax paid	Total taxable income
P	$40,000			$40,000
T		$20,000	$12,000	20,000
S		20,000	9,000	20,000
Group				80,000

(ii) The separate taxable income of each member was computed by taking into account the rules under § 1.1502–12. Accordingly, T's intercompany gain of $2,000 is not included in T's taxable income for Year 1. The group's consolidated taxable income (computed in accordance with § 1.1502–11) is $80,000. The consolidated tax liability against which the credit may be taken (computed in accordance with paragraph (c)(3) of this section) is $16,800.

(2) *Analysis.* The aggregate taxes paid to all foreign countries with respect to the foreign branch category income of $21,000 ($12,000 + $9,000) is limited to $8,400 ($16,800 × $40,000/$80,000). Assuming P, as the agent for the group, chooses to use the foreign taxes paid as a credit, the group may claim a $8,400 foreign tax credit.

(f) *Applicability date.* This section applies to taxable years for which the original consolidated Federal income tax return is due (without extensions) after December 17, 2019.

■ **Par. 28.** Section 1.1502–21 is amended by adding a sentence to the end of paragraph (b)(2)(iv)(B) to read as follows:

§ 1.1502–21. Net operating losses.

* * * * *

(b) * * *

(2) * * *

(iv) * * *

(B) * * * The source and section 904(d) separate category of the CNOL attributable to a member is determined under § 1.1502–4(c)(1)(iii).

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 29.** The authority citation for part 301 is amended by adding an entry for § 301.6689–1, to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.6689–1 also issued under 26 U.S.C. 6689(a), 26 U.S.C. 6227(d), and 26 U.S.C. 6241(11).

* * * * *

■ **Par. 30.** Section 301.6227–1 is amended by adding paragraph (g) to read as follows:

§ 301.6227–1 Administrative adjustment request by partnership.

* * * * *

(g) *Notice requirement and partnership adjustments required as a result of a foreign tax redetermination.* For special rules applicable when an adjustment to a partnership related item (as defined in section 6241(2)) is required as part of a redetermination of U.S. tax liability under section 905(c) and § 1.905–3(b) of this chapter as a result of a foreign tax redetermination (as defined in § 1.905–3(a) of this chapter), see § 1.905–4(b)(2)(ii) of this chapter.

* * * * *

■ **Par. 31.** Section 301.6689–1, as proposed to be added at 72 FR 62807 (November 7, 2007), is further revised to read as follows:

§ 301.6689–1 Failure to file notice of redetermination of foreign income taxes.

(a) *Application of civil penalty.* If a foreign tax redetermination occurs, and the taxpayer failed to notify the Internal Revenue Service (IRS) on or before the date and in the manner prescribed in § 1.905–4 of this chapter, or as required under section 404A(g)(2), for giving notice of a foreign tax redetermination, then, unless paragraph (d) of this section applies, there is added to the deficiency (or the imputed underpayment as determined under section 6225) attributable to such redetermination an amount determined under paragraph (b) of this section. Subchapter B of chapter 63 of the Internal Revenue Code (relating to deficiency proceedings) does not apply with respect to the assessment of the amount of the penalty.

(b) *Amount of the penalty.* The amount of the penalty shall be equal to—

(1) Five percent of the deficiency (or imputed underpayment) if the failure is for not more than one month, plus

(2) An additional five percent of the deficiency (or imputed underpayment) for each month (or fraction thereof) during which the failure continues, but not to exceed in the aggregate twenty-five percent of the deficiency (or imputed underpayment).

(c) *Foreign tax redetermination defined.* For purposes of this section, a foreign tax redetermination is any redetermination for which a notice is required under sections 905(c) or 404A(g)(2). See §§ 1.905–3 through 1.905–5 of this chapter for rules relating to the notice requirement under section 905(c).

(d) *Reasonable cause.* The penalty set forth in this section shall not apply if it is established to the satisfaction of the IRS that the failure to file the notification within the prescribed time was due to reasonable cause and not due to willful neglect. An affirmative showing of reasonable cause must be made in the form of a written statement that sets forth all the facts alleged as reasonable cause for the failure to file the notification on time and that contains a declaration by the taxpayer that the statement is made under the penalties of perjury. This statement must be filed with the Internal Revenue Service Center in which the notification was required to be filed. The taxpayer must file this statement with the notice required under section 905(c) or section 404A(g)(2). If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the notification within the prescribed time, then the delay will be considered to be due to reasonable cause and not willful neglect.

(e) *Applicability date.* This section applies to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019, and to foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a United States shareholder ending on or December 16, 2019.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2019–24847 Filed 12–16–19; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 84 Tuesday,

No. 242 December 17, 2019

Part III

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2018–0746; FRL–10001–98–OAR]

RIN 2060–AT85

National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is proposing amendments to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Miscellaneous Organic Chemical Manufacturing source category. The EPA is proposing decisions concerning the residual risk and technology review (RTR), including proposing amendments pursuant to the technology review for equipment leaks and heat exchange systems, and also proposing amendments pursuant to the risk review to specifically address ethylene oxide emissions from storage tanks, process vents, and equipment leaks. The EPA is also proposing amendments to correct and clarify regulatory provisions related to emissions during periods of startup, shutdown, and malfunction (SSM), including removing general exemptions for periods of SSM, adding work practice standards for periods of SSM where appropriate, and clarifying regulatory provisions for certain vent control bypasses. Lastly, the EPA is proposing to add monitoring and operational requirements for flares that control ethylene oxide emissions and flares used to control emissions from processes that produce olefins and polyolefins; and add provisions for electronic reporting of performance test results and reports, performance evaluation reports, and compliance reports. We estimate that, if finalized, these proposed amendments (not including the potential excess emission reductions from flares) would reduce hazardous air pollutants (HAP) emissions from this source category by 116 tons per year (tpy) and would reduce ethylene oxide emissions from this source category by approximately 10 tpy.

DATES: *Comments.* Comments must be received on or before January 31, 2020. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before January 16, 2020.

Public hearing. The EPA is planning to hold at least one public hearing in response to this proposed action. Information about the hearing, including location, date, and time, along with instructions on how to register to speak at the hearing, will be published in a second **Federal Register** document and posted at *https://www.epa.gov/stationary-sources-air-pollution/miscellaneous-organic-chemical-manufacturing-national-emission.* See **SUPPLEMENTARY INFORMATION** for information on registering and attending a public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2018–0746, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2018–0746 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2018–0746.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2018–0746, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except federal holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Ms. Tegan Lavoie, Sector Policies and Programs Division (E–143–01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5110; fax number: (919) 541–0516; and email address: *lavoie.tegan@epa.gov.* For specific information regarding the risk modeling methodology, contact Mr. Matthew Woody, Health and Environmental Impacts Division (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–1535; fax number: (919) 541–0840; and email address: *woody.matthew@epa.gov.* For questions about monitoring and testing requirements, contact Ms. Gerri Garwood, Sector Policies and Programs Division (D243–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–2406; fax number: (919) 541–4991; and email address: *garwood.gerri@epa.gov.* For information about the applicability of the NESHAP to a particular entity, contact Mr. John Cox, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, WJC South Building (Mail Code 2227A), 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564–1395; and email address: *cox.john@epa.gov.*

SUPPLEMENTARY INFORMATION:

Public hearing. The EPA is planning to hold at least one public hearing in response to this proposed action. Information about the hearing, including location, date, and time, along with instructions on how to register to speak at the hearing will be published in a second **Federal Register** document.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2018–0746. All documents in the docket are listed in *Regulations.gov.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *Regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, WJC West Building, 1301 Constitution Avenue NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2018–0746. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov/* or email. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2018–0746.

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

ACA American Coatings Association
ACC American Chemistry Council
AEGL acute exposure guideline level
AERMOD air dispersion model used by the HEM–3 model
AFPM American Fuel & Petrochemical Manufacturers
AMEL alternative means of emission limitation
APCD air pollution control device
ATSDR Agency for Toxic Substances and Disease Registry
BAAQMD Bay Area Air Quality Management District
BACT best available control technology
Btu British thermal unit
Btu/scf British thermal unit per standard cubic foot
CAA Clean Air Act
CalEPA California EPA
CBI Confidential Business Information
CDX Central Data Exchange
CEDRI Compliance and Emissions Data Reporting Interface
CEMS continuous emission monitoring system(s)
CFR Code of Federal Regulations
ECHO Enforcement and Compliance History Online
EIS emissions inventory system
EPA Environmental Protection Agency
ERPG Emergency Response Planning Guideline
ERT Electronic Reporting Tool
FID flame ionization detector
FTIR fourier transfer infrared spectrometry
GACT generally available control technologies
HAPV hazardous air pollutant(s)
HCl hydrochloric acid
HEM–3 Human Exposure Model
HF hydrogen fluoride
HI hazard index
HQ hazard quotient
HRVOC highly reactive volatile organic compounds
ICR Information Collection Request
IRIS Integrated Risk Information System
km kilometer
LAER lowest achievable emission rate
LDAR leak detection and repair
LEL lower explosive limit
MACT maximum achievable control technology
MCPU miscellaneous organic chemical manufacturing process unit
mg/m^3 milligrams per cubic meter
MIR maximum individual risk
MON Miscellaneous Organic Chemical Manufacturing NESHAP
MPGF multi-point ground flare(s)
NAAQS National Ambient Air Quality Standards
NAICS North American Industry Classification System
NEI National Emission Inventory
NESHAP national emission standards for hazardous air pollutants
NHVcz net heating value in the combustion zone gas
NHVdil net heating value dilution parameter
NHVvg net heating value of flare vent gas
NRDC Natural Resources Defense Council
NSPS new source performance standards
NTTAA National Technology Transfer and Advancement Act
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
OSHA Occupational Safety and Health Administration
PB–HAP hazardous air pollutants known to be persistent and bio-accumulative in the environment
PDF portable document format
PDH propane dehydrogenation
POM polycyclic organic matter
ppm parts per million
ppmw parts per million by weight
ppmv parts per million by volume
PRA Paperwork Reduction Act
PRD pressure relief device(s)
psig pounds per square inch gauge
RACT reasonably available control technology
REL reference exposure level
RFA Regulatory Flexibility Act
RfC reference concentration
RTR residual risk and technology review
SAB Science Advisory Board
SCC source classification code
SSM startup, shutdown, and malfunction
TCEQ Texas Commission on Environmental Quality
TOSHI target organ-specific hazard index
tpy tons per year

TRIM.FaTE Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure Model
UF uncertainty factor
μg/m³ micrograms per cubic meter
UMRA Unfunded Mandates Reform Act
URE unit risk estimate
USGS U.S. Geological Survey
VCS voluntary consensus standards
VOC volatile organic compound(s)

Organization of this document. The information in this preamble is organized as follows below. In particular, section IV of this preamble describes the majority of the Agency's rationale for the proposed actions in this preamble. Section IV.A of this preamble specifies proposed monitoring and operational requirements for a subset of flares in the Miscellaneous Organic Chemical Manufacturing source category to ensure that the level of control from the original maximum achievable control technology (MACT) standards is achieved by these air pollution control devices (APCD). To ensure that Clean Air Act (CAA) section 112 standards continuously apply (*Sierra Club* v. *EPA, 551 F.3d 1019* (D.C. Cir. 2008)), section IV.A of this preamble also proposes work practice standards for periods of SSM for when flares are used as an APCD, proposes work practice standards for periods of SSM for certain vent streams (*i.e.,* pressure relief device (PRD) releases and maintenance vents), and proposes clarifications for vent control bypasses for certain vent streams (*i.e.,* closed vent systems containing bypass lines, and flares connected to fuel gas systems).

Section IV.B of this preamble summarizes the results of the risk assessment while section IV.C summarizes our proposed decisions regarding the results of the risk assessment, and proposes revisions for storage tanks, process vents, and equipment leaks to reduce emissions of ethylene oxide. Section IV.D of this preamble summarizes the results of our technology review, and proposes revisions for heat exchange systems and equipment leaks. Section IV.E of this preamble summarizes other changes we are proposing, including general regulatory language changes related to the removal of SSM exemptions, electronic reporting, and other minor clarifications identified as part our review of the NESHAP and as part of the other proposed revisions in this proposal. Lastly, section IV.F of this preamble summarizes our rationale for the compliance dates we are proposing.

I. General Information

A. Does this action apply to me?

Table 1 of this preamble lists the NESHAP and associated regulated industrial source category that is the subject of this proposal. Table 1 is not intended to be exhaustive, but rather provides a guide for readers regarding the entities that this proposed action is likely to affect. The proposed standards, once promulgated, will be directly applicable to the affected sources. Federal, state, local, and tribal government entities would not be affected by this proposed action. On July 16, 1992 (57 FR 31576), pursuant to specific listing requirements in CAA section 112(c), the Agency published an initial list of 174 categories of major and area sources that would be subject to MACT emission standards. Following this listing, in a November 7, 1996, document (61 FR 57602), the Agency combined 21 of the 174 source categories originally defined in the *Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990* (see 57 FR 31576, July 16, 1992) and *Documentation for Developing the Initial Source Category List, Final Report* (see EPA–450/3–91–030, July 1992), and other organic chemical processes which were not included in the original 174 source category list, into one source category called the ''Miscellaneous Organic Chemical Processes'' source category. In a November 18, 1999, document (64 FR 63035), the Agency divided the ''Miscellaneous Organic Chemical Processes'' source category into two new source categories called the ''Miscellaneous Organic Chemical Manufacturing'' source category and the ''Miscellaneous Coating Manufacturing'' source category. The Miscellaneous Organic Chemical Manufacturing source category includes any facility engaged in benzyltrimethylammonium chloride production, carbonyl sulfide production, chelating agents production, chlorinated paraffins production, ethylidene norbornene production, explosives production, hydrazine production, photographic chemicals production, phthalate plasticizers production, rubber chemicals production, symmetrical tetrachloropyridine production, oxybisphenoxarsine/1,3-diisocyanate production, alkyd resins production, polyester resins production, polyvinyl alcohol production, polyvinyl acetate emulsions production, polyvinyl butyral production, polymerized vinylidene chloride production, polymethyl methacrylate production, maleic anhydride copolymers production, or any other organic chemical processes not covered by another MACT standard. Many of these organic chemical processes involve similar process equipment, similar emission points and control equipment, and are in many cases co-located with other source categories. For more information about the Miscellaneous Organic Chemical Manufacturing source category, see section II.B of this preamble.

TABLE 1—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Source category	NESHAP	NAICS code [1]
Miscellaneous Organic Chemical Manufacturing	Miscellaneous Organic Chemical Manufacturing.	3251, 3252, 3253, 3254, 3255, 3256, and 3259, with several exceptions.

[1] North American Industry Classification System.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/miscellaneous-organic-chemical-manufacturing-national-emission.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same website. Information on the overall RTR program is available at *https://www3.epa.gov/ttn/atw/rrisk/rtrpg.html.*

A redline version of the regulatory language that incorporates the proposed changes is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2018–0746).

II. Background

A. What is the statutory authority for this action?

The statutory authority for this action is provided by sections 112 and 301 of the CAA, as amended (42 U.S.C. 7401 *et seq.*). Section 112 of the CAA establishes a two-stage regulatory process to develop standards for emissions of HAP from stationary sources. Generally, the first stage involves establishing technology-based standards and the second stage involves evaluating those standards that are based on MACT to determine whether additional standards are needed to address any remaining risk associated with HAP emissions. This second stage is commonly referred to as the ''residual risk review.'' In addition to the residual risk review, the CAA also requires the EPA to review standards set under CAA section 112 every 8 years to determine if there are ''developments in practices, processes, or control technologies'' that may be appropriate to incorporate into the standards. This review is commonly referred to as the ''technology review.'' When the two reviews are combined into a single rulemaking, it is commonly referred to as the ''risk and technology review.'' The discussion that follows identifies the most relevant statutory sections and briefly explains the contours of the methodology used to implement these statutory requirements. A more comprehensive discussion appears in the document titled *CAA Section 112 Risk and Technology Reviews: Statutory Authority and Methodology,* in the docket for this rulemaking.

In the first stage of the CAA section 112 standard setting process, the EPA promulgates technology-based standards under CAA section 112(d) for categories of sources identified as emitting one or more of the HAP listed in CAA section 112(b). Sources of HAP emissions are either major sources or area sources, and CAA section 112 establishes different requirements for major source standards and area source standards. ''Major sources'' are those that emit or have the potential to emit 10 tpy or more of a single HAP or 25 tpy or more of any combination of HAP. All other sources are ''area sources.'' For major sources, CAA section 112(d)(2) provides that the technology-based NESHAP must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts). These standards are commonly referred to as MACT standards. CAA section 112(d)(3) also establishes a minimum control level for MACT standards, known as the MACT ''floor.'' The EPA must also consider control options that are more stringent than the floor. Standards more stringent than the floor are commonly referred to as beyond-the-floor standards. In certain instances, as provided in CAA section 112(h), the EPA may set work practice standards where it is not feasible to prescribe or enforce a numerical emission standard. For area sources, CAA section 112(d)(5) gives the EPA discretion to set standards based on generally available control technologies or management practices (GACT standards) in lieu of MACT standards.

The second stage in standard-setting focuses on identifying and addressing any remaining (*i.e.,* ''residual'') risk according to CAA section 112(f). For source categories subject to MACT standards, section 112(f)(2) of the CAA requires the EPA to determine whether promulgation of additional standards is needed to provide an ample margin of safety to protect public health or to prevent an adverse environmental effect. Section 112(d)(5) of the CAA provides that this residual risk review is not required for categories of area sources subject to GACT standards. Section 112(f)(2)(B) of the CAA further expressly preserves the EPA's use of the two-step approach for developing standards to address any residual risk and the Agency's interpretation of ''ample margin of safety'' developed in the *National Emissions Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants* (Benzene NESHAP) (54 FR 38044, September 14, 1989). The EPA notified Congress in the Risk Report that the Agency intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11). The EPA subsequently adopted this approach in its residual risk determinations and the United States Court of Appeals for the District of Columbia Circuit (the Court) upheld the EPA's interpretation that CAA section 112(f)(2) incorporates the approach established in the Benzene NESHAP. See *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (D.C. Cir. 2008).

The approach incorporated into the CAA and used by the EPA to evaluate residual risk and to develop standards under CAA section 112(f)(2) is a two-step approach. In the first step, the EPA determines whether risks are acceptable. This determination ''considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR)[1] of approximately 1-in-10 thousand.'' 54 FR 38045, September 14, 1989. If risks are unacceptable, the EPA must determine the emissions standards necessary to reduce risk to an acceptable level without considering costs. In the second step of the approach, the EPA considers whether the emissions standards provide an ample margin of safety to protect public health ''in consideration of all health information, including the number of persons at risk levels higher than approximately 1-in-1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.'' *Id.* The EPA must promulgate emission standards necessary to provide an ample margin of safety to protect public health or determine that the standards being reviewed provide an ample margin of safety without any revisions. After conducting the ample margin of safety analysis, we consider whether a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

CAA section 112(d)(6) separately requires the EPA to review standards promulgated under CAA section 112 and revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less often than every 8 years. In conducting this review, which we call the ''technology review,'' the EPA is not required to recalculate the MACT floor. *Natural Resources Defense Council (NRDC)* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir. 2008). *Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667 (D.C. Cir. 2013). The EPA may consider cost in deciding whether to revise the standards pursuant to CAA section 112(d)(6).

B. What is this source category and how does the current NESHAP regulate its HAP emissions?

The current NESHAP, herein called the Miscellaneous Organic Chemical Manufacturing NESHAP (MON) for the Miscellaneous Organic Chemical Manufacturing source category was promulgated on November 10, 2003 (68 FR 63852), and codified at 40 CFR part 63, subpart FFFF. As promulgated in 2003, and further amended on July 1, 2005 (70 FR 38562), and July 14, 2006 (71 FR 40316), the MON regulates HAP emissions from miscellaneous organic chemical manufacturing process units (MCPUs) located at major sources. An MCPU includes a miscellaneous organic chemical manufacturing process, as defined in 40 CFR 63.2550(i), and must meet the following criteria: (1) It manufactures any material or family of materials described in 40 CFR 63.2435(b)(1); it processes, uses, or generates any of the organic HAP described in 40 CFR 63.2435(b)(2); and, except for certain process vents that are part of a chemical manufacturing process unit, as identified in 40 CFR 63.100(j)(4), the MCPU is not an affected source or part of an affected source under another subpart of 40 CFR part 63. An MCPU also includes any assigned storage tanks and transfer racks; equipment in open systems that is used to convey or store water having the same concentration and flow characteristics as wastewater; and components such as pumps, compressors, agitators, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, connectors, and instrumentation systems that are used to manufacture any material or family of materials described in 40 CFR 63.2435(b)(1). Sources of HAP emissions regulated by the MON include the following: process vents, storage tanks, transfer racks, equipment leaks, wastewater streams, and heat exchange systems.

As of November 6, 2018, the EPA identified 201 miscellaneous organic chemical manufacturing facilities in operation and subject to the MON standards, herein referred to as ''MON facilities'', using methods described in section II.C of this preamble. A complete list of known MON facilities is available in Appendix 1 of the document titled *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this rulemaking.

C. What data collection activities were conducted to support this action?

The EPA used several sources to develop the list of existing MON facilities. All facilities in the 2014 National Emissions Inventory (NEI) and the 2014 Toxics Release Inventory with a primary facility NAICS code beginning with 325, representing the chemical manufacturing sector, were queried to create a comprehensive base facility list. The list was also supplemented using the Office of Enforcement and Compliance Assurance's (OECA) Enforcement and Compliance History Online (ECHO) tool (*https://echo.epa.gov*) and chemical sector facility lists provided internally from the EPA's records. This starting chemical manufacturing sector facility list included over 5,000 unique facilities, 201 of which we found to be subject to the MON.

To determine which facilities on the comprehensive chemical manufacturing sector facility list were subject to the MON, title V air permits were obtained from each state's online database. In cases where the online database was incomplete, the Region and/or state was contacted for help in obtaining the air permits, and internet searches were performed to determine the status of the facility (*e.g.,* open, permanently closed, sold, etc.). The list was also shared with the American Chemistry Council (ACC) and the American Coatings Association (ACA) for voluntary input on rule applicability. This review and analysis produced the final facility list of 201 MON facilities. For MON facilities that reported emissions of ethylene oxide, we not only reviewed the air permit, but we also contacted facilities to verify process and operating information.[2]

In November 2018, the EPA issued a request, pursuant to CAA section 114, to gather information about process equipment, control technologies, and emissions, and requested performance testing for certain pollutants for one MCPU source emitting ethylene oxide. The facility completed the survey and submitted responses (and follow-up responses) to the EPA between January 2019 and February 2019. The results of the performance testing were received on September 3, 2019, and, therefore, were not included in the risk analysis. The Agency has made the results publicly available in the docket for this rulemaking to provide the public with an opportunity to review the data before promulgation of the rule. Before final promulgation of this rulemaking, the EPA intends to use the collected information to assist the Agency in filling data gaps, establishing the baseline emissions and control levels for purposes of the regulatory reviews, identifying the most effective control measures, and estimating the environmental impacts associated with the regulatory options considered and reflected in this proposed action. The information not claimed as CBI by respondents and received in time to be included in this proposal is available in

[1] Although defined as ''maximum individual risk,'' MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk if an individual were exposed to the maximum level of a pollutant for a lifetime.

[2] As discussed in section IV.C.2 of this preamble, we specifically address ethylene oxide emissions from storage tanks, process vents, and equipment leaks.

the memorandum titled *Data Received from Information Collection Request for the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking.

D. What other relevant background information and data are available?

We are relying on technical reports and memoranda that the EPA developed for flares used as air pollution control devices in the Petroleum Refinery Sector RTR and New Source Performance Standards (NSPS) (80 FR 75178, December 1, 2015). These technical reports and memoranda can be found in the Petroleum Refinery Sector RTR and NSPS rulemaking docket, Docket ID No. EPA–HQ–OAR–2010–0682. The Petroleum Refinery Sector docket contains several flare-related technical reports and memoranda documenting numerous analyses the EPA conducted to develop the final suite of operational and monitoring requirements for refinery flares. For completeness of the rulemaking record for this action and ease of reference in finding these items in the publicly available refinery sector rulemaking docket, we are including a list of the most relevant technical support documents in Table 1 of the memorandum titled *Control Option Impacts for Flares Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking.

In addition, the EPA is incorporating into the docket for this rulemaking materials associated with a number of site-specific alternative means of emission limitation (AMEL) requests for facilities electing to use multi-point ground flares (MPGF) as an APCD. These site-specific AMEL requests for MPGF have been approved by the EPA because the MPGF can achieve at least equivalent reductions in emissions to the underlying flare operational standards in various NESHAP and/or NSPS. The EPA receives these AMEL requests because MPGFs are designed to operate above the current maximum permitted velocity requirements for flares in the General Provisions at 40 CFR 63.11(b). Given that the EPA has provided notice and sought comment on certain specific AMEL requests, the underlying AMEL requests submitted by industry, MPGF test data, technical memorandums, **Federal Register** documents [3] and other supporting and related material that formed the basis of the AMEL requests and approved alternative operating conditions have been placed in a publicly available docket at Docket ID No. EPA–HQ–OAR–2014–0738. We consider all items in Docket ID No. EPA–HQ–OAR–2014–0738 part of our rulemaking record as well, given that this docket is specific to MPGF AMEL requests. We are, therefore, referencing the materials in Docket ID No. EPA–HQ–OAR–2014–0738 for this rule.

We are also relying on data gathered to support the RTR for ethylene production processes, as well as memoranda documenting the technology review for those processes. Many of the emission sources for ethylene production facilities are similar to MON facilities, and several of the control options analyzed for the MON were also analyzed for the Ethylene Production RTR. The memoranda and background technical information can be found in the Ethylene Production RTR rulemaking docket, Docket ID No. EPA–HQ–OAR–2017–0357.

Furthermore, the risk assessment presented here relies on the use of the 2016 updated ethylene oxide unit risk estimate (URE) for regulatory purposes. The EPA previously requested comment on the use of this URE in the Hydrochloric Acid Production RTR proposed rule (84 FR 1584, February 4, 2019), the comment period for which closed on April 26, 2019. The Agency received a number of comments on the use of the updated ethylene oxide URE. However, ethylene oxide is not emitted by the Hydrochloric Acid Production source category but is emitted by the Miscellaneous Organic Chemical Manufacturing source category. Therefore, the EPA is incorporating these comments into the docket for this rulemaking from Docket ID No. EPA–HQ–OAR–2018–0417 and, along with comments received on this proposal, will address all comments in the response to comments document of this final rulemaking. Note that all comments received in the Hydrochloric Acid Production RTR proposal were at least partially related to risks from ethylene oxide, and, therefore, we are incorporating all comments from that rulemaking into the docket for this action. (Note, additional discussion on the use of the 2016 updated URE for ethylene oxide for this regulatory action is provided in section IV.C.3 in this preamble.)

Lastly, the EPA is incorporating into the docket for this rulemaking all materials associated with the development of the current MON standards from Docket ID No. A–96–04 and Docket ID No. OAR–2003–0121. Publicly available docket materials are available either electronically at *https://www.regulations.gov/* or in hard copy at the EPA Docket Center, EPA WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

III. Analytical Procedures and Decision-Making

In this section, we describe the analyses performed to support the proposed decisions for the RTR and other issues addressed in this proposal.

A. How do we consider risk in our decision-making?

As discussed in section II.A of this preamble and in the Benzene NESHAP, in evaluating and developing standards under CAA section 112(f)(2), we apply a two-step approach to determine whether or not risks are acceptable and to determine if the standards provide an ample margin of safety to protect public health. As explained in the Benzene NESHAP, ''the first step judgment on acceptability cannot be reduced to any single factor'' and, thus, ''[t]he Administrator believes that the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information.'' 54 FR 38046, September 14, 1989. Similarly, with regard to the ample margin of safety determination, ''the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.'' *Id.* The Benzene NESHAP approach provides flexibility regarding factors the EPA may consider in making determinations and how the EPA may weigh those factors for each source category. The EPA conducts a risk assessment that provides estimates of the MIR posed by the HAP emissions from each source in the source category, the hazard index (HI) for chronic exposures to HAP with the potential to cause noncancer health effects, and the

[3] 80 FR 8023, February 13, 2015; 80 FR 52426, August 31, 2015; 81 FR 23480, April 21, 2016; 82 FR 16392, April 4, 2017; 82 FR 27822, June 19, 2017; and 83 FR 18034, April 25, 2018.

hazard quotient (HQ) for acute exposures to HAP with the potential to cause noncancer health effects.[4] The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The scope of the EPA's risk analysis is consistent with the EPA's response to comments on our policy under the Benzene NESHAP where the EPA explained that:

> ''[t]he policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the *Vinyl Chloride* mandate that the Administrator ascertain an acceptable level of risk to the public by employing his expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in his judgment, believes are appropriate to determining what will 'protect the public health'.''

See 54 FR 38057, September 14, 1989. Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risk. The Benzene NESHAP explained that ''an MIR of approximately one in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find, in a particular case, that a risk that includes an MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors.'' *Id.* at 38045. In other words, risks that include an MIR above 100-in-1 million may be determined to be acceptable, and risks with an MIR below that level may be determined to be unacceptable, depending on all of the available health information. Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: ''EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category.'' *Id.* at 38061. We also consider the uncertainties associated with the various risk analyses, as discussed earlier in this preamble, in our determinations of acceptability and ample margin of safety.

The EPA notes that it has not considered certain health information to date in making residual risk determinations. At this time, we do not attempt to quantify the HAP risk that may be associated with emissions from other facilities that do not include the source category under review, mobile source emissions, natural source emissions, persistent environmental pollution, or atmospheric transformation in the vicinity of the sources in the category.

The EPA understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. We recognize that such consideration may be particularly important when assessing noncancer risk, where pollutant-specific exposure health reference levels (*e.g.,* reference concentrations (RfCs)) are based on the assumption that thresholds exist for adverse health effects. For example, the EPA recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse noncancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.,* other facilities) to which an individual is exposed may be sufficient to result in an increased risk of adverse noncancer health effects. In May 2010, the Science Advisory Board (SAB) advised the EPA ''that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area.''[5]

In response to the SAB recommendations, the EPA incorporates cumulative risk analyses into its RTR risk assessments, including those reflected in this proposal. The Agency (1) conducts facility-wide assessments, which include source category emission points, as well as other emission points within the facilities; (2) combines exposures from multiple sources in the same category that could affect the same individuals; and (3) for some persistent and bioaccumulative pollutants, analyzes the ingestion route of exposure. In addition, the RTR risk assessments consider aggregate cancer risk from all carcinogens and aggregated noncancer HQs for all noncarcinogens affecting the same target organ or target organ system.

Although we are interested in placing source category and facility-wide HAP risk in the context of total HAP risk from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. Estimates of total HAP risk from emission sources other than those that we have studied in depth during this RTR review would have significantly greater associated uncertainties than the source category or facility-wide estimates. Such aggregate or cumulative assessments would compound those uncertainties, making the assessments too unreliable.

B. How do we perform the technology review?

Our technology review focuses on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the MACT standards were promulgated. Where we identify such developments, we analyze their technical feasibility, estimated costs, energy implications, and non-air environmental impacts. We also consider the emission reductions associated with applying each development. This analysis informs our decision of whether it is ''necessary'' to revise the emissions standards. In addition, we consider the appropriateness of applying controls to new sources versus retrofitting existing sources. For this exercise, we consider any of the following to be a ''development'':

• Any add-on control technology or other equipment that was not identified and considered during development of the original MACT standards;

• Any improvements in add-on control technology or other equipment (that were identified and considered during development of the original

[4] The MIR is defined as the cancer risk associated with a lifetime of exposure at the highest concentration of HAP where people are likely to live. The HQ is the ratio of the potential HAP exposure concentration to the noncancer dose-response value; the HI is the sum of HQs for HAP that affect the same target organ or organ system.

[5] Recommendations of the SAB Risk and Technology Review Methods Panel are provided in their report, which is available at: *https://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

MACT standards) that could result in additional emissions reduction;

- Any work practice or operational procedure that was not identified or considered during development of the original MACT standards;
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the original MACT standards; and
- Any significant changes in the cost (including cost-effectiveness) of applying controls (including controls the EPA considered during the development of the original MACT standards).

In addition to reviewing the practices, processes, and control technologies that were considered at the time we originally developed (or last updated) the NESHAP, we review a variety of data sources in our investigation of potential practices, processes, or controls to consider. See sections II.C and II.D of this preamble for information on the specific data sources that were reviewed as part of the technology review.

C. How do we estimate post-MACT risk posed by the source category?

In this section, we provide a complete description of the types of analyses that we generally perform during the risk assessment process. In some cases, we do not perform a specific analysis because it is not relevant. For example, in the absence of emissions of HAP known to be persistent and bioaccumulative in the environment (PB–HAP), we would not perform a multipathway exposure assessment. Where we do not perform an analysis, we state that we do not and provide the reason. While we present all of our risk assessment methods, we only present risk assessment results for the analyses actually conducted (see section IV.B of this preamble).

The EPA conducts a risk assessment that provides estimates of the MIR for cancer posed by the HAP emissions from each source in the source category, the HI for chronic exposures to HAP with the potential to cause noncancer health effects, and the HQ for acute exposures to HAP with the potential to cause noncancer health effects. The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The eight sections that follow this paragraph describe how we estimated emissions and conducted the risk assessment. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule.* The methods used to assess risk (as described in the eight primary steps below) are consistent with those described by the EPA in the document reviewed by a panel of the EPA's SAB in 2009;[6] and described in the SAB review report issued in 2010. They are also consistent with the key recommendations contained in that report.

1. How did we estimate actual emissions and identify the emissions release characteristics?

The MON facility list was developed as described in section II.C of this preamble and consists of 201 facilities. The emissions modeling input files were developed using the EPA's 2014 NEI. Two modeling input files were developed, one that contains the whole facility emissions and one that contains only emissions from MON processes, or the source category. For the 201 MON facilities, only 197 had reported HAP emissions in the 2014 NEI. Of the four facilities without HAP emissions, two had reported no HAP data to the 2014 NEI and two had no Emissions Inventory System (EIS) ID and, therefore, no emissions data to pull from the NEI. Of the 197 facilities with reported HAP emissions, three facilities did not report any HAP emissions that could be identified as attributed to MON processes and, therefore, emissions data for these three facilities could not be modeled. Therefore, due to lack of available data, source category risk modeling was not conducted for seven of the 201 MON facilities, which could potentially result in an underestimation of risk for the source category. The complete MON facility list is available in Appendix 1 of the document titled *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this rulemaking.

The EPA created the whole facility modeling file using all HAP emissions records from the 2014 NEI for the list of 197 EIS IDs which had available HAP data. The NEI data were also used to develop the other parameters needed to perform the risk modeling analysis, including the emissions release characteristics, such as stack heights, stack diameters, flow rates, temperatures, and emission release point locations.

The EPA then created the source category modeling input file by identifying the specific NEI emissions records in the whole facility modeling input file that are subject to the MON by reviewing the facilities' title V air permits, unit source classification code (SCC), emission unit descriptions, and process descriptions. The EPA also used SCC codes, emission unit descriptions, and process descriptions to identify units that are not subject to the MON (*e.g.,* boilers, engines, etc.) and removed them from the source category modeling file. In general, ambiguous NEI records were assumed to be subject to the MON to be conservatively inclusive, with the intention of verifying the rule applicability later if the risk analysis revealed these unit emissions to be risk drivers for the source category. As mentioned previously, of the 197 facilities with reported HAP emissions at the whole facility level, three facilities did not report any HAP emissions that could be identified as attributed to MON processes and, therefore, emissions data for 194 facilities was included in the source category modeling file. After determining which NEI records were subject to the MON, the record was assigned to an emission process group, identified in Table 2.

TABLE 2—EMISSION PROCESS GROUPS RELATED TO THE MISCELLANEOUS ORGANIC CHEMICAL MANUFACTURING SOURCE CATEGORY

Emission process group abbreviation [1]	Emission process group description [1]
PV	Process Vent.
ST	Storage Tank.
TR	Transfer Operation.
HE	Heat Exchange System.
EL	Equipment Leak.
WS	Wastewater.
FL	Flare.
IN [2]	Potential MON Process Group.[2]
UK [3]	Unknown Process Group.[3]
OT [4]	Non-MON Process Group.[4]

[1] Sometimes the record includes co-mingled emissions from more than one emission process group due to a shared control device.

[6] U.S. EPA. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* June 2009. EPA–452/R–09–006. *https://www3.epa.gov/airtoxics/rrisk/rtrpg.html.*

[2] These are emission records at the facility from sources that may potentially be subject to the MON, based on their SCC code, emission unit description, or process description, but could not be verified due to lack of available information.

[3] These are emission records at the facility from sources that are subject to the MON but lack specific details in the NEI record to allow identification of an appropriate emission process group.

[4] These are emission records at the facility from sources that are not subject to the MON. Therefore, this emission process group will only appear in the whole facility modeling file, and not in the source category modeling file.

The RTR emissions dataset was refined following an extensive quality assurance check of source locations, emission release point parameters, and annual emission estimates. The EPA reviewed the locations of emission release points at each facility and revised each record as needed to ensure that all release points were located within the fenceline of the facility. If an emission release point was located outside of the facility fenceline or on an obviously incorrect location within the fenceline (*e.g.,* parking lot, lake, etc.) then the emission release point was re-located to either the true location of the equipment, if known, or the approximate center of the facility.

The emission release point parameters for stacks in the modeling input files include stack height, exit gas temperature, stack diameter, exit gas velocity, and exit gas flow rate. If emission release point parameters were outside of typical quality assurance range checks or missing, then the air permit was used to try and determine the permitted value. If this information could not be found within the air permit, then a surrogate value was assigned based on either the NAICS code, the regulatory code, or the SCC. In some cases, missing emission release point parameters were calculated using other parameters within the modeling input file. For example, missing exit gas flow rates were calculated using reported diameter and velocity.

Additionally, the EPA compared the emission release point type (*i.e.,* fugitive, stack) to the emission unit and process descriptions for the modeling file records. In cases where information was conflicting (*i.e.,* equipment leaks being modeled as a vertical stack, or process vent emissions being modeled as a fugitive area), we updated the emission release point type to the appropriate category and supplemented the appropriate emission release parameters using either permitted values, when available, or defaulted values.

In some cases, the EPA coordinated with Regional offices, state agencies, and/or industry on a specific emission record if it was unknown whether the emissions belonged to a MON process and preliminary risk analysis indicated that this pollutant might be a risk driver. This specific inquiry was done to ensure that only MON emissions were included in the source category modeling file. To further improve the quality of the modeling file, in September 2017, the EPA provided member companies of ACC and ACA with the emissions modeling input records. The emissions records were also sent directly to several companies. This allowed companies the opportunity to review and revise emission values, emission release point parameters, and coordinates, as needed. Any changes received between September 2017 and November 2018 were incorporated into the RTR modeling file. Changes received after November 2018 will be considered for incorporation in the final rule. A list of responses received from the Regional offices, state agencies, and chemical companies can be found in Appendix 1 of the document titled *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this rulemaking. This memorandum provides a description of the information received, the file name of the response received, and details on how the information was used to supplement the modeling file. This memorandum also provides records of all changes made to the source category and whole facility modeling input files throughout the quality assurance and quality control process, and additional details on the data and methods used to develop actual emissions estimates for the risk modeling, including the EPA's quality assurance review.

2. How did we estimate MACT-allowable emissions?

The available emissions data in the RTR emissions dataset include estimates of the mass of HAP emitted during a specified annual time period. These ''actual'' emission levels are often lower than the emission levels allowed under the requirements of the current MACT standards. The emissions allowed under the MACT standards are referred to as the ''MACT-allowable'' emissions. We discussed the consideration of both MACT-allowable and actual emissions in the final Coke Oven Batteries RTR (70 FR 19998–19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP RTR (71 FR 34428, June 14, 2006, and 71 FR 76609, December 21, 2006, respectively). In those actions, we noted that assessing the risk at the MACT-allowable level is inherently reasonable since that risk reflects the maximum level facilities could emit and still comply with national emission standards. We also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP approach. (54 FR 38044, September 14, 1989.)

For this analysis, we have determined that the actual emissions data are reasonable estimates of the MACT-allowable emissions levels for the Miscellaneous Organic Chemical Manufacturing source category. The ability to estimate MACT-allowable emissions from the actual emissions dataset is largely dependent on the format of the standard for a given emissions source as well as the types of controls employed for the source. For further details on the assumptions and methodologies used to estimate MACT-allowable emissions, see Appendix 1 of the document titled *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this rulemaking.

3. How do we conduct dispersion modeling, determine inhalation exposures, and estimate individual and population inhalation risk?

Both long-term and short-term inhalation exposure concentrations and health risk from the source category addressed in this proposal were estimated using the Human Exposure Model (HEM–3).[7] The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 kilometers (km) of the modeled sources, and (3) estimating individual and population-level inhalation risk using the exposure estimates and quantitative dose-response information.

a. Dispersion Modeling

The air dispersion model AERMOD, used by the HEM–3 model, is one of the EPA's preferred models for assessing air pollutant concentrations from industrial facilities.[8] To perform the dispersion modeling and to develop the

[7] For more information about HEM–3, go to *https://www.epa.gov/fera/risk-assessment-and-modeling-human-exposure-model-hem.*

[8] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (2016) of hourly surface and upper air observations from 824 meteorological stations, selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block [9] internal point locations and populations provides the basis of human exposure calculations (U.S. Census, 2010). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant-specific dose-response values is used to estimate health risk. These are discussed below.

b. Risk From Chronic Exposure to HAP

In developing the risk assessment for chronic exposures, we use the estimated annual average ambient air concentrations of each HAP emitted by each source in the source category. The HAP air concentrations at each nearby census block centroid located within 50 km of the facility are a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044, September 14, 1989) and the limitations of Gaussian dispersion models, including AERMOD.

For each facility, we calculate the MIR as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week, 52 weeks per year, 70 years) exposure to the maximum concentration at the centroid of each inhabited census block. We calculate individual cancer risk by multiplying the estimated lifetime exposure to the ambient concentration of each HAP (in micrograms per cubic meter (μg/m³)) by its URE. The URE is an upper-bound estimate of an individual's incremental risk of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use UREs from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) UREs, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate. The pollutant-specific dose-response values used to estimate cancer health risk are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

To estimate individual lifetime cancer risks associated with exposure to HAP emissions from each facility in the source category, we sum the risks for each of the carcinogenic HAP [10] emitted by the modeled facility. We estimate cancer risk at every census block within 50 km of every facility in the source category. The MIR is the highest individual lifetime cancer risk estimated for any of those census blocks. In addition to calculating the MIR, we estimate the distribution of individual cancer risks for the source category by summing the number of individuals within 50 km of the sources whose estimated risk falls within a specified risk range. We also estimate annual cancer incidence by multiplying the estimated lifetime cancer risk at each census block by the number of people residing in that block, summing results for all of the census blocks, and then dividing this result by a 70-year lifetime.

To assess the risk of noncancer health effects from chronic exposure to HAP, we calculate either an HQ or a target organ-specific hazard index (TOSHI). We calculate an HQ when a single noncancer HAP is emitted. Where more than one noncancer HAP is emitted, we sum the HQ for each of the HAP that affects a common target organ or target organ system to obtain a TOSHI. The HQ is the estimated exposure divided by the chronic noncancer dose-response value, which is a value selected from one of several sources. The preferred chronic noncancer dose-response value is the EPA RfC, defined as "an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime" (*https://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=IRIS%20Glossary*). In cases where an RfC from the EPA's IRIS is not available or where the EPA determines that using a value other than the RfC is appropriate, the chronic noncancer dose-response value can be a value from the following prioritized sources, which define their dose-response values similarly to the EPA: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) Minimum Risk Level (*https://www.atsdr.cdc.gov/mrls/index.asp*); (2) the CalEPA Chronic Reference Exposure Level (REL) (*https://oehha.ca.gov/air/crnr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0*); or (3) as noted above, a scientifically credible dose-response value that has been developed in a manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA. The pollutant-specific dose-response values used to estimate chronic noncancer health risks are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

c. Risk from Acute Exposure to HAP That May Cause Health Effects Other Than Cancer

For each HAP for which appropriate acute inhalation dose-response values are available, the EPA also assesses the potential health risks due to acute exposure. For these assessments, the EPA makes conservative assumptions about emission rates, meteorology, and exposure location. In this proposed rulemaking, as part of our efforts to continually improve our methodologies to evaluate the risks that HAP emitted from categories of industrial sources pose to human health and the

[9] A census block is the smallest geographic area for which census statistics are tabulated.

[10] The EPA's 2005 *Guidelines for Carcinogen Risk Assessment* classifies carcinogens as: "carcinogenic to humans," "likely to be carcinogenic to humans," and "suggestive evidence of carcinogenic potential." These classifications also coincide with the terms "known carcinogen, probable carcinogen, and possible carcinogen," respectively, which are the terms advocated in the EPA's *Guidelines for Carcinogen Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986). In August 2000, the document, *Supplemental Guidance for Conducting Health Risk Assessment of Chemical Mixtures* (EPA/630/R–00/002), was published as a supplement to the 1986 document. Copies of both documents can be obtained from *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=20533&CFID=70315376&CFTOKEN=71597944.* Summing the risk of these individual compounds to obtain the cumulative cancer risk is an approach that was recommended by the EPA's SAB in their 2002 peer review of the EPA's National Air Toxics Assessment (NATA) titled *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory,* available at *https://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf.*

environment,[11] we are revising our treatment of meteorological data to use reasonable worst-case air dispersion conditions in our acute risk screening assessments instead of worst-case air dispersion conditions. This revised treatment of meteorological data and the supporting rationale are described in more detail in *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* We will be applying this revision in RTR rulemakings proposed on or after June 3, 2019.

To assess the potential acute risk to the maximally exposed individual, we use the peak hourly emission rate for each emission point,[12] reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile), and the point of highest off-site exposure. Specifically, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions co-occur and that a person is present at the point of maximum exposure.

To characterize the potential health risks associated with estimated acute inhalation exposures to a HAP, we generally use multiple acute dose-response values, including acute RELs, acute exposure guideline levels (AEGLs), and emergency response planning guidelines (ERPG) for 1-hour exposure durations, if available, to calculate acute HQs. The acute HQ is calculated by dividing the estimated acute exposure concentration by the acute dose-response value. For each HAP for which acute dose-response values are available, the EPA calculates acute HQs.

An acute REL is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.''[13] Acute RELs are based on the most sensitive, relevant, adverse health effect reported in the peer-reviewed medical and toxicological literature. They are designed to protect the most sensitive individuals in the population through the inclusion of margins of safety. Because margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact. AEGLs represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to 8 hours.[14] They are guideline levels for ''once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.'' *Id.* at 21. The AEGL–1 is specifically defined as ''the airborne concentration (expressed as ppm (parts per million) or mg/m^3 (milligrams per cubic meter)) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.'' The document also notes that ''Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.'' *Id.* AEGL–2 are defined as ''the airborne concentration (expressed as parts per million or milligrams per cubic meter) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.'' *Id.*

ERPGs are ''developed for emergency planning and are intended as health-based guideline concentrations for single exposures to chemicals.''[15] *Id.* at 1. The ERPG–1 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor.'' *Id.* at 2. Similarly, the ERPG–2 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action.'' *Id.* at 1.

An acute REL for 1-hour exposure durations is typically lower than its corresponding AEGL–1 and ERPG–1. Even though their definitions are slightly different, AEGL–1s are often the same as the corresponding ERPG–1s, and AEGL–2s are often equal to ERPG–2s. The maximum HQs from our acute inhalation screening risk assessment typically result when we use the acute REL for a HAP. In cases where the maximum acute HQ exceeds 1, we also report the HQ based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1).

For the acute inhalation risk assessment of the Miscellaneous Organic Chemical Manufacturing source category, we used process level-specific acute emissions multipliers, ranging from a factor of 2 to 10. In general, hourly emissions estimates were based on peak-to-mean ratios for 37 emission process groups, with emissions from transfer racks and other emission process groups where sufficient information did not exist to adequately assess peak hourly emissions (*e.g.,* flares controlling various unknown emissions sources) having the highest hourly peak emissions at a factor of 10 times the annual average. A further discussion of why these factors were selected can be found in Appendix 1 of the document titled *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this rulemaking.

In our acute inhalation screening risk assessment, acute impacts are deemed negligible for HAP for which acute HQs are less than or equal to 1, and no further analysis is performed for these

[11] See, *e.g.,* U.S. EPA. *Screening Methodologies to Support Risk and Technology Reviews (RTR): A Case Study Analysis,* Draft Report, May 2017. *https://www3.epa.gov/ttn/atw/rrisk/rtrpg.html.*

[12] In the absence of hourly emission data, we develop estimates of maximum hourly emission rates by multiplying the average actual annual emissions rates by a factor (either a category-specific factor or a default factor of 10) to account for variability. This is documented in *Residual Risk Assessment for Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* Both are available in the docket for this rulemaking.

[13] CalEPA issues acute RELs as part of its Air Toxics Hot Spots Program, and the 1-hour and 8-hour values are documented in *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* which is available at *https://oehha.ca.gov/air/general-info/oehha-acute-8-hour-and-chronic-reference-exposure-level-rel-summary.*

[14] National Academy of Sciences, 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2. Available at *https://www.epa.gov/sites/production/files/2015-09/documents/sop_final_standing_operating_procedures_2001.pdf.* Note that the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances ended in October 2011, but the AEGL program continues to operate at the EPA and works with the National Academies to publish final AEGLs (*https://www.epa.gov/aegl*).

[15] *ERPGS Procedures and Responsibilities.* March 2014. American Industrial Hygiene Association. Available at: *https://www.aiha.org/get-involved/AIHAGuidelineFoundation/EmergencyResponsePlanningGuidelines/Documents/ERPG%20Committee%20Standard%20Operating%20Procedures%20%20-%20March%202014%20Revision%20%28Updated%2010-2-2014%29.pdf.*

HAP. In cases where an acute HQ from the screening step is greater than 1, we assess the site-specific data to ensure that the acute HQ is at an off-site location. For this source category, the data refinements employed consisted of ensuring the locations where the maximum HQ occurred were off facility property and where the public could potentially be exposed. These refinements are discussed more fully in the *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this source category.

4. How do we conduct the multipathway exposure and risk screening assessment?

The EPA conducts a tiered screening assessment examining the potential for significant human health risks due to exposures via routes other than inhalation (*i.e.,* ingestion). We first determine whether any sources in the source category emit any HAP known to be persistent and bioaccumulative in the environment, as identified in the EPA's Air Toxics Risk Assessment Library (see Volume 1, Appendix D, at *https://www.epa.gov/fera/risk-assessment-and-modeling-air-toxics-risk-assessment-reference-library*).

For the Miscellaneous Organic Chemical Manufacturing source category, we identified PB–HAP emissions of polycyclic organic matter (POM) (of which polycyclic aromatic hydrocarbons is a subset), lead compounds, mercury compounds, cadmium compounds, and arsenic compounds, so we proceeded to the next step of the evaluation. Except for lead, the human health risk screening assessment for PB–HAP consists of three progressive tiers. In a Tier 1 screening assessment, we determine whether the magnitude of the facility-specific emissions of PB–HAP warrants further evaluation to characterize human health risk through ingestion exposure. To facilitate this step, we evaluate emissions against previously developed screening threshold emission rates for several PB–HAP that are based on a hypothetical upper-end screening exposure scenario developed for use in conjunction with the EPA's Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure (TRIM.FaTE) model. The PB–HAP with screening threshold emission rates are arsenic compounds, cadmium compounds, chlorinated dibenzodioxins and furans, mercury compounds, and POM. Based on the EPA estimates of toxicity and bioaccumulation potential, these pollutants represent a conservative list for inclusion in multipathway risk assessments for RTR rules. (See Volume 1, Appendix D at *https://www.epa.gov/sites/production/files/2013-08/documents/volume_1_reflibrary.pdf*). In this assessment, we compare the facility-specific emission rates of these PB–HAP to the screening threshold emission rates for each PB–HAP to assess the potential for significant human health risks via the ingestion pathway. We call this application of the TRIM.FaTE model the Tier 1 screening assessment. The ratio of a facility's actual emission rate to the Tier 1 screening threshold emission rate is a ''screening value'' (SV).

We derive the Tier 1 screening threshold emission rates for these PB–HAP (other than lead compounds) to correspond to a maximum excess lifetime cancer risk of 1-in-1 million (*i.e.,* for arsenic compounds, polychlorinated dibenzodioxins and furans and POM) or, for HAP that cause noncancer health effects (*i.e.,* cadmium compounds and mercury compounds), a maximum HQ of 1. If the emission rate of any one PB–HAP or combination of carcinogenic PB–HAP in the Tier 1 screening assessment exceeds the Tier 1 screening threshold emission rate for any facility (*i.e.,* the SV is greater than 1), we conduct a second screening assessment, which we call the Tier 2 screening assessment. The Tier 2 screening assessment separates the Tier 1 combined fisher and farmer exposure scenario into fisher, farmer, and gardener scenarios that retain upper-bound ingestion rates.

In the Tier 2 screening assessment, the location of each facility that exceeds a Tier 1 screening threshold emission rate is used to refine the assumptions associated with the Tier 1 fisher and farmer exposure scenarios at that facility. A key assumption in the Tier 1 screening assessment is that a lake and/or farm is located near the facility. As part of the Tier 2 screening assessment, we use a U.S. Geological Survey (USGS) database to identify actual waterbodies within 50 km of each facility and assume the fisher only consumes fish from lakes within that 50 km zone. We also examine the differences between local meteorology near the facility and the meteorology used in the Tier 1 screening assessment. We then adjust the previously-developed Tier 1 screening threshold emission rates for each PB–HAP for each facility based on an understanding of how exposure concentrations estimated for the screening scenario change with the use of local meteorology and USGS lakes database.

In the Tier 2 farmer scenario, we maintain an assumption that the farm is located within 0.5 km of the facility and that the farmer consumes meat, eggs, dairy, vegetables, and fruit produced near the facility. We may further refine the Tier 2 screening analysis by assessing a gardener scenario to characterize a range of exposures, with the gardener scenario being more plausible in RTR evaluations. Under the gardener scenario, we assume the gardener consumes home-produced eggs, vegetables, and fruit products at the same ingestion rate as the farmer. The Tier 2 screen continues to rely on the high-end food intake assumptions that were applied in Tier 1 for local fish (adult female angler at 99th percentile fish consumption [16]) and locally grown or raised foods (90th percentile consumption of locally grown or raised foods for the farmer and gardener scenarios [17]). If PB–HAP emission rates do not result in a Tier 2 SV greater than 1, we consider those PB–HAP emissions to pose risks below a level of concern. If the PB–HAP emission rates for a facility exceed the Tier 2 screening threshold emission rates, we may conduct a Tier 3 screening assessment.

There are several analyses that can be included in a Tier 3 screening assessment, depending upon the extent of refinement warranted, including validating that the lakes are fishable, locating residential/garden locations for urban and/or rural settings, considering plume-rise to estimate emissions lost above the mixing layer, and considering hourly effects of meteorology and plume rise on chemical fate and transport (a time-series analysis). If necessary, the EPA may further refine the screening assessment through a site-specific assessment.

In evaluating the potential multipathway risk from emissions of lead compounds, rather than developing a screening threshold emission rate, we compare maximum estimated chronic inhalation exposure concentrations to the level of the current National Ambient Air Quality Standard (NAAQS) for lead.[18] Values below the level of the

[16] Burger, J. 2002. Daily consumption of wild fish and game: Exposures of high end recreationists. *International Journal of Environmental Health Research* 12:343–354.

[17] U.S. EPA. *Exposure Factors Handbook 2011 Edition (Final).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/052F, 2011.

[18] In doing so, the EPA notes that the legal standard for a primary NAAQS—that a standard is requisite to protect public health and provide an adequate margin of safety (CAA section 109(b))—

Continued

primary (health-based) lead NAAQS are considered to have a low potential for multipathway risk.

For further information on the multipathway assessment approach, see the *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this action.

5. How do we assess risks considering emissions control options?

In addition to assessing baseline inhalation risks and screening for potential multipathway risks, we also estimate risks considering the potential emission reductions that would be achieved by the control options under consideration. In these cases, the expected emission reductions are applied to the specific HAP and emission points in the RTR emissions dataset to develop corresponding estimates of risk and incremental risk reductions.

6. How do we conduct the environmental risk screening assessment?

a. Adverse Environmental Effect, Environmental HAP, and Ecological Benchmarks

The EPA conducts a screening assessment to examine the potential for an adverse environmental effect as required under section 112(f)(2)(A) of the CAA. Section 112(a)(7) of the CAA defines ''adverse environmental effect'' as ''any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.''

The EPA focuses on eight HAP, which are referred to as ''environmental HAP,'' in its screening assessment: Six PB–HAP and two acid gases. The PB–HAP included in the screening assessment are arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. The acid gases included in the screening assessment are hydrochloric acid (HCl) and hydrogen fluoride (HF).

HAP that persist and bioaccumulate are of particular environmental concern because they accumulate in the soil, sediment, and water. The acid gases, HCl and HF, are included due to their well-documented potential to cause direct damage to terrestrial plants. In the environmental risk screening assessment, we evaluate the following four exposure media: Terrestrial soils, surface water bodies (includes water-column and benthic sediments), fish consumed by wildlife, and air. Within these four exposure media, we evaluate nine ecological assessment endpoints, which are defined by the ecological entity and its attributes. For PB–HAP (other than lead), both community-level and population-level endpoints are included. For acid gases, the ecological assessment evaluated is terrestrial plant communities.

An ecological benchmark represents a concentration of HAP that has been linked to a particular environmental effect level. For each environmental HAP, we identified the available ecological benchmarks for each assessment endpoint. We identified, where possible, ecological benchmarks at the following effect levels: Probable effect levels, lowest-observed-adverse-effect level, and no-observed-adverse-effect level. In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we use all of the available effect levels to help us to determine whether ecological risks exist and, if so, whether the risks could be considered significant and widespread.

For further information on how the environmental risk screening assessment was conducted, including a discussion of the risk metrics used, how the environmental HAP were identified, and how the ecological benchmarks were selected, see Appendix 9 of the *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this action.

b. Environmental Risk Screening Methodology

For the environmental risk screening assessment, the EPA first determined whether any facilities in the Miscellaneous Organic Chemical Manufacturing source category emitted any of the environmental HAP. For the Miscellaneous Organic Chemical Manufacturing source category, we identified emissions of POM, lead compounds, mercury compounds, cadmium compounds, arsenic compounds, HCl, and HF. Because one or more of the environmental HAP evaluated are emitted by at least one facility in the source category, we proceeded to the second step of the evaluation.

c. PB–HAP Methodology

The environmental screening assessment includes six PB–HAP, arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. With the exception of lead, the environmental risk screening assessment for PB–HAP consists of three tiers. The first tier of the environmental risk screening assessment uses the same health-protective conceptual model that is used for the Tier 1 human health screening assessment. TRIM.FaTE model simulations were used to back-calculate Tier 1 screening threshold emission rates. The screening threshold emission rates represent the emission rate in tons of pollutant per year that results in media concentrations at the facility that equal the relevant ecological benchmark. To assess emissions from each facility in the category, the reported emission rate for each PB–HAP was compared to the Tier 1 screening threshold emission rate for that PB–HAP for each assessment endpoint and effect level. If emissions from a facility do not exceed the Tier 1 screening threshold emission rate, the facility ''passes'' the screening assessment, and, therefore, is not evaluated further under the screening approach. If emissions from a facility exceed the Tier 1 screening threshold emission rate, we evaluate the facility further in Tier 2.

In Tier 2 of the environmental screening assessment, the screening threshold emission rates are adjusted to account for local meteorology and the actual location of lakes in the vicinity of facilities that did not pass the Tier 1 screening assessment. For soils, we evaluate the average soil concentration for all soil parcels within a 7.5-km radius for each facility and PB–HAP. For the water, sediment, and fish tissue concentrations, the highest value for each facility for each pollutant is used. If emission concentrations from a facility do not exceed the Tier 2 screening threshold emission rate, the facility ''passes'' the screening assessment and typically is not evaluated further. If emissions from a

differs from the CAA section 112(f) standard (requiring, among other things, that the standard provide an ''ample margin of safety to protect public health''). However, the primary lead NAAQS is a reasonable measure of determining risk acceptability (*i.e.,* the first step of the Benzene NESHAP analysis) since it is designed to protect the most susceptible group in the human population—children, including children living near major lead emitting sources. 73 FR 67002/3; 73 FR 67000/3; 73 FR 67005/1. In addition, applying the level of the primary lead NAAQS at the risk acceptability step is conservative, since that primary lead NAAQS reflects an adequate margin of safety.

facility exceed the Tier 2 screening threshold emission rate, we evaluate the facility further in Tier 3.

As in the multipathway human health risk assessment, in Tier 3 of the environmental screening assessment, we examine the suitability of the lakes around the facilities to support life and remove those that are not suitable (*e.g.,* lakes that have been filled in or are industrial ponds), adjust emissions for plume-rise, and conduct hour-by-hour time-series assessments. If these Tier 3 adjustments to the screening threshold emission rates still indicate the potential for an adverse environmental effect (*i.e.,* facility emission rate exceeds the screening threshold emission rate), we may elect to conduct a more refined assessment using more site-specific information. If, after additional refinement, the facility emission rate still exceeds the screening threshold emission rate, the facility may have the potential to cause an adverse environmental effect.

To evaluate the potential for an adverse environmental effect from lead, we compared the average modeled air concentrations (from HEM–3) of lead around each facility in the source category to the level of the secondary NAAQS for lead. The secondary lead NAAQS is a reasonable means of evaluating environmental risk because it is set to provide substantial protection against adverse welfare effects which can include ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.''

d. Acid Gas Environmental Risk Methodology

The environmental screening assessment for acid gases evaluates the potential phytotoxicity and reduced productivity of plants due to chronic exposure to HF and HCl. The environmental risk screening methodology for acid gases is a single-tier screening assessment that compares modeled ambient air concentrations (from AERMOD) to the ecological benchmarks for each acid gas. To identify a potential adverse environmental effect (as defined in section 112(a)(7) of the CAA) from emissions of HF and HCl, we evaluate the following metrics: The size of the modeled area around each facility that exceeds the ecological benchmark for each acid gas, in acres and km^2; the percentage of the modeled area around each facility that exceeds the ecological benchmark for each acid gas; and the area-weighted average SV around each facility (calculated by dividing the area-weighted average concentration over the 50-km modeling domain by the ecological benchmark for each acid gas). For further information on the environmental screening assessment approach, see Appendix 9 of the *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this action.

7. How do we conduct facility-wide assessments?

To put the source category risks in context, we typically examine the risks from the entire ''facility,'' where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category emission points of interest, but also emissions of HAP from all other emission sources at the facility for which we have data. For this source category, we conducted the facility-wide assessment using a dataset compiled from the 2014 NEI. The source category records of that NEI dataset were flagged within the dataset, as described in section II.C of this preamble: What data collection activities were conducted to support this action? Quality assurance and quality control was performed on the whole facility dataset, which included the flagged source category records. The facility-wide file was then used to analyze risks due to the inhalation of HAP that are emitted ''facility-wide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, the modeled source category risks were compared to the facility-wide risks to determine the portion of the facility-wide risks that could be attributed to the source category addressed in this proposal. We also specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

8. How do we consider uncertainties in risk assessment?

Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health and environmentally protective. A brief discussion of the uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates, and dose-response relationships follows below. Also included are those uncertainties specific to our acute screening assessments, multipathway screening assessments, and our environmental risk screening assessments. A more thorough discussion of these uncertainties is included in the *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this action. If a multipathway site-specific assessment was performed for this source category, a full discussion of the uncertainties associated with that assessment can be found in Appendix 11 of that document, *Site-Specific Human Health Multipathway Residual Risk Assessment Report.*

a. Uncertainties in the RTR Emissions Dataset

Although the development of the RTR emissions dataset involved quality assurance/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in emission estimates, and other factors. The emission estimates considered in this analysis generally are annual totals for certain years, and they do not reflect short-term fluctuations during the course of a year or variations from year to year. The estimates of peak hourly emission rates for the acute effects screening assessment were based on an emission adjustment factor applied to the average annual hourly emission rates, which are intended to account for emission fluctuations due to normal facility operations.

b. Uncertainties in Dispersion Modeling

We recognize there is uncertainty in ambient concentration estimates associated with any model, including the EPA's recommended regulatory dispersion model, AERMOD. In using a model to estimate ambient pollutant concentrations, the user chooses certain options to apply. For RTR assessments, we select some model options that have the potential to overestimate ambient air concentrations (*e.g.,* not including plume depletion or pollutant transformation). We select other model options that have the potential to underestimate ambient impacts (*e.g.,* not including building downwash). Other options that we select have the potential to either under- or overestimate ambient levels (*e.g.,* meteorology and receptor locations). On balance, considering the directional nature of the uncertainties commonly present in ambient concentrations estimated by dispersion models, the approach we apply in the RTR assessments should yield unbiased estimates of ambient HAP concentrations. We also note that the selection of meteorology dataset location could have an impact on the risk estimates. As we continue to update and expand our library of meteorological station data used in our risk assessments, we expect to reduce this variability.

c. Uncertainties in Inhalation Exposure Assessment

Although every effort is made to identify all of the relevant facilities and emission points, as well as to develop accurate estimates of the annual emission rates for all relevant HAP, the uncertainties in our emission inventory likely dominate the uncertainties in the exposure assessment. Some uncertainties in our exposure assessment include human mobility, using the centroid of each census block, assuming lifetime exposure, and assuming only outdoor exposures. For most of these factors, there is neither an under nor overestimate when looking at the maximum individual risk or the incidence, but the shape of the distribution of risks may be affected. With respect to outdoor exposures, actual exposures may not be as high if people spend time indoors, especially for very reactive pollutants or larger particles. For all factors, we reduce uncertainty when possible. For example, with respect to census-block centroids, we analyze large blocks using aerial imagery and adjust locations of the block centroids to better represent the population in the blocks. We also add additional receptor locations where the population of a block is not well represented by a single location.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and noncancer effects from both chronic and acute exposures. Some uncertainties are generally expressed quantitatively, and others are generally expressed in qualitative terms. We note, as a preface to this discussion, a point on dose-response uncertainty that is stated in the EPA's *2005 Guidelines for Carcinogen Risk Assessment;* namely, that ''the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective'' (the EPA's *2005 Guidelines for Carcinogen Risk Assessment,* page 1–7). This is the approach followed here as summarized in the next paragraphs.

Cancer UREs used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk.[19] That is, they represent a ''plausible upper limit to the true value of a quantity'' (although this is usually not a true statistical confidence limit). In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[20] Chronic noncancer RfC and reference dose (RfD) values represent chronic exposure levels that are intended to be health-protective levels. To derive dose-response values that are intended to be ''without appreciable risk,'' the methodology relies upon an uncertainty factor (UF) approach,[21] which considers uncertainty, variability, and gaps in the available data. The UFs are applied to derive dose-response values that are intended to protect against appreciable risk of deleterious effects.

Many of the UFs used to account for variability and uncertainty in the development of acute dose-response values are quite similar to those developed for chronic durations. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.,* 4 hours) to derive an acute dose-response value at another exposure duration (*e.g.,* 1 hour). Not all acute dose-response values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the dose-response value or values being exceeded. Where relevant to the estimated exposures, the lack of acute dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Uncertainty also exists in the selection of ecological benchmarks for the environmental risk screening assessment. We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. We searched for benchmarks for three effect levels (*i.e.,* no-effects level, threshold-effect level, and probable effect level), but not all combinations of ecological assessment/environmental HAP had benchmarks for all three effect levels. Where multiple effect levels were available for a particular HAP and assessment endpoint, we used all of the available effect levels to help us determine whether risk exists and whether the risk could be considered significant and widespread.

Although we make every effort to identify appropriate human health effect dose-response values for all pollutants emitted by the sources in this risk assessment, some HAP emitted by this source category are lacking dose-response assessments. Accordingly, these pollutants cannot be included in the quantitative risk assessment, which could result in quantitative estimates understating HAP risk. To help to alleviate this potential underestimate, where we conclude similarity with a HAP for which a dose-response value is available, we use that value as a surrogate for the assessment of the HAP for which no value is available. To the extent use of surrogates indicates appreciable risk, we may identify a need to increase priority for an IRIS assessment for that substance. We additionally note that, generally speaking, HAP of greatest concern due to environmental exposures and hazard are those for which dose-response assessments have been performed, reducing the likelihood of understating risk. Further, HAP not included in the quantitative assessment are assessed

[19] IRIS glossary (*https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=IRIS%20Glossary*).

[20] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

[21] See *A Review of the Reference Dose and Reference Concentration Processes,* U.S. EPA, December 2002, and *Methods for Derivation of Inhalation Reference Concentrations and Application of Inhalation Dosimetry,* U.S. EPA, 1994.

qualitatively and considered in the risk characterization that informs the risk management decisions, including consideration of HAP reductions achieved by various control options.

For a group of compounds that are unspeciated (*e.g.,* glycol ethers), we conservatively use the most protective dose-response value of an individual compound in that group to estimate risk. Similarly, for an individual compound in a group (*e.g.,* ethylene glycol diethyl ether) that does not have a specified dose-response value, we also apply the most protective dose-response value from the other compounds in the group to estimate risk.

e. Uncertainties in Acute Inhalation Screening Assessments

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that the EPA conducts as part of the risk review under section 112 of the CAA. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emission rates, meteorology, and the presence of a person. In the acute screening assessment that we conduct under the RTR program, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile) co-occur. These two events are unlikely to occur at the same time, making these assumptions conservative. We then include the additional assumption that a person is located at this point at the same time. Together, these assumptions represent a reasonable worst-case exposure scenario. In most cases, it is unlikely that a person would be located at the point of maximum exposure during the time when peak emissions and reasonable worst-case air dispersion conditions occur simultaneously.

f. Uncertainties in the Multipathway and Environmental Risk Screening Assessments

For each source category, we generally rely on site-specific levels of PB–HAP or environmental HAP emissions to determine whether a refined assessment of the impacts from multipathway exposures is necessary or whether it is necessary to perform an environmental screening assessment. This determination is based on the results of a three-tiered screening assessment that relies on the outputs from models—TRIM.FaTE and AERMOD—that estimate environmental pollutant concentrations and human exposures for five PB–HAP (dioxins, POM, mercury, cadmium, and arsenic) and two acid gases (HF and HCl). For lead, we use AERMOD to determine ambient air concentrations, which are then compared to the secondary NAAQS standard for lead. Two important types of uncertainty associated with the use of these models in RTR risk assessments and inherent to any assessment that relies on environmental modeling are model uncertainty and input uncertainty.[22]

Model uncertainty concerns whether the model adequately represents the actual processes (*e.g.,* movement and accumulation) that might occur in the environment. For example, does the model adequately describe the movement of a pollutant through the soil? This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screening assessments are appropriate and state-of-the-art for the multipathway and environmental screening risk assessments conducted in support of RTR.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the multipathway and environmental screening assessments, we configured the models to avoid underestimating exposure and risk. This was accomplished by selecting upper-end values from nationally representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, lake location and size, meteorology, surface water, soil characteristics, and structure of the aquatic food web. We also assume an ingestion exposure scenario and values for human exposure factors that represent reasonable maximum exposures.

In Tier 2 of the multipathway and environmental screening assessments, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the actual location of lakes near the facility rather than the default lake location that we apply in Tier 1. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screening assessment. In Tier 3 of the screening assessments, we refine the model inputs again to account for hour-by-hour plume rise and the height of the mixing layer. We can also use those hour-by-hour meteorological data in a TRIM.FaTE run using the screening configuration corresponding to the lake location. These refinements produce a more accurate estimate of chemical concentrations in the media of interest, thereby reducing the uncertainty with those estimates. The assumptions and the associated uncertainties regarding the selected ingestion exposure scenario are the same for all three tiers.

For the environmental screening assessment for acid gases, we employ a single-tiered approach. We use the modeled air concentrations and compare those with ecological benchmarks.

For all tiers of the multipathway and environmental screening assessments, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying high risks for adverse impacts.

Despite the uncertainties, when individual pollutants or facilities do not exceed screening threshold emission rates (*i.e.,* screen out), we are confident that the potential for adverse multipathway impacts on human health is very low. On the other hand, when individual pollutants or facilities do exceed screening threshold emission rates, it does not mean that impacts are significant, only that we cannot rule out that possibility and that a refined assessment for the site might be necessary to obtain a more accurate risk characterization for the source category.

The EPA evaluates the following HAP in the multipathway and/or environmental risk screening assessments, where applicable: Arsenic, cadmium, dioxins/furans, lead, mercury (both inorganic and methyl mercury), POM, HCl, and HF. These HAP represent pollutants that can cause adverse impacts either through direct exposure to HAP in the air or through exposure to HAP that are deposited from the air onto soils and surface waters and then through the environment into the food web. These HAP represent those HAP for which we can conduct a meaningful multipathway

[22] In the context of this discussion, the term ''uncertainty'' as it pertains to exposure and risk encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal, and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

or environmental screening risk assessment. For other HAP not included in our screening assessments, the model has not been parameterized such that it can be used for that purpose. In some cases, depending on the HAP, we may not have appropriate multipathway models that allow us to predict the concentration of that pollutant. The EPA acknowledges that other HAP beyond these that we are evaluating may have the potential to cause adverse effects and, therefore, the EPA may evaluate other relevant HAP in the future, as modeling science and resources allow.

IV. Analytical Results and Proposed Decisions

A. What actions are we taking in addition to those identified in the risk and technology review?

In addition to the proposed actions on the risk review and technology review discussed further in this section, we are proposing the following: (1) Adding monitoring and operational requirements for flares that control ethylene oxide emissions and flares used to control emissions from processes that produce olefins and polyolefins, with the option for an owner or operator of a flare outside of this subset to choose to opt in to the proposed requirements in lieu of complying with the current flare standards, and (2) consistent with *Sierra Club* v. *EPA, 551 F.3d 1019* (D.C. Cir. 2008), ensuring that CAA section 112 standards apply continuously by proposing work practice standards for periods of SSM for certain vent streams (*i.e.,* PRD releases and maintenance vents), and proposing clarifications for vent control bypasses for certain vent streams (*i.e.,* closed vent systems containing bypass lines, and flares connected to fuel gas systems). The results and proposed decisions based on the analyses performed pursuant to CAA section 112(d)(2) and (3) are presented below.

1. Flares

The EPA is proposing under CAA section 112(d)(2) and (3) to amend the operating and monitoring requirements for a subset of flares used as APCDs in the Miscellaneous Organic Chemical Manufacturing source category because we have determined that the current requirements for flares in this subset are not adequate to ensure the level of destruction efficiency needed to conform with the MACT standards in the MON. This subset includes flares that either (1) control ethylene oxide emissions, (2) control emissions from processes that produce olefins, or (3) control emissions from processes that produce polyolefins. Flares falling into one of these categories are referred to as the flare ‘‘subset’’ in this preamble, and for clarification, it is our intention that, as part of this proposal, flares controlling propane dehydrogenation (PDH) processes be included in this flare subset since the PDH process produces olefins such as propylene. The EPA is also proposing that, for flares outside of this subset, an owner or operator may choose to comply with the updated standards in lieu of complying with the current flare standards. Therefore, all proposed flare standards in section IV.A.1 of this preamble are intended to apply to only the specified flare subset and to flares at MON facilities where the owner or operator has chosen to opt in to the proposed standards. Flares outside of this subset, or at MON facilities where the owner or operator has chosen not to opt in to the proposed standards, will be subject to the current provisions for flares in the MON standard.

The specified flare subset was selected on the basis that the current requirements for flares may be inadequate to ensure the level of destruction efficiency needed to conform with the MACT standards in the MON. Flares are commonly used within the Miscellaneous Organic Chemical Manufacturing source category. The requirements applicable to flares, which are used to control emissions from various emission sources in the Miscellaneous Organic Chemical Manufacturing source category (*e.g.,* process vents, storage tanks, transfer racks, equipment leaks, wastewater streams), are set forth in the General Provisions to 40 CFR part 63 and are cross-referenced in 40 CFR part 63, subpart G (for wastewater), and 40 CFR part 63, subpart SS (for process vents, storage tanks, transfer racks, and equipment leaks). In general, flares used as APCDs are expected to achieve 98-percent HAP destruction efficiencies when designed and operated according to the requirements in the General Provisions. Studies on flare performance,[23] however, indicate that these General Provision requirements are inadequate to ensure proper performance of flares at refineries and other petrochemical facilities (including chemical manufacturing facilities), particularly when either assist steam or assist air is used. In addition, over the last decade, flare minimization efforts at these facilities have led to an increasing number of flares operating at well below their design capacity, and while these efforts have resulted in reduced flaring of gases, situations of over assisting with either steam or air have become exacerbated, leading to the degradation of flare combustion efficiency. Several flares located at MON facilities control vent streams containing olefins. These MON facilities operate directly downstream from refineries and other petrochemical plants (*e.g.,* ethylene production plants) and, consequently, likely burn similar types of waste gas constituents to a refinery or petrochemical plant (*e.g.,* olefins and hydrogen). Given that flares at petrochemical plants (including facilities that produce olefins) were also included in the flare dataset that formed the underlying basis of the new standards for refinery flares, we believe that it is appropriate to apply the finalized suite of operational and monitoring requirements for refinery flares to those flares in the Miscellaneous Organic Chemical Manufacturing source category that control emissions from processes that produce olefins and/or polyolefins. Additionally, we included flares controlling ethylene oxide emissions within this subset to ensure that these flares will achieve high combustion efficiency, which is necessary as small quantities of ethylene oxide emissions can present significant cancer risks to surrounding communities. Additional discussion on this proposed control option is presented in section IV.C.2 of this preamble, which proposes that process vents and storage tanks in ethylene oxide service either use a control device achieving 99.9-percent emissions reductions, control emissions using a non-flare control device that reduces ethylene oxide to less than 1 part per million by volume (ppmv) or (for process vents only) less than 5 pounds per year for all combined process vents, or control emissions using a flare that meets the proposed flare standards presented in this section. Therefore, these proposed amendments will ensure that continuous compliance with the CAA section 112(d)(2) and (d)(3) standards is achieved for MON facilities that use flares that control ethylene oxide emissions and/or flares used to control emissions from MCPUs that produce olefins and/or polyolefins. We solicit comments and data on the application of these standards to the proposed flare subset, the option for an owner or operator to choose to opt in to the proposed flare standards for flares outside of this subset in lieu of

[23] For a list of studies, refer to the technical report titled *Parameters for Properly Designed and Operated Flares,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0191.

complying with the current flare standards, and the need to apply these standards more broadly.

The General Provisions of 40 CFR 63.11(b) specify that flares be: (1) Steam-assisted, air-assisted, or non-assisted; (2) operated at all times when emissions may be vented to them; (3) designed for and operated with no visible emissions (except for periods not to exceed a total of 5 minutes during any 2 consecutive hours); and (4) operated with the presence of a pilot flame at all times. These General Provisions also specify both the minimum heat content of gas combusted in the flare and maximum exit velocity at the flare tip. The General Provisions specify monitoring for the presence of the pilot flame and the operation of a flare with no visible emissions. For other operating limits, 40 CFR part 63, subpart SS, includes an initial flare compliance assessment to demonstrate compliance but specifies no monitoring requirements to ensure continuous compliance. We are proposing to revise the General Provisions table to 40 CFR part 63, subpart FFFF (Table 12), entries for 40 CFR 63.8(a)(4) and 40 CFR 63.11 such that these provisions do not apply to flares in the specified subset, because we are proposing to replace these provisions with new standards we are proposing for flares in the specified subset. We are also proposing at 40 CFR 63.2535(m) to clarify that owners or operators of flares that are not considered to be in the specified subset but are subject to the provisions of 40 CFR 60.18 or 63.11 may elect to comply with the new proposed flare standards in lieu of the provisions of 40 CFR 60.18 or 63.11.

In 2012, the EPA compiled information and test data collected on flares and summarized its preliminary findings on operating parameters that affect flare combustion efficiency in a technical report titled *Parameters for Properly Designed and Operated Flares,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0191.[24] The EPA submitted this report, along with a charge statement and a set of charge questions, to an external peer review panel.[25] The panel, consisting of individuals representing a variety of backgrounds and perspectives (*i.e.,* industry, academia, environmental experts, and industrial flare consultants), concurred with the EPA's assessment that the following three primary factors affect flare performance: (1) The flow of the vent gas to the flare; (2) the amount of assist media (*e.g.,* steam or air) added to the flare; and (3) the combustibility of the vent gas/assist media mixture in the combustion zone (*i.e.,* the net heating value, lower flammability, and/or combustibles concentration) at the flare tip. However, in response to peer review comments, the EPA performed a validation and usability analysis on all available test data as well as a failure analysis on potential parameters discussed in the technical report as indicators of flare performance. The peer review comments are in the memorandum titled *Peer Review of Parameters for Properly Designed and Operated Flares,* available in Docket ID Item No. EPA–HQ–OAR–2010–0682–0193, which has been incorporated into the docket for this rulemaking. These analyses resulted in a change to the population of test data that the EPA used and helped form the basis for the flare operating limits promulgated in the 2015 Petroleum Refinery Sector MACT final rule at 40 CFR part 63, subpart CC (80 FR 75178).[26] We are also relying on the same analyses and proposing the same operating limits for flares in the specified subset used as APCDs in the Miscellaneous Organic Chemical Manufacturing source category. The Agency believes, given the results from the various data analyses conducted for the Petroleum Refinery Sector MACT rule, that the operating limits promulgated for flares used in the petroleum refinery sector are also appropriate and reasonable for flares in the specified subset, and will ensure that flares in the specified subset meet the HAP removal efficiency at all times. Therefore, we are proposing at 40 CFR 63.2450(e)(5) to directly apply the Petroleum Refinery Sector MACT rule flare definitions and requirements in 40 CFR part 63, subpart CC, to flares in the specified subset in the Miscellaneous Organic Chemical Manufacturing source category with certain clarifications and exemptions discussed in this section of the preamble, including, but not limited to, specifying that several definitions in 40 CFR part 63, subpart CC, that apply to petroleum refinery flares also apply to flares in the specified subset in the Miscellaneous Organic Chemical Manufacturing source category, adding a definition and requirements for pressure-assisted multi-point flares, and specifying additional requirements when a gas chromatograph or mass spectrometer is used for compositional analysis.

The remainder of this section of the preamble includes a discussion of requirements that we are proposing for flares in the specified subset used as APCDs in the Miscellaneous Organic Chemical Manufacturing source category, along with impacts and costs associated with these proposed revisions. Specifically, this action proposes that flares in the specified subset operate pilot flame systems continuously and that flares operate with no visible emissions (except for periods not to exceed a total of 5 minutes during any 2 consecutive hours) when the flare vent gas flow rate is below the smokeless capacity of the flare. In addition, this action proposes to consolidate measures related to flare tip velocity and proposes new operational and monitoring requirements related to the combustion zone gas. Further, in keeping with the elimination of the SSM exemption as discussed in section IV.E.1 of this preamble, this action proposes a work practice standard related to the visible emissions and velocity limits during periods when the flare is operated above its smokeless capacity (*e.g.,* periods of emergency flaring). Currently, the MACT standards in the MON cross-reference the General Provisions at 40 CFR 63.11(b) for the operational requirements for flares used as APCD (through reference of 40 CFR part 63, subparts G and SS). This proposal eliminates cross-references to the General Provisions and instead specifies all new operational and monitoring requirements that are intended to apply to flares in the specified subset used as APCDs in the MON standards.

a. Pilot Flames

The MON references the flare requirements in 40 CFR 63.11(b) (through reference of 40 CFR part 63, subpart G, 40 CFR part 63, subpart SS, and Table 12 to 40 CFR part 63, subpart FFFF), which specify that a flare used as an APCD should operate with a pilot flame present at all times. Pilot flames are proven to improve flare flame stability, and even short durations of an extinguished pilot could cause a

[24] See section II.D of this preamble, which addresses the incorporation by reference of certain docket files such as this one into the docket for this rulemaking.

[25] These documents can also be found at *https://www.epa.gov/stationary-sources-air-pollution/review-peer-review-parameters-properly-designed-and-operated-flares.*

[26] See technical memorandum titled *Flare Performance Data: Summary of Peer Review Comments and Additional Data Analysis for Steam-Assisted Flares,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0200 for a more detailed discussion of the data quality and analysis; the technical memorandum titled *Petroleum Refinery Sector Rule: Operating Limits for Flares,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0206 for a more detailed discussion of the failure analysis and the technical memorandum titled *Flare Control Option Impacts for Final Refinery Sector Rule,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0748 for additional analyses on flare performance standards based on public comments received on the proposed Petroleum Refinery Sector rule.

significant reduction in flare destruction efficiency. In this proposal, we are proposing to remove the cross-reference to the General Provisions for flares in the specified subset only and instead cross-reference 40 CFR part 63, subpart CC, to include in the MON the existing provision that flares operate with a pilot flame at all times and be continuously monitored for a pilot flame using a thermocouple or any other equivalent device. We are also proposing to add a continuous compliance measure for flares in the specified subset that would consider each 15-minute block when there is at least 1 minute where no pilot flame is present when regulated material is routed to the flare as a deviation from the standard. Refer to 40 CFR 63.2450(e)(5) and 40 CFR 63.670(b) and (g) for these proposed requirements. See section IV.A.1.e of this preamble for our rationale for proposing to use a 15-minute block averaging period for determining continuous compliance. We solicit comment on the proposed revisions for flare pilot flames.

b. Visible Emissions

The MON references 40 CFR 63.11(b) (through reference of 40 CFR part 63, subpart G, 40 CFR part 63, subpart SS, and Table 12 to 40 CFR part 63, subpart FFFF), which specifies that a flare used as an APCD should operate with visible emissions for no more than 5 minutes in a 2-hour period. Owners or operators of these flares are required to conduct an initial performance demonstration for visible emissions using EPA Method 22 of Appendix A–7 to 40 CFR part 60 (''Method 22''). We are proposing to remove the cross-reference to the General Provisions for flares in the specified subset and instead cross-reference 40 CFR part 63, subpart CC, to include the limitation on visible emissions. We are also proposing to clarify that the initial 2-hour visible emissions demonstration should be conducted the first time regulated materials are routed to the flare.

With regard to continuous compliance with the visible emissions limitation, we are proposing daily visible emissions monitoring for flares in the specified subset for whenever regulated material is routed to the flare and also visible emissions monitoring for whenever visible emissions are observed from the flare. On days that the flare receives regulated material, we are proposing that owners or operators of flares in the specified subset monitor visible emissions at a minimum of once per day while the flare is receiving regulated material using an observation period of 5 minutes and Method 22. Additionally, whenever regulated material is routed to a flare in the specified subset and there are visual emissions from the flare, we are proposing that another 5-minute visible emissions observation period be performed using Method 22, even if the minimum required daily visible emission monitoring has already been performed. For example, if an employee observes visible emissions, the owner or operator of the flare would perform a 5-minute Method 22 observation to check for compliance upon initial observation or notification of such event. In addition, in lieu of daily visible emissions observations performed using Method 22, we are proposing that owners and operators be allowed to use video surveillance cameras. We believe that video surveillance cameras would be at least as effective as the proposed daily 5-minute visible emissions observations using Method 22.

We are also proposing to extend the observation period for a flare in the specified subset to 2 hours whenever visible emissions are observed for greater than 1 continuous minute during any of the 5-minute observation periods. Refer to 40 CFR 63.2450(e)(5) and 40 CFR 63.670(c) and (h) for these proposed requirements. We acknowledge that operating a flare near the incipient smoke point (the point at which black smoke begins to form within the flame) results in good combustion at the flare tip; however, smoking flares can contribute significantly to emissions of particulate matter that is 2.5 micrometers in diameter or smaller. Thus, while increasing the allowable period for visible emissions may be useful from an operational perspective, we do not believe the allowable period for visible emissions should be increased to more than 5 minutes in any 2-hour period. We solicit comment on the proposed allowable period for visible emissions from flares.

As discussed later in this section, we are proposing additional operational and monitoring requirements for flares in the specified subset that we expect will result in owners or operators of MCPUs installing equipment that can be used to fine-tune and control the amount of assist steam or air introduced at the flare tip such that combustion efficiency of the flare will be maximized. These monitoring and control systems will assist these flare owners or operators to operate near the incipient smoke point without exceeding the visible emissions limit. While combustion efficiency may be highest at the incipient smoke point, it is not significantly higher than the combustion efficiency achieved by the proposed operating limits discussed in section IV.A.1.d of this preamble. As seen in the performance curves for flares, there is very limited improvement in flare performance beyond the performance achieved at the proposed operating limits (see technical memorandum titled *Petroleum Refinery Sector Rule: Operating Limits for Flares,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0206, which has been incorporated into the docket for this rulemaking). We solicit comments and data on appropriate periods of visible emissions that would encourage operation at the incipient smoke point.

In addition, we are proposing that the owner or operator establish the smokeless capacity of each flare in the specified subset based on design specification of the flare, and that the visible emissions limitation only apply when the flare vent gas flow rate is below its smokeless capacity. We are proposing a work practice standard for the limited times (*i.e.,* during emergency releases) when the flow to a flare in the specified subset exceeds the smokeless capacity of the flare, based on comments the EPA received on the proposed Petroleum Refinery Sector rule. Refer to 40 CFR 63.2450(e)(5) and 40 CFR 63.670(o) for these proposed provisions. In the Petroleum Refinery Sector final rule, the EPA explained that numerous comments on the proposal suggested that flares are not designed to meet the visible emissions requirements when operated beyond their smokeless capacity (80 FR 75178). According to commenters, flares are typically designed to operate in a smokeless manner at 20 to 30 percent of full hydraulic load. Thus, they claimed, flares have two different design capacities: A ''smokeless capacity'' to handle normal operations and typical process variations and a ''hydraulic load capacity'' to handle very large volumes of gases discharged to the flare as a result of an emergency shutdown. According to commenters, this is inherent in all flare designs and has not previously been an issue because flare operating limits did not apply during malfunction events.

For this proposed work practice standard, owners or operators would need to develop a flare management plan for flares in the specified subset that identifies procedures for limiting discharges to the flare as a result of process upsets or malfunctions that cause the flare to exceed its smokeless capacity. In addition, for any flare in the specified subset that exceeds both the smokeless design capacity and visible emissions limit, we are proposing that owners or operators would need to conduct a specific root cause analysis and take corrective action to prevent the recurrence of a similarly caused event (similar to the prevention measures we are proposing in this rule to minimize the likelihood of a PRD release, see section IV.A.2.a of this preamble). We are proposing that if the root cause analysis indicates that the exceedance of the visible emissions limit is caused by operator error or poor maintenance, then the exceedance would be considered a deviation from the work practice standard. We are also proposing that a second event within a rolling 3-year period from the same root cause on the same equipment would be considered a deviation from the standard. Further, we are proposing that events caused by force majeure would be excluded from a determination of whether there has been a second event. Finally, and again excluding force majeure events, we are proposing that a third visible emissions limit exceedance occurring from the same flare in a rolling 3-year period would be a deviation from the work practice standard, regardless of the cause. We are proposing at 40 CFR 63.2550(i) to define a force majeure event as a release of HAP, either directly to the atmosphere from a PRD or discharged via a flare, that is demonstrated to the satisfaction of the Administrator to result from an event beyond the owner or operator's control, such as natural disasters; acts of war or terrorism; loss of a utility external to the MCPU (*e.g.,* external power curtailment), excluding power curtailment due to an interruptible service agreement; and fire or explosion originating at a near or adjoining facility outside of the miscellaneous organic chemical manufacturing process unit that impacts the MCPU's ability to operate.

With regard to the proposed rolling 3-year period for assessing a deviation of the work practice standard, the EPA evaluated the impacts of different frequencies and time periods to the number of events that would be the ''backstop'' (*i.e.,* a deviation of the standard) to ensure that corrective actions are meaningfully applied (see the memorandum, *Control Option Impacts for Flares Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking). The EPA assumed that the best performers would have no more than one event every 7 years, or a probability of 14.3 percent of having an event in any given year. The EPA found that, over a long period of time such as 20 years, about half of these best performers would have two events in a 3-year period, which would still result in about half of the ''best performing'' flares having a deviation from the work practice standard if it was limited to two events in 3 years. Conversely, the EPA found that over a long time period such as 20 years, only 6 percent of the best performing flares would have three events in 3 years over this same time horizon. Based on this analysis, three events in 3 years would appear to be ''achievable'' for the average of the best performing flares.

c. Flare Tip Velocity

This action consolidates provisions related to flare tip velocity for flares in the specified subset. The MON references the flare provisions in 40 CFR 63.11(b) (through reference of 40 CFR part 63, subpart G, 40 CFR part 63, subpart SS, and Table 12 to 40 CFR part 63, subpart FFFF), which specify maximum flare tip velocities based on flare type (non-assisted, steam-assisted, or air-assisted) and the net heating value of the flare vent gas. For MON facilities using flares as APCDs, it is estimated that approximately 90 percent of these flares are either steam- or air-assisted (see the memorandum, *Control Option Impacts for Flares Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking). These maximum flare tip velocities are required to ensure that the flame does not ''lift off'' the flare (*i.e.,* a condition where a flame separates from the tip of the flare and there is space between the flare tip and the bottom of the flame), which could cause flame instability and/or potentially result in a portion of the flare gas being released without proper combustion. We are proposing to remove the cross-reference to the General Provisions for flares in the specified subset and instead cross-reference 40 CFR part 63, subpart CC, to consolidate the provisions for maximum flare tip velocity into the MON as a single equation, irrespective of flare type (*i.e.,* steam-assisted, air-assisted, or non-assisted). Refer to 40 CFR 63.2450(e)(5) and 40 CFR 63.670(d), (i), and (k) for these proposed provisions.

Based on analysis conducted for the Petroleum Refinery Sector final rule, the EPA identified air-assisted test runs with high flare tip velocities that had high combustion efficiencies (see technical memorandum, *Petroleum Refinery Sector Rule: Evaluation of Flare Tip Velocity Requirements,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0212). These test runs exceeded the maximum flare tip velocity limits for air-assisted flares using the linear equation in 40 CFR 63.11(b)(8). When these test runs were compared with the test runs for non-assisted and steam-assisted flares, air-assisted flares appeared to have the same operating envelope as the non-assisted and steam-assisted flares. Therefore, for air-assisted flares in the specified subset, we are proposing the use of the same equation that non-assisted and steam-assisted flares currently use to establish the flare tip velocity operating limit. We are also proposing that the owner or operator determine the flare tip velocity on a 15-minute block average basis. See section IV.A.1.e of this preamble for our rationale for proposing to use a 15-minute block averaging period for determining continuous compliance.

In addition, we are proposing the same work practice standard for flare tip velocity during emergency releases (when the flow to the flare exceeds the smokeless capacity of the flare) as we are proposing for visible emissions for flares in the specified subset. Refer to 40 CFR 63.2450(e)(5) and 40 CFR 63.670(o) for these proposed provisions. Specifically, instead of owners and operators meeting the flare tip velocity operating limit at all times for flares in the specified subset, we are proposing that the owner or operator establish the smokeless capacity of each flare based on design specification of the flare, and that the flare tip velocity operating limit would only apply when the flare vent gas flow rate is below its smokeless capacity. We are proposing a work practice standard for flares in the specified subset for the limited times (*i.e.,* during emergency releases) when the flow to the flare exceeds the smokeless capacity of the flare, based on comments the EPA received on the proposed Petroleum Refinery Sector rule. In the Petroleum Refinery Sector final rule, the EPA explained that numerous comments on the proposal suggested that flares are not designed to meet the flare tip velocity requirements when being operated beyond their smokeless capacity (80 FR 75178). According to commenters, flares are commonly operated during emergency releases at exit velocities greater than 400 feet per second (which is 270 miles per hour), and this is inherent in all flare designs and has not previously been an issue because flare operating limits did not apply during malfunction events.

For the proposed work practice standard, owners or operators would develop a flare management plan for flares in the specified subset identifying procedures that they intend to follow in order to limit discharges to the flare as a result of process upsets or malfunctions that cause the flare to exceed its flare tip velocity operating limit. In addition, we are proposing that owners or operators would conduct a specific root cause analysis for flares in the specified subset and take corrective action to prevent the recurrence of a similarly caused event, similar to the prevention measures we are proposing in this rule to minimize the likelihood of a PRD release (see section IV.A.2.a of this preamble), for any flare event above smokeless design capacity that also exceeds the flare tip velocity operating limit. We are proposing that if the root cause analysis indicates that the exceedance is caused by operator error or poor maintenance, then the exceedance would be considered a deviation from the work practice standard. We are also proposing that a second event where the flare tip velocity operating limit is exceeded within a rolling 3-year period from the same root cause on the same equipment would be considered a deviation from the standard. Further, we are proposing that events caused by force majeure (see section IV.A.1.b of this preamble for a proposed definition of force majeure) would be excluded from a determination of whether there has been a second event. Finally, and again excluding force majeure events, we are proposing that a third event where the flare tip velocity operating limit is exceeded exceedance occurring from the same flare in a rolling 3-year period would be a deviation from the work practice standard, regardless of the cause. As previously explained in section IV.A.1.b of this preamble, we believe no more than three events in 3 years appear to be ''achievable'' for the average of the best performing flares. We solicit comment on the proposed work practice standard for flare tip velocity during emergency releases (when the flow to the flare exceeds the smokeless capacity of the flare).

Finally, we are also proposing not to include the provision for the special flare tip velocity equation in the General Provisions at 40 CFR 63.11(b)(6)(i)(A) for non-assisted flares in the specified subset with hydrogen content greater than 8 percent. This equation, which was developed based on limited data from a chemical manufacturer, has very limited applicability for flares used as APCDs in the Miscellaneous Organic Chemical Manufacturing source category because it only provides an alternative for non-assisted flares with large quantities of hydrogen. Available data indicates that approximately 90 percent of the flares used at MON facilities are either steam-assisted or air-assisted. Furthermore, we are proposing compliance alternatives that we believe provide a better way for flares in the specified subset with high hydrogen content to comply with the rule while ensuring proper destruction performance of the flare (see section IV.A.3.d of this preamble for the proposed compliance alternatives). Therefore, for non-assisted flares in the specified subset with hydrogen content greater than 8 percent that are used as ACPDs, we are not proposing to include this special flare tip velocity equation as a compliance alternative. We request comment on the need to include this equation.

d. Net Heating Value of the Combustion Zone Gas

The current provisions for flares in 40 CFR 63.11(b) specify that the flare vent gas meet a minimum net heating value of 200 British thermal units per standard cubic foot (Btu/scf) for non-assisted flares and 300 Btu/scf for air- and steam-assisted flares. The MON references these provisions (through reference of 40 CFR part 63, subpart G, 40 CFR part 63, subpart SS, and Table 12 to 40 CFR part 63, subpart FFFF), but neither the General Provisions nor the MON include specific requirements for monitoring the net heating value of the flare vent gas. Moreover, recent flare testing results indicate that the minimum net heating value alone does not address instances when the flare may be over-assisted because it only considers the gas being combusted in the flare and nothing else (*e.g.,* no assist media). However, many industrial flares use steam or air as an assist medium to protect the design of the flare tip, promote turbulence for the mixing, induce air into the flame, and operate with no visible emissions. Using excessive steam or air results in dilution and cooling of flared gases and can lead to operating a flare outside its stable flame envelope, reducing the destruction efficiency of the flare. In extreme cases, over-steaming or excess aeration can snuff out a flame and allow regulated material to be released into the atmosphere without complete combustion. As previously noted, because available data indicate that approximately 90 percent of all flares used as APCDs in the Miscellaneous Organic Chemical Manufacturing source category are either steam- or air-assisted, it is critical that we ensure the assist media is accounted for in some form. Recent flare test data have shown that the best way to account for situations of over-assisting is to consider the gas mixture properties at the flare tip in the combustion zone when evaluating the ability to combust efficiently. As discussed in the introduction to this section, the external peer review panel concurred with our assessment that the combustion zone properties at the flare tip are critical parameters to know in determining whether a flare will achieve good combustion. The General Provisions, however, solely rely on the net heating value of the flare vent gas, and we have determined that is not sufficient for the flares at issue.

In this proposal, in lieu of requiring compliance with the operating limits for net heating value of the flare vent gas in the General Provisions, we are proposing to cross-reference 40 CFR part 63, subpart CC, to include in the MON a single minimum operating limit for the net heating value in the combustion zone gas (NHVcz) of 270 Btu/scf during any 15-minute period for steam-assisted, air-assisted, and non-assisted flares in the specified subset. Refer to 40 CFR 63.2450(e)(5) and 40 CFR 63.670(e) and (m) for these proposed provisions. The Agency believes, given the results from the various data analyses conducted for the Petroleum Refinery Sector rule, that this NHVcz operating limit promulgated for flares in the Petroleum Refinery Sector source category is also appropriate and reasonable and will ensure flares in the specified subset meet the HAP destruction efficiencies in the standard at all times when operated in concert with the other proposed flare provisions (*e.g.,* pilot flame, visible emissions, and flare tip velocity requirements) (see the memoranda titled *Petroleum Refinery Sector Rule: Operating Limits for Flares* and *Flare Control Option Impacts for Final Refinery Sector Rule,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0206 and EPA–HQ–OAR–2010–0682–0748, respectively). In addition, we are proposing that owners or operators may use a corrected heat content of 1,212 Btu/scf for hydrogen, instead of 274 Btu/scf, to demonstrate compliance with the NHVcz operating limit for flares in the specified subset; however, owners or operators who wish to use the corrected hydrogen heat content must have a system capable of monitoring for the hydrogen content in the flare vent gas. The 1,212 Btu/scf value is based on a comparison between the lower flammability limit and net heating value of hydrogen compared to light organic compounds and has been used in several consent decrees issued by the EPA. Based on analyses conducted for the Petroleum Refinery Sector rule (see the memorandum titled *Flare Control Option Impacts for Final Refinery Sector*

Rule, in Docket ID Item No. EPA–HQ–OAR–2010–0682–0748), the EPA determined that using a 1,212 Btu/scf value for hydrogen greatly improves the correlation between combustion efficiency and the combustion zone net heating value over the entire array of data.

Furthermore, in addition to the NHVcz operating limit, we are proposing a net heating value dilution parameter (NHVdil) for certain flares in the specified subset that operate with perimeter assist air. Refer to 40 CFR 63.2450(e)(5) and 40 CFR 63.670(f) and (n) for these proposed provisions. For air-assisted flares, use of too much perimeter assist air can lead to poor flare performance. Furthermore, based on our analysis of the air-assisted flare datasets (see technical memorandum, *Petroleum Refinery Sector Rule: Operating Limits for Flares,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0206), we determined a NHVdil of 22 British thermal units per square foot is necessary to ensure that there is enough combustible material available to adequately combust the gas and pass through the flammability region and also ensure that degradation of flare performance from excess aeration does not occur. We found that including the flow rate of perimeter assist air in the calculation of the NHVcz does not identify all instances of excess aeration and could (in some instances) even allow facilities to send very dilute vent gases to the flare that would not combust (*i.e.,* vent gases below their lower flammability limit could be sent to flare). Instead, the data suggest that the diameter of the flare tip, in concert with the amount of perimeter assist air (and other parameters used to determine NHVcz), provides the inputs necessary to calculate whether this type of flare is over-assisted. This dilution parameter is consistent with the combustion theory that the more time the gas spends in the flammability region above the flare tip, the more likely it will combust. Also, because both the volume of the combustion zone (represented by the diameter) and how quickly this gas is diluted to a point below the flammability region (represented by perimeter assist air flow rate) characterize this time, it is logical that we propose such a parameter.

We also found that some assist steam lines are purposely designed to entrain air into the lower or upper steam at the flare tip; and for flare tips with an effective tip diameter of 9 inches or more, there are no flare tip steam induction designs that can entrain enough assist air to cause a flare operator to have a deviation from the NHVdil operating limit without first deviating from the NHVcz operating limit. Therefore, we are proposing to allow owners or operators of flares in the specified subset whose only assist air is from perimeter assist air entrained in lower and upper steam at the flare tip and with a flare tip diameter of 9 inches or greater to comply only with the NHVcz operating limit. Steam-assisted flares with perimeter assist air and an effective tip diameter of less than 9 inches would remain subject to the requirement to account for the amount of assist air intentionally entrained within the calculation of NHVdil. However, we recognize that this assist air cannot be directly measured, but the quantity of air entrained is dependent on the assist steam rate and the design of the steam tube's air entrainment system. Therefore, we are proposing provisions to specify that owners or operators of these smaller diameter steam-assisted flares in the specified subset use the steam flow rate and the maximum design air-to-steam ratio of the steam tube's air entrainment system for determining the flow rate of this assist air. Using the maximum design ratio will tend to over-estimate the assist air flow rate, which is conservative with respect to ensuring compliance with the NHVdil operating limit.

Finally, we are proposing that owners or operators record and calculate 15-minute block average values for these parameters. Our rationale for selecting a 15-minute block averaging period is provided in section IV.A.1.e of this preamble. We solicit comment on the proposed revisions related to NHVcz.

e. Data Averaging Periods for Flare Gas Operating Limits

Except for the visible emissions operating limits as described in section IV.A.1.b, we are proposing to use a 15-minute block averaging period for each proposed flare operating parameter (*i.e.,* presence of a pilot flame, flare tip velocity, and NHVcz) to ensure that flares in the specified subset are operated within the appropriate operating conditions. We consider a short averaging time to be the most appropriate for assessing proper flare performance because flare vent gas flow rates and composition can change significantly over short periods of time. Furthermore, because destruction efficiency can fall precipitously when a flare is controlling vent gases below (or outside) the proposed operating limits, short time periods where the operating limits are not met could seriously impact the overall performance of the flare. Refer to the Petroleum Refinery Sector rule preambles (79 FR 36880 and 80 FR 75178) for further details supporting why we believe a 15-minute averaging period is appropriate.

Given the short averaging times for the operating limits, we are proposing special calculation methodologies to enable owners or operators to use ''feed forward'' calculations to ensure compliance with the operating limits on a 15-minute block average for flares in the specified subset. Specifically, we propose using the results of the compositional analysis determined just prior to a 15-minute block period for the next 15-minute block average. Owners or operators of flares in the specified subset will then know the vent gas properties for the upcoming 15-minute block period and can adjust assist gas flow rates relative to vent gas flow rates to comply with the proposed operating limits. In other words, ''feed forward'' means that owners or operators would use the net heating value in the vent gas (NHVvg) going into the flare in one 15-minute period to adjust the assist media (*i.e.,* steam or air) and/or the supplemental gas in the next 15-minute period, as necessary, to calculate an NHVcz limit of 270 Btu/scf or greater using the proposed equation. We recognize that when a subsequent measurement value is determined, the instantaneous NHVcz based on that compositional analysis and the flow rates that exist at the time may not be above 270 Btu/scf. We are proposing that this is not a deviation from the operating limit. Rather, we propose that the owner or operator is only required to make operational adjustments based on that information to achieve, at a minimum, the net heating value limit for the subsequent 15-minute block average. We are, however, proposing that failure to make adjustments to assist media or supplemental natural gas using the NHVvg from the previous period in the equation provided for calculating an NHVcz limit of 270 Btu/scf, would be a deviation from the operating limit. Alternatively, because the owner or operator could directly measure the NHVvg on a more frequent basis, such as with a calorimeter (and optional hydrogen analyzer), the process control system is able to adjust more quickly, and the owner or operator can make adjustments to assist media or supplemental natural gas more quickly. In this manner, the owner or operator is not limited by relying on NHVvg data that may not represent the current conditions. We are, therefore, also proposing that the owner or operator may opt to use the NHVvg in such instances from the same period to comply with the operating limit. For examples of ''feed forward'' calculations, please see Attachment 3 of the memorandum titled *Flare Control Option Impacts for Final Refinery Sector Rule,* in Docket ID Item No. EPA–HQ–OAR–2010–0682–0748.

We are also proposing to clarify that when determining compliance with the flare tip velocity and combustion zone operating limits specified in 40 CFR 63.670(d) and (e), the initial 15-minute block period starts with the 15-minute block that includes a full 15 minutes of the flaring event. In other words, we are proposing to clarify that the owner or operator demonstrate compliance with the velocity and NHVcz requirements starting with the block that contains the fifteenth minute of a flaring event; and the owner or operator is not required to demonstrate compliance for the previous 15-minute block in which the event started and contained only a fraction of flow. We solicit comment on these proposed revisions.

f. Flares in Dedicated Service

In lieu of requiring the composition of the vent gas and the NHVvg to be continuously monitored, we are proposing an alternative monitoring approach for flares in the specified subset that are in dedicated service that have consistent composition and flow. We believe that these types of flares, which have limited flare vent gas streams, do not need to have the same type of ongoing monitoring requirements as those with more variable waste streams. Thus, we are proposing an option that owners or operators can use to demonstrate compliance with the operating requirements for flares in the specified subset that are in dedicated service to a specific emission source, such as a transfer rack operation consistently loading the same material. We are proposing that owners or operators will need to submit an application for the use of this alternative compliance option. We are proposing that the application include a description of the system, characterization of the vent gases that could be routed to the flare based on a minimum of seven grab samples (14 daily grab samples for continuously operated flares), and specification of the net heating value that will be used for all flaring events (based on the minimum net heating value of the grab samples). In other words, for flares in the specified subset that are in dedicated service, we are proposing that the minimum NHVvg determined from the grab samples could be used in the equation at 40 CFR 63.670(m)(1) for all flaring events to determine NHVcz. We are also proposing to allow engineering estimates to characterize the amount of gas flared and the amount of assist gas introduced into the system. For example, we believe that the use of fan curves to estimate air assist rates would be acceptable. We propose that flare owners or operators would use the net heating value determined from the initial sampling phase and measured or estimated flare vent gas and assist gas flow rates, if applicable, to demonstrate compliance with the standards. Refer to 40 CFR 63.2450(e)(5) and 40 CFR 63.670(j)(6) for these proposed provisions. Finally, for owners and operators that must comply with the continuous monitoring requirements, we are proposing additional clarifications and requirements at 40 CFR 63.2450(e)(5) when using a gas chromatograph or mass spectrometer for compositional analysis. We solicit comment on the proposed revisions related to flares in dedicated service.

g. Pressure-Assisted Multi-Point Flares

Pressure-assisted flares are conceptually similar, yet technically different in both design and operation compared to more traditional elevated flare tip designs (*e.g.,* steam-assisted, air-assisted, and non-assisted flare tips). Pressure-assisted flares operate by taking advantage of the pressure upstream of the flare tip to create a condition whereby air is drawn into contact and mixed with high exit velocity flared gas, resulting in smokeless flare operation and emissions reductions at least equivalent to those of traditional flares types, if properly designed and operated. Pressure-assisted flares can be used in a single flare burner type layout or in staged arrays with many identical flare burners. These staged arrays can be elevated or at ground level; however, we are only aware of ground level staged array systems, that are commonly referred to as MPGF, at three facilities in the Miscellaneous Organic Chemical Manufacturing source category that emit ethylene oxide or produce olefins and/or polyolefins. Two of these MPGFs are used solely as a secondary flare to control large emissions events that result during periods of SSM. MPGFs have multiple (*e.g.,* hundreds) flare burners at ground level. The flare burners in a MPGF are designed with a staging system that opens and closes staging valves according to gas pressure in the flare header such that the stages, and accompanying flare burners for those stages, are activated to control emissions as the flare vent gas flow and pressure increase in the flare header, or are deactivated as the flare vent gas flow and pressure decrease in the flare header. The flare burners in a MPGF are typically lit with a pilot flame system where the first burners on a stage are lit by the pilot flame and the flame propagates (*i.e.,* cross-lights) down the stage to the remaining burners on the stage (*e.g.,* like how burners on a gas grill would light). The MPGF system is surrounded by a panel type fence to allow air in for combustion as well as to protect nearby workers from the radiant heat of the flare system.

MPGF are often used as secondary flares to control large emissions events that result during periods of SSM. With the elimination of the SSM exemption (see section IV.E.1 of this preamble for additional discussion), proposing requirements for this unique flare type for flares in the specified subset is an important consideration given that some facilities currently use them as APCD. Based on our review of recently approved AMEL requests for MPGF and the underlying data analyses that supported those decisions (see section II.D of this preamble), MPGF can achieve at least equivalent reductions in volatile organic compounds (VOC) and organic HAP to traditional elevated flares; however, different operating requirements are needed for these flare types to ensure a high level of control is achieved given that the individual flare burners are designed to operate at high velocities (*i.e.,* up to sonic velocity). Important considerations for proper design and operation of MPGF center around the following: (1) Flare flame stability, (2) pilot flame presence and its interplay with proper cross-lighting, (3) operation of the MPGF with no visible emissions, and (4) monitoring of certain parameters of the MPGF and the vent gases it controls for purposes of compliance assurance.

In reviewing the initial MPGF AMEL requests by Dow Chemical and ExxonMobil (80 FR 8023–8030, February 13, 2015), the Agency noted two general conclusions from the test data supporting the AMEL requests that were consistent with 1985 studies [27] conducted by the EPA on pressure-assisted flares. The first general conclusion was that ''flare head design can influence the flame stability curve.'' The second general conclusion was that ''stable flare flames and high (≤98–99 percent) combustion and destruction efficiencies are attained when flares are operated within operating envelopes specific to each flare burner and gas

[27] Pohl, J. and N. Soelberg. 1985. *Evaluation of the efficiency of industrial flares: Flare head design and gas composition.* EPA–600/2–85–106. Prepared for U.S. EPA Office of Air Quality Planning and Standards.

mixture tested. Operation beyond the edge of the operating envelope can result in rapid flame de-stabilization and a decrease in combustion and destruction efficiencies.'' In reviewing all the available data in the MPGF AMEL docket (*i.e.,* Docket ID No. EPA–HQ–OAR–2014–0738), we found these two general observations were still valid conclusions. The data clearly show that for some test runs flare flameouts occurred, meaning the flares were not operated within the proper envelope to produce a stable flame. In reviewing these data, we observed that all flare flameouts occurred for the various burners/waste gas mixtures tested below an NHVcz of 800 Btu/scf. Thus, we selected a minimum NHVcz of 800 Btu/scf to ensure the MPGF at facilities in the Miscellaneous Organic Chemical Manufacturing source category that emit ethylene oxide or produce olefins and/or polyolefins are operated within the proper envelope to produce a stable flame and achieve high destruction efficiencies at least equivalent to those as the underlying MON standards. Above this level, no flare flameouts are observed, and high combustion/destruction efficiencies at least equivalent to those as the underlying MON MACT standards are achieved. Thus, to that end, we are proposing to not allow use of the ''feed forward'' calculation approach (discussed in section IV.A.1.e of this preamble) to demonstrate compliance with the NHVcz limit of 800 Btu/scf. We are only proposing allowance of complying with a straight 15-minute block average for these flare types in the specified subset.

Another unique characteristic of MPGF is that they may use a cross-lighting pilot flame system as a means of ignition to initially combust the waste gases sent to the flare burners on a particular staged array. Thus, we also reviewed the equipment-specific set-ups in the test data that allowed for successful cross-lighting of MPGF. Based on review of the data, it appears that one option would be for facilities to conduct performance demonstrations to demonstrate successful cross-lighting on a minimum of three burners (*i.e.,* as outlined in the Framework for Streamlining Approval of Future Pressure-Assisted MPGF AMEL Requests, 81 FR 23480, April 21, 2016). However, given the data before us in the MPGF AMEL docket, and rather than requiring facilities to conduct a performance demonstration, it appears that an equipment standard that sets an upper limit on the distance between burners of 6 feet will ensure a successful cross-lighting on a stage of burners in a MPGF.

Furthermore, in reviewing the site-specific AMEL standards that facilities are complying with for MPGF,[28] we believe these same site-specific standards, if applied to all MPGF in the specified subset, would demonstrate at least equivalent emissions reductions to the underlying MON MACT standards as well as demonstrate at least equivalent reductions to the new operational and monitoring requirements we are proposing for more traditional, elevated flare tips. Therefore, we are proposing that owners or operators of MPGF for the specified flare subset (1) Maintain an NHVcz≥800 Btu/scf over a short averaging period (*i.e.,* 15-minutes); (2) continuously monitor the NHVcz and flare vent gas flow rate; (3) continuously monitor for the presence of a pilot flame, and if cross-lighting is occurring on a particular stage of burners, ensuring that the stage has a minimum of two pilots per stage that are capable of igniting all flare vent gases sent to that stage; (4) operate the MPGF with no visible emissions (except for 5 minutes during any 2 consecutive hours); (5) maintain a distance of no greater than 6 feet between any two burners on a stage of burners that use cross-lighting; and (6) monitor to ensure the staging valves for each stage of the MPGF operate properly so that the flare will control vent gases within the range of the tested conditions based on the flare manufacturer's recommendations.

Finally, although we are unaware of any MON facilities that use multi-point elevated flares in the specified flare subset, we recognize that an owner or operator may elect to use this type of flare design in the future. Given the design similarities of a multi-point elevated flare when compared to a MPGF (*i.e.,* each flare type uses pressure-assisted burners with staged arrays), we determined that our analyses of the test data (including our review of approved AMEL requests) related to MPGF that control waste gases could also apply to multi-point elevated flares in the specified subset that combust waste gases. Therefore, we are proposing that owners and operators of multi-point elevated flares meet the same requirements that we are proposing for MPGF. In other words, the proposed requirements discussed in this section of the preamble would apply to all pressure-assisted multi-point flares (*i.e.,* MPGF and multi-point elevated flares) in the specified subset. We are soliciting comment on whether this approach is appropriate, and whether test data are available for multi-point elevated flares that control waste gases from MON facilities. We are also soliciting comment on whether the proposed requirements for pressure-assisted multi-point flares should ultimately supersede the currently approved MPGF AMEL requests at MON facilities.

[28] 80 FR 52426, August 31, 2015; 81 FR 23480, April 21, 2016; and 82 FR 27822, June 19, 2017.

h. Impacts of the Flare Operating and Monitoring Requirements

The EPA expects that the newly proposed requirements for flares in the specified subset that are discussed in this section will affect flares at 21 facilities nationwide. We assumed that these facilities each operate one flare that either controls ethylene oxide emissions or controls emissions from an olefins and/or polyolefins process. The ACC provided the EPA a distribution of flares by type for 68 MON facility flares at 18 facilities. We used this information to estimate the flare type for each of the 21 flares at MON facilities that control ethylene oxide emissions or produce olefins and/or polyolefins. Based on this information, we estimate that the majority of these flares (about 90 percent) have traditional elevated flare tip designs (*e.g.,* steam-assisted, air-assisted, and non-assisted flare tips) that receive flare vent gas flows on a regular basis (*i.e.,* other than during periods of SSM). We also reviewed consent decrees and approved AMEL requests issued to these facilities. Based on this information, five of the 21 MON facilities are expected to already have the monitoring equipment needed to better control their flares. Specifically, two facilities operate under consent decree only, two facilities operate MPGF under approved AMEL requests only, and one facility both operates under consent decree and also operates a MPGF under an approved AMEL request. Therefore, we estimate that only 16 flares are expected to incur costs, based on the assumption that owners and operators of flares at the five facilities with consent decrees and/or approved AMEL requests already have the monitoring equipment in place. Costs were estimated for each flare for a given facility, considering current monitoring systems already installed on each individual flare. Given that the same type of equipment is used for flares in the Miscellaneous Organic Chemical Manufacturing source category and for the petroleum refinery sector, costs for any additional monitoring systems needed were estimated based on installed costs received from petroleum refineries and, if installed costs were unavailable, costs were estimated based on vendor-purchased equipment. The baseline emission estimate and the emission reductions achieved by the proposed flare requirements were estimated by back-calculating from the NEI-reported VOC and HAP controlled emissions assuming a 93.1-percent baseline control efficiency, derived from the best available data.[29] The results of the impact estimates are summarized in Table 3 of this preamble. We note that the requirements for flares in the specified subset that we are proposing in this proposal will ensure compliance with the MACT standards in the MON when flares are used as an APCD. Because we are not changing the underlying MACT standards in the MON, we did not include any of the estimated excess emissions from flares in the summary of total estimated emissions reductions for this action. However, we estimate that the proposed operational and monitoring requirements have the potential to reduce excess emissions from flares in the specified subset by approximately 260 tpy of HAP and 1,300 tpy of VOC. The VOC compounds are non-methane, non-ethane total hydrocarbons. According to the modeling file we used to assess risk (see section III.C.1 of this preamble), there are approximately 30 individual HAP compounds included in the emission inventory for flares in the specified subset, but many of these are emitted in trace quantities. The majority of the HAP emissions from flares are attributable to HCl, hexane, vinyl acetate, and 1,3-butadiene. Note that this analysis does not consider costs incurred for flares outside of the specified subset for which an owner or operator may choose to opt-in to the proposed requirements. For more detail on the impact estimates, see the technical memorandum titled *Control Option Impacts for Flares Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking.

TABLE 3—NATIONWIDE COST IMPACTS FOR FLARES AT MON FACILITIES THAT CONTROL EMISSIONS OF ETHYLENE OXIDE OR EMISSIONS FROM OLEFINS OR POLYOLEFINS PROCESSES [1]

Control description	Total capital investment (million $)	Total annualized costs (million $/yr)
Flare Operational and Monitoring Requirements	17.0	4.05
Work Practice Standards for Flares Operating Above Their Smokeless Capacity	0.16	0.04
Total	17.2	4.09

[1] Costs are calculated for the year 2016.

2. Vent Control Bypasses

a. Pressure Relief Devices

The MON defines several terms applicable to process vents at 40 CFR 63.2550. The current definition of ''continuous process vent'' excludes ''relief valve discharges,'' and instead, the MACT standard in the MON recognizes relief valve discharges to be the result of malfunctions. The acronym ''PRD'' means pressure relief device and is common vernacular to describe the variety of devices regulated as pressure relief valves (see the end of this section for our proposed definitions of pressure relief device and relief valve, to provide clarity). PRDs are designed to remain closed during normal operation. Typically, the Agency considers PRD releases as the result of an overpressure in the system caused by operator error, a malfunction such as a power failure or equipment failure, or other unexpected cause that results in immediate venting of gas from process equipment to avoid safety hazards or equipment damage.

The MON currently regulates PRDs when they are seated through equipment leak provisions that are applied only after the pressure relief occurs (*i.e.,* conduct monitoring with EPA Method 21 of Appendix A–7 to 40 CFR part 60 after each pressure release using a leak definition of 500 ppm); however, these provisions do not apply to an emissions release from a PRD. In addition, the MON follows the EPA's then-practice of exempting SSM events from otherwise applicable emission standards. Consequently, with PRD releases defined as unplanned, nonroutine, and the result of malfunctions, the MON did not restrict PRD releases to the atmosphere but instead treated them in the same manner as malfunctions subject to the SSM exemption provision. In *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), the Court determined that the SSM exemption violates the CAA. Section IV.E.1 of this preamble contains additional discussions on the removal of the SSM exemption provision for this source category. As a result, we evaluated the MACT standard in the MON for PRD discharges to ensure a standard continuously applies, consistent with the *Sierra Club* SSM decision.

CAA section 112(d)(1) specifies that the EPA may ''distinguish among classes, types, and sizes of sources'' when establishing standards. (In establishing standards under CAA section 112(d), the EPA may ''distinguish among classes, types, and sizes of sources within a category or sub-category.'' CAA section 112(d)(1). See *Sierra Club* v. *EPA,* 479 F.3d 875, 885 (D.C. Cir. 2007)). We are proposing two subcategories of PRDs for the MACT standard in the MON to distinguish between classes of PRDs: (1) PRDs designed to vent through a closed-vent system to a control device or to a process, fuel gas system, or drain system (referred to as PRDs that vent to a control system); and (2) PRDs designed to vent to the atmosphere, if a release were to occur. We are proposing to subcategorize PRDs by class because of design differences between the numerous PRDs at MON facilities that vent to a control system and that vent to the atmosphere. Currently, MON facilities are required to evaluate PRDs as part of their risk management and process safety management programs. When implementing these programs, facilities identify PRDs that they intend to control as compared to those they elect not to control (and that have the potential to vent to the atmosphere if a release were to occur). Facilities do not control certain PRDs because of technical or site-specific safety considerations, such as PRDs that

[29] API, the National Petrochemical and Refiners Association (NPRA; now known as the American Fuels and Petrochemical Manufacturers (AFPM)), and the ACC provided the EPA with a dataset that includes detailed hourly operational information for 38 steam-assisted flares, characterizing different operating conditions by waste gas flow rate, steam flow rate, waste gas composition, and duration of that operating condition.

release chemicals that could be incompatible with vent streams in downstream controls.

We evaluated each subcategory of PRDs separately to ensure that a standard continuously applies. Essentially, PRDs that vent to a control system are already complying with the process vent standards and are, thus, presumably, already appropriately controlled. However, PRDs that vent to atmosphere cannot meet the current continuous process vent standards. Therefore, we examined whether it would be feasible to regulate PRDs that vent to atmosphere under CAA section 112(d)(2) and (3). As detailed here, we determined it was feasible to regulate PRDs that vent to atmosphere under CAA section 112(h) and are proposing work practice standards at 40 CFR 63.2480(e) that are intended to reduce the number of PRD releases and will incentivize owners or operators to eliminate the causes of PRD releases to the atmosphere.

No MON facility is subject to numeric emission limits for PRDs that vent to the atmosphere. Further, we do not believe it is appropriate to subject PRDs that vent to the atmosphere to numeric emission limits due to technological and economical limitations that make it impracticable to measure emissions from such PRDs. CAA section 112(h)(1) states that the EPA may prescribe a work practice standard or other requirement, consistent with the provisions of CAA sections 112(d) or (f), in those cases where, in the judgment of the Administrator, it is not feasible to enforce an emission standard. CAA section 112(h)(2)(B) further defines the term ''not feasible'' in this context as meaning that ''the application of measurement technology to a particular class of sources is not practicable due to technological and economic limitations.'' We consider it appropriate to establish a work practice standard for PRDs that vent to atmosphere as provided in CAA section 112(h), because the application of a measurement methodology for PRDs that vent to atmosphere is not practicable due to technological and economic limitations. First, it is not practicable to use a measurement methodology for PRD releases that vent to atmosphere. PRDs are designed to remain closed during normal operations and release emissions only during nonroutine and unplanned events, and the venting time can be very short and may vary widely in composition and flow rate. These unique event characteristics make it infeasible to collect a grab sample of the gases when a PRD release occurs, and a single grab sample would also likely not account for potential variation in vent gas composition. Additionally, it would not be cost-effective to construct an appropriate conveyance and install and operate continuous monitoring systems for each individual PRD that vents to atmosphere in order to attempt to quantitatively measure a release event that may occur only a few times in a 3-year period. (See *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 664–67 (2016).) Further, we have not identified any available, technically feasible continuous emission monitoring system (CEMS) that can accurately determine a mass release quantity of VOC or HAP given the flow, composition, and composition variability of potential PRD releases that vent to the atmosphere from MCPUs. Rather, we have identified only monitoring systems capable of alerting an owner or operator when a PRD release occurs. Consequently, we concluded that it is appropriate to establish a work practice standard for PRDs that vent to atmosphere as provided in CAA section 112(h).

We also reviewed information about MON facilities to determine how the best performers are minimizing emissions from PRDs that vent to atmosphere. We first reviewed the requirements in the EPA's Chemical Accident Prevention Provisions (40 CFR part 68) and Occupational Safety and Health Administration's (OSHA) Process Safety Management rule (29 CFR 1910.119). These rules focus on planning for and minimizing or preventing scenarios which would result in releases of chemicals. For example, as stated in Appendix C to the OSHA rule, ''Process safety management is the proactive identification, evaluation and mitigation or prevention of chemical releases that could occur as a result of failures in process, procedures or equipment.'' The rules are applicable to any equipment in the process, and relief valves are identified in each rule as an applicable source to evaluate. The EPA and OSHA rules have similar requirements, except that applicability determination is unique to each rule. Owners or operators are subject to the EPA's Chemical Accident Prevention Provisions at 40 CFR part 68 if a process has more than a threshold quantity of a regulated substance. Regulated substances and their thresholds are listed at 40 CFR 68.130. Owners or operators are subject to OSHA's Process Safety Management rule at 29 CFR 1910.119 if a process involves either a chemical that is above specified threshold quantities (listed in appendix A to 29 CFR 1910.119) or a Category 1 flammable gas or liquid. MON facilities may be subject to the Chemical Accident Prevention Provisions rule, as identified in their title V permit (40 CFR 68.215 requires permits to list part 68 as an applicable requirement, if subject). As a result, we further reviewed this rule for consideration in developing the work practice standard.

The EPA's Chemical Accident Prevention Provisions require a prevention program. Facilities subject to the MON would fall under prevention program 3. Prevention program 3 includes the following: Documentation of process safety information, conducting a hazard analysis, documentation of operating procedures, employee training, on-going maintenance, and incident investigations. The process safety information documented must include information pertaining to the hazards of the regulated substances in the process, the technology of the process, and the process equipment (including relief valves). When conducting the hazard analysis, facilities must identify, evaluate, and control the hazards in the process; controls may consider the application of detection methodologies (*e.g.,* process monitoring and control instrumentation) to provide early warning of releases. The operating procedures must address multiple operating scenarios (*e.g.,* normal operations, startup, emergency shutdown) and provide instructions for safely conducting process activities. Conducting the hazard analysis and documenting operating procedures are similar to prevention measures, discussed below, though we note a specific number of measures or controls is not specified for the program 3 prevention program. Incident investigations must document the factors that contributed to an incident and any resolutions and corrective actions (incident investigations are consistent with root cause analysis and corrective action, discussed below). Facilities are also required to document this information in a Risk Management Plan that must be updated at least every 5 years.

Next, we considered that some companies operating MON facilities also own and operate petroleum refineries and may have established company-wide best practices as a result of specific state and federal requirements. For example, petroleum refineries and chemical plants located in certain counties in California are subject to and complying with specific requirements for PRDs such as the Bay Area Air Quality Management District

(BAAQMD) Rule 8–28–304 and South Coast Air Quality Management District (SCAQMD) Rule 1173. The BAAQMD rule requires implementation of three prevention measures, and both rules require root cause analysis and corrective action for certain PRDs. These rules also formed the basis of the work practice standards promulgated for PRD releases at petroleum refineries in the Petroleum Refinery Sector RTR performed by the EPA (80 FR 75178, December 1, 2015).

Considering our review of the EPA's Chemical Accident Prevention Provisions and company-wide best practices that MON facilities may have implemented, we expect that the best performing MON facilities have implemented a program for PRDs that vent to the atmosphere that consists of using at least three prevention measures and performing root cause analysis and corrective action in the event that a PRD does release emissions directly to the atmosphere. We used this information as the basis of the work practice standards that we are proposing at 40 CFR 63.2480(e). Examples of prevention measures include the following: Flow indicators, level indicators, temperature indicators, pressure indicators, routine inspection and maintenance programs, operator training, inherently safer designs, safety instrumentation systems, deluge systems, and staged relief systems where the initial PRD discharges to a control system.

We are also proposing a limit on the number of PRD releases that would result in a deviation from the work practice standard for PRDs that vent to the atmosphere. We believe setting criteria to determine a deviation is necessary for the work practice to be effective. We considered limits on the number of PRD releases in both 3- and 5-year periods. Based on a Monte Carlo analysis of random rare events (as conducted for the Petroleum Refinery Sector rule [30]), we note that it is quite likely to have two or three events in a 5-year period when a long time horizon (*e.g.,* 20 years) is considered. Therefore, we are proposing to limit the number of PRD releases from a single PRD to either one, two, or three (depending on the root cause) in a 3-year period as the basis of a deviation from the work practice standard. We are proposing that it is a deviation from the work practice standard if a single PRD that vents to atmosphere has two releases within a 3-year period due to the same root cause. We believe that this provision will help ensure that root cause/corrective action are conducted effectively. Otherwise, we are proposing that it is a deviation from the work practice standard if a single PRD that vents to atmosphere has three releases within a 3-year period for any reason. In addition, we are proposing that any PRD release for which the root cause was determined to be operator error or poor maintenance is a deviation from the work practice standard. Refer to 40 CFR 63.2480(e)(3)(v) for these proposed provisions. We are proposing that ''force majeure'' events would not be included when counting the number of releases. ''Force majeure'' events result from natural disasters, acts of war or terrorism, or external power curtailment beyond the facility's control. These types of events are beyond the control of the owner or operator. We are providing that these events should not be included in the event count, but that they would be subject to the root cause analysis in order to confirm whether the release was caused by a force majeure event. Based on our cost assumptions, the nationwide capital cost for complying with the PRD work practice requirements is $6.03 million and the annualized capital costs is $0.58 million.

In addition, we believe that it is appropriate to exclude certain types of PRDs that have very low potential to emit based on their type of service, size, and/or pressure from the proposed work practice standard for PRD releases that vent to atmosphere. Both the Chemical Accident Prevention Provisions and the California petroleum refinery PRD rules also exempt or impose simpler requirements for certain PRDs. We are proposing at 40 CFR 63.2480(e)(5) that the following types of PRDs would not be subject to the work practice standard for PRDs that vent to the atmosphere: (1) PRDs with a design release pressure of less than 2.5 pounds per square inch gauge (psig); (2) PRDs in heavy liquid service; (3) PRDs that are designed solely to release due to liquid thermal expansion; and (4) pilot-operated and balanced bellows PRDs if the primary release valve associated with the PRD is vented through a control system. Each of the types of PRDs that we are proposing are not subject to the work practice standard are discussed in greater detail here. With regard to PRDs with a design release pressure of less than 2.5 psig, it is technically infeasible to pipe sources with a release pressure of less than 2.5 psig to a flare (or other similar control system) because the back pressure in the flare header system generally exceeds 2.5 psig. Therefore, we are proposing that PRDs with a design release pressure of less than 2.5 psig are not subject to the work practice standard. With regard to PRDs in heavy liquid service, any release from a PRD in heavy liquid service would have a visual indication of a leak and any repairs to the valve would have to be further inspected and, if necessary, repaired under the existing equipment leak provisions. Therefore, we are proposing that PRDs in heavy liquid service are not subject to the work practice standard. In addition, we are proposing that PRDs designed solely to release due to liquid thermal expansion are not subject to the work practice standard. We expect that releases from these thermal relief valves would be insignificant. Finally, we are also proposing that pilot-operated PRDs (where emissions can be released to the atmosphere through a pilot discharge vent) and balanced bellow PRDs (where emissions can be released to the atmosphere through a bonnet vent) are not subject to the work practice standard, if the primary release valve associated with the pilot-operated or balanced bellows PRD is vented through a control system. Pilot-operated and balanced bellows PRDs are primarily used for pressure relief when the back pressure of the discharge vent may be high or variable. Conventional pressure relief devices act on a differential pressure between the process gas and the discharge vent. If the discharge vent pressure increases, the vessel pressure at which the PRD will open increases, potentially leading to vessel over-pressurization that could cause vessel failure. Balanced bellows PRDs use a bellow to shield the pressure relief stem and top portion of the valve seat from the discharge vent pressure. A balanced bellows PRD will not discharge gas to the atmosphere during a release event, except for leaks through the bonnet vent due to bellows failure or fatigue. Pilot-operated PRDs use a small pilot safety valve that discharges to the atmosphere to effect actuation of the primary valve or piston, which then discharges to a control system. Balanced bellows or pilot operated PRDs are considered a reasonable and necessary means to safely control the primary PRD release.

For all PRDs in organic HAP service, owners or operators would still be required to comply with the leak detection and repair (LDAR) provisions, as they are currently applicable. Therefore, all PRDs that vent to the atmosphere would still perform LDAR to ensure the PRD properly reseats if a release does occur, and PRDs that vent to control systems would still be exempt from LDAR requirements given that if a release were to occur from this specific

[30] See 80 FR 75217, December 1, 2015.

class of PRDs, it would vent to a closed vent system and control device.

Finally, to ensure compliance with the proposed work practice standard for PRDs that vent to the atmosphere, we are also proposing at 40 CFR 63.2480(e)(3) that sources monitor these PRDs using a system that is capable of identifying and recording the time and duration of each pressure release and of notifying operators that a pressure release has occurred. Pressure release events from PRDs that vent to atmosphere have the potential to emit large quantities of HAP. When a pressure release occurs, it is important to identify and mitigate it as quickly as possible. For purposes of estimating the costs of this requirement, we assumed that operators would install electronic monitors on PRDs that vent to atmosphere to identify and record the time and duration of each pressure release. However, we are proposing to allow owners and operators to use a range of methods to satisfy these requirements, including the use of a parameter monitoring system (that may already be in place) on the process operating pressure that is sufficient to indicate that a pressure release has occurred as well as record the time and duration of that pressure release. Based on our cost assumptions, the nationwide capital cost of installing these electronic monitors is $12.7 million, and the annualized capital cost is $1.68 million per year.

We also considered requiring all PRDs to be vented to a control device as a beyond-the-floor requirement. While this would provide additional emission reductions beyond those we are establishing as the MACT floor, these reductions come at significant costs. Assuming 25 percent to 50 percent of PRDs already vent to a control device, the capital cost for controlling the remaining PRDs ranges from $2,540 million to $5,070 million, and the annualized cost ranges from $330 million to $660 million. The incremental cost effectiveness for requiring control of all PRDs that vent to atmosphere compared to the requirements described above exceeds $80 million per ton of HAP reduced. Consequently, we conclude that this is not a cost-effective option.

The EPA is also proposing a requirement that any future installed pilot-operated PRDs be the non-flowing type. As previously noted, under CAA section 112(d)(1), the EPA may ''distinguish among classes, types, and sizes of sources'' when establishing standards. There are two designs of pilot-operated PRDs: Flowing and non-flowing. When a flowing pilot-operated PRD is actuated, the pilot discharge vent continuously releases emissions; however, when a non-flowing pilot-operated PRD is actuated, the pilot discharge vent does not vent continuously. Although we expect pilot discharge vent emissions to be minimal for both designs, limiting the future use of flowing pilot-operated PRDs is warranted to prevent continuous release of emissions. Therefore, we are proposing at 40 CFR 63.2480(e)(8) to require future installation and operation of non-flowing pilot-operated PRDs at all affected sources.

The terms ''pressure release,'' ''pressure relief device,'' and ''relief valve'' are not defined in the MON; therefore, we are proposing a definition for each of these terms at 40 CFR 63.2550(i) that would apply only to the MON standards. We are proposing to define ''pressure release'' as the emission of materials resulting from the system pressure being greater than the set pressure of the pressure relief device. This release can be one release or a series of releases over a short time period. We are proposing to define ''pressure relief device'' as a valve, rupture disk, or similar device used only to release an unplanned, nonroutine discharge of gas from process equipment in order to avoid safety hazards or equipment damage. A pressure relief device discharge can result from an operator error, a malfunction such as a power failure or equipment failure, or other unexpected cause. Such devices include conventional, spring-actuated relief valves, balanced bellows relief valves, pilot-operated relief valves, rupture disks, and breaking, buckling, or shearing pin devices. We are proposing to define ''relief valve'' as a type of pressure relief device that is designed to re-close after the pressure relief.

We solicit comment on all of the proposed revisions for PRDs. See the technical memorandum titled *Review of Regulatory Alternatives for Certain Vent Streams in the Miscellaneous Organic Chemical Manufacturing Source Category,* in the docket for this rulemaking for details on the assumptions and methodologies used in this analysis.

b. Closed-Vent System Containing Bypass Lines

For a closed-vent system containing bypass lines that can divert the stream away from the APCD to the atmosphere, the MON requires the owner or operator to either (1) install, maintain, and operate a continuous parametric monitoring system for flow on the bypass line that is capable of detecting whether a vent stream flow is present at least once every 15 minutes or (2) secure the bypass line valve in the non-diverting position with a car-seal or a lock-and-key type configuration. Depending on the emission source, the MON references bypass line requirements in either 40 CFR part 63, subparts G, H, and SS, or 40 CFR part 65, subpart F. Under option (2), the owner or operator is also required to inspect the seal or closure mechanism at least once per month to verify the valve is maintained in the non-diverting position (*e.g.,* see 40 CFR 63.998(d)(1)(ii)(B) for more details). To ensure standards apply to MON emission sources at all times, we are proposing at 40 CFR 63.2450(e)(6) that an owner or operator may not bypass the APCD at any time, and if a bypass is used, then we are proposing that owners and operators estimate and report the quantity of organic HAP released. We are proposing this revision because bypassing an APCD could result in a release of regulated organic HAP to the atmosphere and to be consistent with *Sierra Club* v. *EPA, 551 F.3d 1019* (D.C. Cir. 2008), where the Court determined that standards under CAA section 112(d) must provide for compliance at all times. We are also proposing that the use of a cap, blind flange, plug, or second valve on an open-ended valve or line is sufficient to prevent a bypass. We solicit comment on these proposed revisions.

c. Maintenance Activities

The EPA is proposing that emission limits apply at all times consistent with *Sierra Club* v. *EPA.* We recognize that this proposed change for vent streams that are periodically discharged will affect certain maintenance activities such as those that require equipment openings, and we consider maintenance activities a separate class of startup and shutdown emissions because there must be a point in time when the equipment can be opened, and any remaining emissions are vented to the atmosphere. We also acknowledge that it would require a significant effort to identify and characterize each of these potential release points (*e.g.,* for permitting purposes).

We reviewed state permit conditions and determined the best performers' permits specify that they meet certain conditions before they open equipment to the atmosphere. The conditions include thresholds regarding the lower explosive limit (LEL) and the mass of gas that may be emitted. Therefore, we are proposing a work practice standard at 40 CFR 63.2455(d)(1)(i) that prior to opening process equipment to the atmosphere during maintenance events, the equipment first be drained and purged to a closed system so that the hydrocarbon content is less than or equal to 10 percent of the LEL. For those situations where 10-percent LEL cannot be demonstrated, we are proposing at 40 CFR 63.2455(d)(1)(ii) that the equipment may be opened and vented to the atmosphere if the pressure is less than or equal to 5 psig, provided there is no active purging of the equipment to the atmosphere until the LEL criterion is met. We are proposing this 5 psig threshold to acknowledge that a certain minimum pressure must exist for the flare header system (or other similar control system) to operate properly. We are also proposing at 40 CFR 63.2455(d)(1)(iii) that equipment may be opened when there is less than 50 pounds of VOC that may be emitted to the atmosphere.

We also acknowledge that installing a blind flange to prepare equipment for maintenance may be necessary and by doing so, the owner or operator may not be able to meet the proposed maintenance vent conditions mentioned above (*e.g.,* a valve used to isolate the equipment will not seat fully so organic material may continually leak into the isolated equipment). To limit the emissions during the blind flange installation, we are proposing at 40 CFR 63.2455(d)(1)(iv) depressurizing the equipment to 2 psig or less prior to equipment opening and maintaining pressure of the equipment where purge gas enters the equipment at or below 2 psig during the blind flange installation. The low allowable pressure limit will reduce the amount of process gas that will be released during the initial equipment opening, and the ongoing 2 psig pressure requirement will limit the purge gas rate. Together, these proposed provisions will limit the emissions during blind flange installation and will result in comparable emissions allowed under the proposed maintenance vent conditions mentioned above. We expect these situations to be rare and that the owner or operator would remedy the situation as soon as practical (*e.g.,* replace the isolation valve or valve seat during the next turnaround in the example provided above). Therefore, we are only proposing that this alternative maintenance vent limit be used under those situations where the proposed primary limits (*i.e.,* hydrocarbon content is less than or equal to 10 percent of the LEL, pressure is less than or equal to 5 psig, or VOC is less than 50 pounds) are not achievable and blinding of the equipment is necessary.

We expect that all MON facilities already have standard procedures in place when performing equipment openings. As such, the only costs incurred are for recordkeeping after each non-conforming event. We are proposing that owners or operators document each circumstance under which the alternative maintenance vent limit is used, providing an explanation as to why other criteria could not be met prior to equipment blinding and an estimate of the emissions that occurred during the equipment blinding process. We calculated the annual costs to be $2,340 per year. We solicit comment on the proposed revisions related to maintenance activities. For additional details and discussion, see the technical memorandum titled *Review of Regulatory Alternatives for Certain Vent Streams in the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking.

d. Flares and Fuel Gas Systems

The current definition of ''batch process vent'' at 40 CFR 63.2550(i) states that ''gaseous streams routed to a fuel gas system(s)'' are not batch process vents. Gas streams going to fuel gas systems are also exempt from the current definition of ''continuous process vent'' at 40 CFR 63.2550(i) by referencing 40 CFR 63.107(h)(3). In addition, other MON standards (*i.e.,* standards for storage tanks and transfer racks) also allow emissions to be routed to a fuel gas system for compliance purposes. A combustion device (typically a boiler or process heater) burning these gaseous streams as fuel effectively achieves the most stringent level of control (*i.e.,* 98-percent organic HAP reduction or an outlet organic HAP concentration of 20 ppmv). However, there can be instances when gaseous streams from the fuel gas system that would otherwise be combusted in a boiler or process heater are instead routed to a flare (*e.g.,* overpressure in the fuel gas system, used as flare sweep gas, used as flare purge gas). In cases where an emission source is required to be controlled in the MON standards but is routed to a fuel gas system, we are proposing that any flare receiving gases from that fuel gas system derived from an MCPU that has processes and/or equipment in ethylene oxide service or that produces olefins or polyolefins, comply with the flare operating and monitoring requirements discussed in section IV.A.1 of this preamble. We recognize that this proposed provision may require owners or operators that use fuel gas for any purpose (*e.g.,* flare sweep gas, flare purge gas, flare supplemental gas) in other flare APCDs that predominately control emissions from other source categories to comply with the proposed flare revisions discussed in section IV.A.1 of this preamble. Thus, in order to minimize this impact, we are proposing that any flare that utilizes fuel gas whereby the majority (*i.e.,* 50 percent or more) of the fuel gas in the fuel gas system is derived from an MCPU that has processes and/ or equipment in ethylene oxide service or that produces olefins or polyolefins comply with the flare operating and monitoring requirements discussed in section IV.A.1 of this preamble. We solicit comment on these proposed revisions.

B. What are the results of the risk assessment and analyses?

As described in section III.C of this preamble, we conducted an inhalation risk assessment for all HAP emitted and multipathway and environmental risk screening assessments on the PB–HAP emitted. We present results of the risk assessment briefly below and in more detail in the document titled *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this rulemaking.

1. Chronic Inhalation Risk Assessment Results

The results of the chronic baseline inhalation cancer risk assessment indicate that, based on estimates of current actual and allowable emissions, the MIR posed by the source category is 2,000-in-1 million driven by ethylene oxide emissions from storage tanks (75 percent), equipment leaks (15 percent), and process vents (8 percent). The total estimated cancer incidence based on actual and allowable emission levels is 0.4 excess cancer cases per year, or 1 case every 2.5 years. The population exposed to cancer risks greater than 100-in-1 million for actual and allowable emissions is approximately 18,000, and the population exposed to cancer risks greater than or equal to 1-in-1 million is approximately 2,900,000 (see Table 4 of this preamble). In addition, the maximum modeled chronic noncancer TOSHI for the source category based on actual and allowable emissions is estimated to be 1.

TABLE 4—MISCELLANEOUS ORGANIC CHEMICAL MANUFACTURING SOURCE CATEGORY INHALATION RISK ASSESSMENT RESULTS

Number of facilities [1]	Maximum individual cancer risk (in 1 million) [2]	Estimated population at increased risk of cancer [2]		Estimated annual cancer incidence (cases per year) [2]	Maximum chronic noncancer TOSHI [2]	Maximum screening acute noncancer HQ
		>100-in-1 million	≥1-in-1 million			
194	2,000	18,000	2,900,000	0.4	1	HQ_{REL} = 6 (acrolein).

[1] Number of facilities evaluated in the risk analysis.
[2] Maximum individual excess lifetime cancer risk due to HAP emissions from the source category.
[3] Actual emissions equal allowable emissions; therefore, actual risks equal allowable risks.

2. Screening Level Acute Risk Assessment Results

As presented in Table 4 of this preamble, the estimated worst-case acute exposures to emissions from the Miscellaneous Organic Chemical Manufacturing source category result in a maximum acute HQ of 6 based on the REL for acrolein (the next highest dose-response value for acrolein, the AEGL–1, results in an HQ of 0.2). There are 11 additional instances of acute HQs greater than 1 from the source category. Evaluation of the screening-level acute risk assessment results is provided in a memo to the docket titled *Evaluation of the Screening-Level Acute Risk Assessment Results for the Miscellaneous Organic Chemical Manufacturing (MON) Source Category.* Detailed information about the assessment is provided in *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this action.

3. Multipathway Risk Screening Results

The multipathway risk screening assessment resulted in a maximum Tier 2 cancer SV of 10 for POM for the farmer scenario. The Tier 2 SVs for all other PB–HAP emitted from the source category (mercury compounds, cadmium compounds, and arsenic compounds) were less than 1. The Tier 2 cancer SV for POM means that the maximum cancer risk from exposure to POM emissions through ingestion of farm products is less than 10-in-1 million. No site-specific assessment using TRIM FaTE (which incorporates AERMOD deposition, enhanced soil/water run-off calculations, and model boundary identification) or Tier 3 screening assessment was deemed necessary due to the conservative nature of the Tier 2 screen and the hypothetical construct of the farmer scenario.

In evaluating the potential for multipathway risk from emissions of lead, we compared modeled annual lead concentrations to the primary NAAQS for lead (0.15 μg/m³). The highest annual lead concentration of 0.0006 μg/m³ is well below the NAAQS for lead, indicating low potential for multipathway risk of concern due to lead emissions.

4. Environmental Risk Screening Results

As described in section III.A of this preamble, we conducted an environmental risk screening assessment for the Miscellaneous Organic Chemical Manufacturing source category for the following pollutants: Arsenic, cadmium, HCl, HF, lead, mercury (methyl mercury and mercuric chloride), and POMs.

In the Tier 1 screening analysis for PB–HAP (other than lead, which was evaluated differently), arsenic and cadmium emissions had no exceedances for any ecological benchmark. Divalent mercury emissions at three facilities had Tier 1 exceedances for the surface soil threshold level (invertebrate and plant communities) by a maximum SV of 10. Methyl mercury emissions at three facilities had Tier 1 exceedances for the surface soil NOAEL (avian ground insectivores and mammalian insectivores) by a maximum SV of 20. POM emissions at four facilities had Tier 1 exceedances for the sediment no-effect level by a maximum SV of 10, and one facility had a Tier 1 exceedance of the sediment threshold level by a maximum SV of 2.

A Tier 2 screening assessment was performed for divalent mercury, methyl mercury, and POM emissions. Neither divalent mercury, methyl mercury, nor POM emissions had a Tier 2 exceedance for any ecological benchmark.

We did not estimate any exceedances of the secondary lead NAAQS.

For HCl and HF, the average modeled concentration around each facility (*i.e.,* the average concentration of all off-site data points in the modeling domain) did not exceed any ecological benchmark. In addition, each individual modeled concentration of HCl and HF (*i.e.,* each off-site data point in the modeling domain) was below the ecological benchmarks for all facilities.

Based on the results of the environmental risk screening analysis, we do not expect an adverse environmental effect as a result of HAP emissions from this source category.

5. Facility-Wide Risk Results

An assessment of facility-wide (or "whole facility") risks was performed as described above to characterize the source category risk in the context of whole facility risks. Whole facility risks were estimated using the NEI-based data described in section III.C of this preamble. The maximum lifetime individual cancer risk posed by the 194 modeled facilities, based on whole facility emissions, is 3,000-in-1 million, with ethylene oxide emissions from fugitive emissions and flares from the Synthetic Organic Chemical Manufacturing, Polyether Polyols Production, and Miscellaneous Organic Chemical Manufacturing source categories driving the risk. Regarding the noncancer risk assessment, the maximum chronic noncancer HI posed by whole facility emissions is estimated to be 7 (for the respiratory system as the target organ), driven by emissions of chlorine and methyl bromide from non-source category sources identified as brominated organic manufacturing.

6. What demographic groups might benefit from this regulation?

To examine the potential for any environmental justice issues that might be associated with the source category, we performed a demographic analysis, which is an assessment of risk to individual demographic groups of the populations living within 5 km and within 50 km of the facilities. In the analysis, we evaluated the distribution of HAP-related cancer and noncancer risk from the Miscellaneous Organic Chemical Manufacturing source category across different demographic groups within the populations living near facilities.[31]

The results of the demographic analysis are summarized in Table 5 below. These results, for various demographic groups, are based on the estimated risk from actual emissions levels for the population living within 50 km of the facilities.

TABLE 5—MISCELLANEOUS ORGANIC CHEMICAL MANUFACTURING SOURCE CATEGORY DEMOGRAPHIC RISK ANALYSIS RESULTS—50 km STUDY AREA RADIUS

		Population with cancer risk greater than or equal to 1 in 1 million	Population with hazard index greater than 1
	Nationwide	Source Category	
Total Population	317,746,049	2,858,862	0
	White and Minority by Percent		
White	62%	44%	0%
Minority	38%	56%	0%
	Minority by Percent		
African American	12%	21%	0%
Native American	0.8%	0.2%	0%
Hispanic or Latino (includes white and nonwhite)	18%	31%	0%
Other and Multiracial	7%	4%	0%
	Income by Percent		
Below Poverty Level	14%	16%	0%
Above Poverty Level	86%	84%	0%
	Education by Percent		
Over 25 and without a High School Diploma	14%	20%	0%
Over 25 and with a High School Diploma	86%	80%	0%
	Linguistically Isolated by Percent		
Linguistically Isolated	6%	8%	0%

The results of the Miscellaneous Organic Chemical Manufacturing source category demographic analysis indicate that emissions from the source category expose approximately 2,900,000 people to a cancer risk at or above 1-in-1 million and no one to a chronic noncancer TOSHI greater than 1. The percentages of the at-risk population in each demographic group (except for White and Non-Hispanic) are similar to or greater than their respective nationwide percentages.

The methodology and the results of the demographic analysis are presented in a technical report, *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Miscellaneous Organic Chemical Manufacturing Source Category Operations,* available in the docket for this action.

C. What are our proposed decisions regarding risk acceptability, ample margin of safety, and adverse environmental effect?

As noted in section III of this preamble, the EPA sets standards under CAA section 112(f)(2) using ''a two-step standard-setting approach, with an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on MIR of approximately 1-in-10 thousand'' (54 FR 38045, September 14, 1989). For this proposal, the EPA estimated risks based on actual and allowable emissions from the Miscellaneous Organic Chemical Manufacturing source category, and we considered these in determining acceptability.

1. Residual Risks Under the Current MACT Provisions

Under the current NESHAP, the risk results indicate that both the actual and allowable inhalation cancer risks to the individual most exposed are well above 100-in-1 million, which is the presumptive limit of acceptability. The estimated inhalation cancer risk to the individual most exposed to actual or allowable emissions from the source category is 2,000-in-1 million. The estimated incidence of cancer due to inhalation exposures is 0.4 excess cancer cases per year, or 1 excess case every 2.5 years. The population estimated to be exposed to cancer risks greater than 100-in-1 million for actual and allowable emissions is approximately 18,000, and the population estimated to be exposed to cancer risks greater than or equal to 1-in-1 million is approximately 2,900,000.

[31] Demographic groups included in the analysis are: White, African American, Native American, Hispanic or Latino, other races and multiracial, people living below the poverty level, people living above the poverty level, over 25 and without a high school diploma, over 25 and with a high school diploma, and linguistically isolated people.

The estimated maximum chronic noncancer TOSHI from inhalation exposure for this source category is 1, indicating low likelihood of adverse noncancer effects from long-term inhalation exposures.

The multipathway risk assessment results indicated a maximum cancer risk of 10-in-1 million based on ingestion exposures estimated using the health protective risk screening assumptions of a Tier 2 farmer exposure scenario.

The acute risk screening assessment of reasonable worst-case inhalation impacts indicates a maximum acute HQ of 6 for acrolein based on the 1-hour REL. There are 11 additional instances of HQs greater than 1. For acute screening analyses, to better characterize the potential health risks associated with estimated reasonable worst-case acute exposures to HAP, we examine a wider range of available acute health metrics than we do for our chronic risk assessments. This is in acknowledgement that there are generally more data gaps and uncertainties in acute reference values than there are in chronic reference values. Examination of the range of available acute health metrics, in addition to the conservative (health-protective) assumptions built into the screening assessment, leads us to conclude that adverse effects from acute exposure to emissions from this category are not anticipated. More detailed information is provided in the memo to the docket titled *Evaluation of the Screening-Level Acute Risk Assessment Results for the Miscellaneous Organic Chemical Manufacturing (MON) Source Category.*

Considering all of the health risk information and factors discussed above, including the uncertainties discussed in section III of this preamble (and taking into account uncertainties in the 2016 updated URE for ethylene oxide and concerns raised by commenters, as discussed in section IV.C.3 of this preamble), the EPA proposes that the risks for this source category under the current MACT provisions are unacceptable. As noted in section II.A of this preamble, when risks are unacceptable, the EPA must determine the emissions standards necessary to reduce risk to an acceptable level without considering costs or technological feasibility. Therefore, we are proposing to revise the NESHAP for the Miscellaneous Organic Chemical Manufacturing (MON) source category pursuant to CAA section 112(f)(2) on the basis for risks being unacceptable.

2. Proposed Controls To Address Risks

We evaluated several control options for reducing risks. Based on the results of the risk assessment, we have identified ethylene oxide as the primary contributor to risks. Ethylene oxide is primarily used at MON facilities as a feedstock in the production of miscellaneous chemicals, including alkyl alkanolamines, agrochemical products, ethoxylates, surfactants, and batch-produced polyols and glycols that are not subject to other NESHAP. Information gathered in this rulemaking indicates that, of the nine facilities identified with ethylene oxide emissions from MON processes, three have emissions from process vents, four have emissions from storage tanks, and all nine have emissions from equipment leaks. We did not identify any ethylene oxide emissions from other MON process units (*e.g.,* heat exchange systems, wastewater, transfer operations); therefore, we are soliciting comment on data related to these other MON process units being potential sources of ethylene oxide emissions. Based on the available data, we analyzed control options for process vents, storage tanks, and equipment leaks to reduce risk.

Process vents and storage tanks as a source of ethylene oxide emissions. Emissions of ethylene oxide can occur from several types of process vents, such as distillation columns, evaporator vents, and vacuum operations, as well as during vapor displacements and heating losses. Storage tanks are used to store liquid and gaseous feedstocks for use in a process, as well as to store liquid and gaseous products from a process. Ethylene oxide is typically stored under pressure as a liquified gas but may also be present at lower concentrations within non-pressurized storage tanks. The pressurized tanks typically use a blanket of inert gas, most often nitrogen, to maintain a non-decomposable vapor space. Emissions from ethylene oxide pressure vessels occur both during loading operations and during the continuous purge of vapor space from non-loading operations.

The current MON standards divide process vents into Group 1 process vents, which require controls, and Group 2 process vents, which generally do not require controls. The Group 1 and Group 2 designations for process vents are based on uncontrolled emissions levels for process vents from batch processes and on flow rate and the total resource index values for process vents from continuous processes. The current MON standard requires uncontrolled Group 1 process vents to reduce total HAP emissions by 98 percent by venting emissions through a closed-vent system to any combination of control devices or to vent emissions through a closed-vent system to a flare. The current MON standard also allows uncontrolled Group 1 batch process vents to be controlled by reducing uncontrolled emissions by 95 percent by venting through a closed-vent system to a recovery device. For process vents, the MON allows use of a design evaluation instead of a performance test to determine the percent reduction of control devices if the total uncontrolled HAP emissions being sent to the control device are less than 10 tpy.

Similarly, the current MON standards divide storage tanks into Group 1 storage tanks, which require control, and Group 2 storage tanks, which generally do not. The Group 1 and Group 2 designation for storage tanks is based on the volume of the storage tank and vapor pressure of the material stored. The current MON standards require uncontrolled Group 1 storage tanks to reduce total HAP emissions by 95 percent by venting emissions through a closed-vent system to any combination of control devices or to vent emissions through a closed-vent system to a flare. The MON allows certain storage tanks to be controlled using the floating roof requirements in 40 CFR part 63, subpart WW, but this option is not applicable to storage tanks containing pure ethylene oxide. For storage tanks, the MON allows use of a design evaluation instead of a performance test to determine the percent reduction of control devices for any quantity of total uncontrolled HAP emissions being sent to the control device.

Results from our risk assessment indicate that, of the source category MIR of 2,000-in-1 million, 8 percent of the risk is from process vent emissions of ethylene oxide and 75 percent of the risk is from storage tank emissions of ethylene oxide. The remaining risk is mostly from equipment leaks. To understand how to best address risk within the source category, we reviewed information gathered for this rulemaking for the three facilities identified with ethylene oxide emissions from process vents and the four facilities identified with ethylene oxide emissions from storage tanks. Of these emission process sources, only one storage tank was classified as Group 1 and was, therefore, required to control emissions. The remaining storage tanks and process vents are classified as Group 2 and are not currently required to control emissions. We note that the Group 1 storage tank contains pure ethylene oxide, and the Group 2 storage tanks contain ethylene oxide at lower concentrations. Performance test data for the scrubber controlling the Group 1 storage tank were unavailable because a design evaluation was used to demonstrate compliance in lieu of performance testing. Based on results from the risk assessment, we also determined that the current MACT provisions for process vents and storage tanks do not result in sufficient reductions of ethylene oxide emissions, and, therefore, we evaluated available control technologies with a higher level of control, as discussed below.

Proposed process vent and storage tank control technologies. To address the risk from ethylene oxide emissions from process vents and storage tanks, we performed a review of available control technologies and identified two options. The first technology is any control device capable of achieving 99.9-percent reduction of uncontrolled ethylene oxide emissions. The second technology is a flare meeting the proposed flare operating requirements discussed in section IV.A.1 of this preamble.

An example of a control technology that can achieve 99.9-percent reduction of uncontrolled ethylene oxide emissions is packed-tower gas absorbers, also referred to in this proposal as scrubbers. These scrubbers control emissions from MON process vents and storage tanks by absorbing ethylene oxide into aqueous systems. The absorbed ethylene oxide can then be reacted to form glycol or can be recovered for downstream use. These systems can be designed to achieve very high ethylene oxide removal, with information provided by one scrubber vendor claiming that many of these systems achieve 99.9 percent or greater removal of ethylene oxide from vent gas. Information gathered in this rulemaking indicates that MON facilities with ethylene oxide emissions from process vents and storage tanks commonly use scrubbers to control emissions.

Flares used as APCDs are expected to achieve 98-percent HAP destruction efficiencies when designed and operated according to the requirements in the General Provisions. As discussed in section IV.A.1 of this preamble, studies on flare performance indicate that these General Provision requirements are inadequate to ensure proper performance of flares at chemical manufacturing facilities, particularly when either assist steam or assist air is used. It is expected that flares controlling ethylene oxide, which is highly flammable and, therefore, readily controlled by combustion controls, operating under the improved efficiency standards proposed in this preamble would achieve more than the 98-percent destruction efficiency required by the flare standard. While we did not identify any process vents or storage tanks in ethylene oxide service that are being controlled primarily by a flare, it is reasonable to expect that, in the case that these streams were controlled by a flare, these requirements would provide the same level of control as other high efficiency ethylene oxide controls.

Equipment leaks as a source of ethylene oxide emissions. Emissions from equipment leaks occur in the form of gases or liquids that escape to the atmosphere through connection points (*e.g.,* threaded fittings) or through the moving parts of valves, pumps, compressors, PRDs, and certain types of process equipment. The equipment leak provisions of the MON require meeting control requirements of 40 CFR part 63, subparts H (National Emission Standards for Organic Hazardous Air Pollutants for Equipment Leaks), UU (National Emission Standards for Equipment Leaks—Control Level 2 Standards), or 40 CFR part 65, subpart F (the Consolidated Air Rule for Equipment Leaks) for existing MON processes and 40 CFR part 63, subpart UU, or 40 CFR part 65, subpart F, for new MON processes. The applicable equipment is those components, including pumps, compressors, agitators, pressure relief devices, sampling collection systems, open-ended valves or lines, valves, and connectors that contain or contact material that is 5 percent by weight or more of organic HAP, operate 300 hours per year or more, and are not in vacuum service. The equipment leak requirements vary by equipment (component) type but require LDAR using monitoring with EPA Method 21 of appendix A–7 to 40 CFR part 60 at certain frequencies (*e.g.,* monthly, quarterly, every 2 quarters, annually) and have varying leak definitions (*e.g.,* 500 ppm, 1,000 ppm, 10,000 ppm) depending on the type of service (*e.g.,* gas and vapor service or in light liquid service). The LDAR requirements for components in heavy liquid service include sensory monitoring and the use of EPA Method 21 monitoring if a leak is identified.

Results from our risk assessment indicate that, for the source category MIR of 2,000-in-1 million, approximately 15 percent is from equipment leak emissions of ethylene oxide. We note that the risk at a second facility is also greater than 100-in-1 million (*i.e.,* 300-in-1 million), with approximately 95 percent of the risk from equipment leak emissions of ethylene oxide.

LDAR and equipment leak control technologies. To address the risk from ethylene oxide emissions from equipment leaks, we performed a review of available measures for reducing ethylene oxide emissions from components that were most likely to be in ethylene oxide service, which included pumps in light liquid service at batch processes, connectors in gas and vapor service or light liquid service, and valves in gas or light liquid service. This review relied on information from a 2011 analysis that identified developments for equipment leaks at chemical manufacturing facilities and petroleum refineries,[32] herein referred to as the 2011 equipment leaks analysis. We identified several developments in LDAR practices and processes, summarized here.

For light liquid pumps, we identified two options: (1) Lower the leak definition for batch pumps from 10,000 ppm to 1,000 ppm with monthly monitoring or (2) require the use of leakless pumps (*i.e.,* canned pumps, magnetic drive pumps, diaphragm pumps, pumps with tandem mechanical seals, pumps with double mechanical seals) with annual monitoring with a leak definition of any reading above background concentration levels.

For gas/vapor and light liquid connectors, we identified two options: (1) Require connector monitoring at a leak definition of 500 ppm with annual monitoring or (2) require connector monitoring at a leak definition of 100 ppm with monthly monitoring.

For gas/vapor and light liquid valves, we identified two options: (1) Require leakless valves (*i.e.,* bellows seal gate and bellows seal globe valves with bellows welded to both the bonnet and stem) with annual monitoring with a leak definition of any reading above background concentration levels or (2) lower the leak definition from 500 ppm to any reading above background concentration levels with monthly monitoring.

Additional information on all evaluated control options is found in the memorandum titled *Analysis of Control Options for Equipment Leaks at Processes that use Ethylene Oxide Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* in the docket for this rulemaking.

[32] Hancy. 2001. Memorandum from Hancy, C., RTI International to Howard, J., EPA/OAQPS. *Analysis of Emissions Reduction Techniques for Equipment Leaks,* December 21, 2011. EPA Docket ID No. EPA–HQ–OAR–2010–0869.

Regulatory options. For process vents, storage tanks, and equipment leaks, we considered the control options described above for reducing risk from the source category. To reduce risk in the source category, we propose to require control of ethylene oxide for (1) process vents, (2) storage tanks, and (3) equipment ''in ethylene oxide service'' (defined in this proposal).[33] For process vents and storage tanks, this control requirement is regardless of whether the equipment is classified as Group 1 or Group 2 for HAP.

In all cases, we are proposing that if information exists that suggests ethylene oxide could be present in these processes, then the process equipment is considered to be in ethylene oxide service unless sampling and analysis is performed to demonstrate that the process equipment does not meet the definition of being in ethylene oxide service. We are proposing sampling and analysis procedures at 40 CFR 63.2492. Examples of information that could suggest ethylene oxide is present in a process stream include calculations based on safety data sheets, material balances, process stoichiometry, or previous test results provided the results are still relevant to the current operating conditions.

Based on the proposed applicability thresholds, we expect that eight facilities will be affected by the proposed ethylene oxide-specific standards. Five of these eight facilities will be subject to the process vent and/ or storage tank provisions; specifically, three facilities have process vents in ethylene oxide service and three facilities have storage tanks in ethylene oxide service. All eight facilities are expected to be subject to the equipment leak provisions.

To reduce risks from process vents in ethylene oxide service, we are proposing to either reduce emissions of ethylene oxide by (1) venting emissions through a closed-vent system to a control device that reduces ethylene oxide by greater than or equal to 99.9 percent by weight, or to a concentration less than 1 ppmv for each process vent, or to less than 5 pounds per year for all combined process vents; or (2) venting emissions through a closed-vent system to a flare meeting the proposed flare operating requirements discussed in section IV.A.1 of this preamble. To reduce risks from storage tanks in ethylene oxide service, we are proposing to either reduce emissions of ethylene oxide by (1) venting emissions through a closed-vent system to a control device that reduces ethylene oxide by greater than or equal to 99.9 percent by weight or to a concentration less than 1 ppmv for each storage tank vent; or (2) venting emissions through a closed-vent system to a flare meeting the proposed flare operating requirements discussed in section IV.A.1 of this preamble. Additionally, we propose removing the option to allow use of a design evaluation in lieu of performance testing to demonstrate compliance for both process vents and storage tanks in ethylene oxide service to ensure that the required level of control is achieved. We are also proposing that after promulgation of the rule, owners or operators that choose to control emissions with a non-flare control device conduct an initial performance test according to 40 CFR 63.997 and 40 CFR 63.2450(g) on each existing control device in ethylene oxide service and on each newly installed control device in ethylene oxide service to verify performance at the required level of control. Subsequently, we propose that owners or operators conduct periodic performance testing on non-flare control devices in ethylene oxide service every 5 years.

As previously stated, we are aware that MON facilities with ethylene oxide emissions from process vents and storage tanks commonly use scrubbers to control emissions. Based on our knowledge of these scrubbers, there is a difference in how these scrubbers operate in order to achieve high control efficiencies versus how a normal wet scrubber operates. The higher removal efficiency of ethylene oxide in these scrubbers is based on the absorption of ethylene oxide into the scrubber water and then conversion of ethylene oxide to ethylene glycol. This conversion is dependent on several factors—maintaining an acid environment to catalyze the reaction and having enough residence time in the scrubber for the reaction to occur. We are proposing continuous monitoring of operating parameters for these scrubbers to ensure that the factors needed for the reaction to occur are met, namely liquid-to-gas ratio, pressure drop across the scrubber, liquid feed pressure, liquid temperature, and pH. However, we are aware that several other parameters may also be important to monitor, such as maximum liquid flow rate, tank levels for the reactant and solution feed tanks, and ethylene glycol content of the tanks. We are requesting comment on the operating parameters we have proposed for these scrubbers and whether these additional operating parameters are necessary, and if so, how these parameter limits should be set and at what frequency they should be monitored.

To reduce risks from equipment leaks, we identified two options that we are co-proposing for controlling emissions from MON equipment in ethylene oxide service, referred to here as equipment leak Control Option 1 and equipment leak Control Option 2. These two co-proposed options, presented in Table 6 and summarized here, provide a level of control beyond what is being proposed in the technology review for all MON equipment in HAP service.

In equipment leak co-proposed Control Option 1, we are proposing that all light liquid pumps in ethylene oxide service be monitored monthly at a leak definition of 1,000 ppm, and when a leak is detected, it be repaired as soon as practicable, but not later than 15 calendar days after it is detected. Additionally, under co-proposed Control Option 1, we are proposing that the leak repair exemption available for pumps at 40 CFR 63.1026(b)(3), 40 CFR 63.163(c)(3), and 40 CFR 65.107(b)(3) would not apply to equipment in ethylene oxide service. Also, as part of co-proposed Control Option 1, we are proposing that all gas/vapor and light liquid connectors in ethylene oxide service be monitored annually at a leak definition of 500 ppm, and when a leak is detected, it be repaired as soon as practicable, but not later than 15 calendar days after it is detected.

As an alternative to Control Option 1, we are co-proposing equipment leak Control Option 2. Under co-proposed Control Option 2, we are proposing that more stringent equipment leak standards would apply to the facilities with a MIR greater than 100-in-1 million after imposition of the proposed standards for process vents and storage tanks, as determined by this risk analysis (*i.e.,* Lanxess Corporation and

[33] For process vents, we are proposing to define ''in ethylene oxide service'' to mean that each batch and continuous process vent in a process that, when uncontrolled, contains a concentration of greater than or equal to 1 ppmv undiluted ethylene oxide, and when combined, the sum of all these process vents would emit uncontrolled, undiluted ethylene oxide emissions greater than or equal to 5 pounds per year (2.27 kilograms per year). For storage tanks of any capacity and vapor pressure, we are proposing to define ''in ethylene oxide service'' to mean that the concentration of ethylene oxide of the stored liquid is greater than or equal to 1 parts per millions by weight (ppmw). We are proposing that the exemptions for ''vessels storing organic liquids that contain HAP only as impurities'' and ''pressure vessels designed to operate in excess of 204.9 kilopascals and without emissions to the atmosphere'' listed in the definition of ''storage tank'' at 40 CFR 63.2550(i) do not apply for storage tanks in ethylene oxide service. For the ethylene oxide equipment leak provisions, we are proposing to define ''in ethylene oxide service'' to mean any equipment that contains or contacts a fluid (liquid or gas) that is at least 0.1 percent by weight of ethylene oxide.

Huntsman Performance), and detailed in Appendix 10 of the document titled *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this rulemaking. For these two facilities, pumps in ethylene oxide service would be required to be leakless (*i.e.,* have zero emissions) and monitored annually to verify there are no emissions. Additionally, valves in ethylene oxide service would be required to either be leakless and monitored annually, or not be leakless and be monitored quarterly. For pumps and valves in ethylene oxide service, equipment is considered leaking if an instrument reading above background is found. Furthermore, at the two higher risk facilities with a MIR greater than 100-in-1 million, connectors in ethylene oxide service would be monitored monthly at a leak definition of 100 ppm. We are proposing that when a leak is detected, it be repaired as soon as practicable, but not later than 15 calendar days after it is detected, and a first attempt at repair be made no later than 5 calendar days after the leak is detected. As part of co-proposed Control Option 2, all other facilities with MON equipment in ethylene oxide service would be subject to the standards previously described in equipment leak co-proposed Control Option 1.

We solicit comment on each of the proposed requirements for process vents, storage tanks, and equipment in ethylene oxide service.

TABLE 6—SUMMARY OF EQUIPMENT LEAK CO-PROPOSED CONTROL OPTIONS FOR MON FACILITIES EMITTING ETHYLENE OXIDE

Equipment Leak Control Option	Applicability		Control option description
1	MON equipment in ethylene oxide service.	Light Liquid Pumps	Require leak definition of 1,000 ppm, monthly monitoring.
		Gas/Vapor and Light Liquid Connectors	Require leak definition of 500 ppm, annual monitoring.
2	MON equipment in ethylene oxide service at the two facilities with cancer risks ≥100-in-1 million (specifically, Lanxess Corporation and Huntsman Performance).	Light Liquid Pumps	Require pumps to have zero emissions (*e.g.,* leakless), annual monitoring.
		Gas/Vapor and Light Liquid Connectors	Require leak definition of 100 ppm, monthly monitoring.
		Gas/Vapor and Light Liquid Valves	Require valves to have zero emissions (*e.g.,* leakless) with annual monitoring or non-leakless with quarterly monitoring.
	MON equipment in ethylene oxide service at all other facilities (excluding Lanxess Corporation and Huntsman Performance).	Light Liquid Pumps	Require leak definition of 1,000 ppm, monthly monitoring.
		Gas/Vapor and Light Liquid Connectors	Require leak definition of 500 ppm, annual monitoring.

Finally, in considering possible control options for equipment leaks, it is important to understand the uncertainties related to the modeled ethylene oxide equipment leak emissions. For Lanxess Corporation, the modeled equipment leak emissions were our best estimate, using component counts from the facility's title V permit application and emission factors, and were not based on measured emissions. Notably, this calculated emission estimate was higher than what was reported to the 2014 NEI and the 2014 Toxics Release Inventory. We used the highest emission estimate in our model run to be conservatively health protective but recognize that this may result in an overestimation of risk. For Huntsman Performance, the modeled equipment leak emissions were also our best estimate, using calculated emissions that were reported to the 2014 NEI, and were also not based on measured emissions. Although Huntsman Performance did report their equipment leak emissions, we do not know which components (*e.g.,* pumps, valves, connectors, etc.) were responsible for these emissions, which introduces uncertainty regarding the effect that the proposed equipment leak controls would have on reducing equipment leak emissions. At Huntsman Performance, we are also aware that the ethylene oxide equipment leak emissions are not entirely from MON processes; however, we did not have enough information to distinguish between emissions attributed to MON processes versus other processes (*e.g.,* 40 CFR part 63, subparts H and PPP). Therefore, the risk for this facility is likely biased high due to our inability to distinguish between co-located emissions. For both Lanxess Corporation and Huntsman Performance, because the ethylene oxide equipment leak emissions were derived from engineering calculations and are not based on measured values, there is considerable uncertainty regarding the appropriateness of the proposed LDAR and control provisions for light liquid pumps, gas/vapor and light liquid connectors, and gas/vapor and light liquid valves. As such, modeled risk reductions may not accurately reflect the actual effects of implementing the proposed controls. Furthermore, we have limited information regarding the use of leakless valves on streams that are in ethylene oxide service and, therefore, are soliciting comment on the applicability of these valves for MON equipment in ethylene oxide service.

3. Determination of Risk Acceptability

As noted in sections II.A and III.A of this preamble and in the Benzene NESHAP, the EPA sets standards under CAA section 112(f)(2) using a two-step approach, with an analytical first step to determine whether risks are acceptable. This determination ''considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) of approximately 1 in 10 thousand'' (54 FR 38045, September 14, 1989). A MIR of 1-in-10,000 (*i.e.,* 100-in-1 million) alone does not constitute a bright line for making a risk acceptability determination. The level of the MIR is only one factor weighed in determining acceptability of risk. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112 and are weighed with other health risk measures and information, including risk estimation uncertainty, in making an overall judgment on acceptability.

In some cases, the health risk measures and information taken together may provide a more realistic description of the magnitude of risk in the exposed population than that provided by the MIR alone. As such, we considered the results of the risk assessment (including the risk estimation uncertainty) and evaluated available control technologies and other measures (including the controls reviewed under the technology review) that could be applied to this source category to reduce the risks due to emissions of ethylene oxide from process vents, storage tanks, and equipment leaks without considering costs or technological feasibility. Additionally, as described previously in section IV.C.2, we are co-proposing two options for control of ethylene oxide emissions from equipment leaks (*e.g.,* co-proposed Control Options 1 and 2). Therefore, we present the risk impacts using health risk measures and information, including the MIR, cancer incidence, population exposed to cancer risks greater than 100-in-1 million, and associated uncertainty in emissions estimates after incremental application of controls for storage tanks, process vents, and either co-proposed equipment leak Control Option 1 or 2, in Table 7 and in the discussion below.

TABLE 7—NATIONWIDE RISK IMPACTS AFTER IMPLEMENTATION OF PROPOSED CONTROLS

Control scenario	MIR (x-in-1 million)	Population		Cancer incidence	Uncertainty
		≥1-in-1 million	>100-in-1 million		
Pre-Control Baseline	2,000 (Lanxess, 300 (Huntsman).	2,900,000	18,000	0.4	
+ Storage Tank Controls.	500 (Lanxess), 300 (Huntsman).	2,600,000	1,500	0.1	The effect of process vent and storage tank controls on emissions is well understood and generally certain.
+ Process Vent Controls.	400 (Lanxess), 300 (Huntsman).	2,400,000	780	0.1	
Either, + Equipment Leak Control Option 1.	200 (Lanxess), 300 (Huntsman).	2,300,000	300	0.1	Fugitive emissions estimates are uncertain and based on engineering calculations. Therefore, there is uncertainty regarding the relevance of the proposed equipment leak controls (Lanxess, Huntsman). Modeled fugitive emissions may be subject to other NESHAP which likely results in an overestimation of risk (Huntsman).
Or, + Equipment Leak Control Option 2.	100 (Lanxess), 200 (Huntsman).	2,100,000	30	0.1	

Although the post-control risks are greater than 100-in-1 million (*i.e.,* 200 to 300-in-1 million), due to the inherent health protective nature of our risk assessment methods and the uncertainties in this assessment, we believe that this risk assessment is more likely to overestimate rather than underestimate the risks. A brief discussion of the health protective aspects of the assessment, including uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates, and dose-response relationships was covered in section III.C.8. A more thorough discussion of these uncertainties is included in the *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this action.

We note that the modeled risks due to emissions of ethylene oxide are sensitive to the URE applied. In this assessment, the modeled risks are largely driven by use of an EPA URE for ethylene oxide that was updated in December 2016 (*i.e.,* 5×10^{-3} per ug/m^3) on the basis of new human data.[34 35] This updated URE is about 60 times greater than the value used previously by EPA in its risk assessments (*i.e.,* California EPA URE of 8.8 x 10^{-5} per ug/m^3, based on animal data).

The UREs we use in our risk assessments generally provide an upper bound estimate of risk[36] to be health protective in light of dose-response modeling uncertainties. As noted above and in Section III.C.8.d, there are uncertainties inherent in all risk assessments, including uncertainties in the development of dose-response values. Consistent with EPA SAB recommendations,[37] where a HAP is a risk driver, as is the case with ethylene oxide for this risk assessment, we examine the underlying technical information, including sources of risk estimation uncertainties. To better characterize the risks, we reviewed EPA's 2016 ethylene oxide dose-response assessment and the uncertainties in the dose-response relationships.

For the EPA's 2016 ethylene oxide URE, two aspects of uncertainty stand out as potentially contributing to the conservative (*i.e.,* health protective) nature of the final 2016 URE. This is documented in the memorandum titled *Sensitivity of Ethylene Oxide Risk Estimates to Dose-Response Model Selection,* which is available in the docket for this rulemaking, and as discussed further below.

[34] U.S. EPA. *Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide (CASRN 75–21–8) In Support of Summary Information on the Integrated Risk Information System (IRIS).* December 2016. EPA/635/R–16/350Fa. *https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/1025tr.pdf.*

[35] SAB. (2015). *Science Advisory Board Review of the EPA's Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide:* Revised external review draft—August 2014 [EPA Report]. (EPA–SAB–15–012). Washington, DC: U.S. EPA, SAB. *https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/BD2B2DB4F84146A585257E9A0070E655/$File/EPA-SAB-15-012+unsigned.pdf.*

[36] IRIS glossary (*https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=IRIS%20Glossary*).

[37] Recommendations of the SAB Risk and Technology Review Methods Panel are provided in their report, which is available at: *https://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

First, the updated IRIS URE for ethylene oxide is based on the upper confidence limit on the slope of the dose response curve. However, according to the 2005 *Guidelines for Carcinogen Risk Assessment,* when human data are available, it is reasonable to consider the central estimate rather than upper confidence limit for a URE.[38] In the case of ethylene oxide, we do have human health data and, therefore, it is reasonable to consider the central estimate. The central estimate of the URE for ethylene oxide is 3 times lower than the upper confidence limit, as documented in the memorandum titled *Sensitivity of Ethylene Oxide Risk Estimates to Dose-Response Model Selection,* which is available in the docket for this rulemaking.

Second, we note that several dose-response models were considered during the 2016 IRIS assessment for two types of cancer: Breast cancer and lymphoid cancer. Considering multiple models ensures the selected model provides the best fit to the exposure data and helps quantify and characterize model and statistical uncertainty. The choice of model also has significant implications for the URE, particularly at the low end of the dose-response range.

With regard to lymphoid cancer, the selected model provided the best fit and satisfied all SAB recommendations.[39] However, there were statistical challenges associated with modeling the data. Therefore, in developing the dose-response value, the EPA considered other lymphoid cancer models that provided reasonably good fits to the exposure data and met some, but not all, of the SAB modeling criteria recommendations. For purposes of characterizing the uncertainty around the final 2016 IRIS URE, it is useful to consider the extent to which choosing an alternative lymphoid cancer model would have affected the value. In fact, one of the alternative lymphoid cancer models evaluated by the EPA would result in a URE 2 to 3 times lower than the IRIS URE, as documented in the memorandum titled *Sensitivity of Ethylene Oxide Risk Estimates to Dose-Response Model Selection,* which is available in the docket for this rulemaking.[40] For breast cancer, there was a high level of statistical certainty with the model selected, and, therefore, we did not include alternative models in this uncertainty discussion.

The EPA concludes that these uncertainties, noted in the 2016 IRIS assessment, provide important context for interpreting whether risks remaining post-control can be considered acceptable. In particular, we note that the central estimate compared to the upper confidence limit could result in a URE 3 times lower than the IRIS URE and an alternative dose-response model for lymphoid cancer could result in a URE 2–3 times lower. While EPA followed SAB recommendations regarding lymphoid model choice, we acknowledge the uncertainty inherent in this model selection, which is important for interpreting risk results. In fact, both the central estimate and an alternative dose-response model combined could result in a URE 5 times lower. This would reduce potential post-control risks to 60- to 100-in-1 million (from 200- to 300-in-1 million).

The updated URE was used in EPA's 2014 National Air Toxics Assessment (NATA). In September 2018, the ACC submitted a Request for Correction under the Information Quality Act asking that the ''NATA risk estimates for E.O.[41] should be withdrawn and corrected to reflect scientifically-supportable risk values''.

Given the ACC's Request for Correction, in the HCl Production RTR proposed rule, the EPA requested comment on the use of the updated ethylene oxide URE for regulatory purposes (84 FR 1584; February 4, 2019). The comment period for the proposed rule closed on April 26, 2019, and the Agency received a number of comments on the updated ethylene oxide URE and its use for regulatory purposes. Those comments are included in Docket ID No. EPA–HQ–OAR–2018–0417, and the EPA is incorporating those comments into the docket for this rulemaking. Commenters provided comments both in support of and opposed to the 2016 updated URE for ethylene oxide and its use for regulatory purposes. One commenter noted that the application of the URE would have wide-ranging implications on regulatory decision making. Commenters supporting the use of the 2016 updated URE noted that the IRIS assessment for ethylene oxide used the best available science, underwent review by Agency and non-Agency experts, as well as public review, and was published in a peer-reviewed journal. Commenters opposing the use of the 2016 updated URE noted concerns with the model and variables used to estimate pre-1978 worker exposure estimates (and suggested an alternative model and alternative pre-1978 worker exposure estimates that would reflect higher pre-1978 exposures and affect the final URE), and another commenter indicated that they are developing their own cancer dose-response value for ethylene oxide.

In June 2019, the Texas Commission on Environmental Quality (TCEQ) issued a draft document for public review (''Ethylene Oxide Carcinogenic Dose-Response Assessment''), which concluded that ''USEPA's ethylene oxide inhalation URF[42] is not adequately supported by scientific data'' and instead proposed a unit risk factor (URF) of 1.4×10^{-6} per ug/m^3. Specifically, TCEQ disagreed with the EPA's model selection as the basis for deriving a URE. TCEQ highlighted uncertainties in the URE arising from what it considered to be errors in the assumptions and calculations used to determine the best model fit of the data. TCEQ's concerns with the EPA's URE derivation have not been peer reviewed and the public comment period closed on September 26, 2019.

Because of the robustness of the comments received and their relevance to this rulemaking, the Agency will consider those comments in the final rule for the Miscellaneous Organic Chemical Manufacturing source category. In this proposed rule, we are requesting any additional comments on the use of the 2016 updated URE for ethylene oxide for regulatory purposes beyond those already received for the HCl Production RTR proposed rule (84 FR 1584–1597; February 4, 2019), as well as comments on the use of an alternative URE for ethylene oxide in the final rule for this source category. The EPA believes it is reasonable to assume that, allowing for the uncertainties in the URE, estimated risks for the Miscellaneous Organic Chemical Manufacturing source category could be lower, even potentially lower than the 100-in-1 million benchmark.

[38] *Guidelines for Carcinogen Risk Assessment. Risk Assessment Forum.* U.S. EPA. Washington, DC. March 2005.

[39] SAB advice on modeling criteria included (1) the recommendation to prioritize models with good fits in the low exposure range (*e.g.,* spline models), (2) preference for using continuous individual-level exposure data over categorical results, and (3) selecting models that have a dose-response shape that is both biologically plausible and consistent with observed data.

[40] The memorandum notes that higher estimates of risk were obtained using other models that statistically fit the data. There were limitations with these models and they were not considered in the uncertainty analysis. However, a comprehensive analysis of alternative models would likely include some risk estimates higher than the IRIS unit risk.

[41] In this instance, ''E.O.'' refers to ''ethylene oxide.''

[42] In this instance, ''URF'' is intended to be functionally equivalent to the EPA's unit risk estimate for ethylene oxide.

It is also important to note that there is considerable uncertainty regarding the estimated equipment leak emissions that are responsible for the remaining modeled risk. As described previously in section IV.C.2 and summarized here, the estimated ethylene oxide equipment leak emissions are based on engineering calculations, not actual measured emissions, and, therefore, it is uncertain whether the proposed controls are appropriate for the actual source(s) of fugitive emissions at these facilities. Furthermore, at Lanxess Corporation, a conservatively high equipment leak emissions estimate was used, and at Huntsman Performance, equipment leak emissions are also thought to be overestimated due to knowledge that the modeled emissions are not entirely from MON equipment. Due to these emissions uncertainties, the post-control MIRs of 300-in-1 million at Huntsman Performance and 200-in-1 million at Lanxess Corporation are likely biased high; the actual MIRs would be expected to be lower at both facilities. Given that the number of people estimated to have a cancer risk greater than 100-in-1 million would be reduced from 18,000 to 300, the incidence would be reduced from 0.4 to 0.1, and considering that the MIR is expected to be lower than 300-in-1 million, we propose that, after application of the ethylene oxide-specific controls for process vents, storage tanks, and equipment leak co-proposed Control Option 1, risks would be acceptable.

Alternatively, additional equipment leak controls (*e.g.,* beyond equipment leak co-proposed Control Option 1) could be applied to the two highest risk facilities to further reduce risks. After application of the ethylene oxide-specific controls for process vents, storage tanks, and equipment leak co-proposed Control Option 2, ethylene oxide emissions would be reduced by 94-percent for the source category, the estimated MIR would be reduced from 2,000-in-1 million to 200-in-1 million at Huntsman Performance and 100-in-1 million at Lanxess Corporation, the number of people estimated to have a cancer risk greater than 100-in-1 million would be reduced from 18,000 to 30, and the incidence would be reduced from 0.4 to 0.1.

Finally, we note that the proposed control measures provide for a significant risk reduction. Application of the ethylene oxide-specific controls for process vents and storage tanks would reduce ethylene oxide emissions by an estimated 89 percent for the source category, and the estimated MIR would be reduced from 2,000-in-1 million to 400-in-1 million at Lanxess Corporation, and the next highest estimated MIR would be 300-in-1 million at Huntsman Performance. In both cases, the remaining risk is primarily from equipment leak emissions of ethylene oxide. Subsequent application of equipment leak co-proposed Control Option 1 would further reduce ethylene oxide emissions by 4 percent, for a total estimated 93-percent reduction in ethylene oxide emissions for the source category, with the MIR at Lanxess Corporation being further reduced to 200-in-1 million and the MIR at Huntsman Performance remaining at 300-in-1 million.

In summary, after implementation of the proposed controls for process vents and storage tanks at MON facilities emitting ethylene oxide, as well as implementation of either of the co-proposed control options for equipment leaks, and considering all of the health risk information and factors discussed above, including the uncertainties regarding the equipment leak emissions, the uncertainties inherent in all risk assessments (*i.e.,* the emissions dataset, dispersion modeling, exposure estimates, and dose-response relationships) and the EPA's use of the updated URE for ethylene oxide (which is developed to be health protective but, given uncertainties in the value, could be as much as 5 times lower), the EPA proposes that the resulting risks would be acceptable for this source category. We are soliciting comment on which of the two ethylene oxide equipment leak co-proposed control options should be implemented in the final rulemaking in order to ensure that risks from the source category are acceptable.

4. Ample Margin of Safety Analysis

The second step in the residual risk decision framework is determination of whether the emission standards proposed to achieve an acceptable risk level would protect public health with an ample margin of safety, or whether more stringent emission standards would be required. In making this determination, we considered the estimate of health risk and other health information, along with additional factors relating to the appropriate level of control, including costs and economic impacts of controls, technological feasibility, uncertainties, and other relevant factors, consistent with the approach of the 1989 Benzene NESHAP. Table 8 of this preamble presents the summary of costs and ethylene oxide emission reductions we estimated for the proposed control options. For details on the assumptions and methodologies used in the costs and impacts analyses, see the technical memoranda titled *Analysis of Control Options for Storage Tanks and Process Vents Emitting Ethylene Oxide Located in the Miscellaneous Organic Chemical Manufacturing Source Category* and *Analysis of Control Options for Equipment Leaks at Processes that use Ethylene Oxide Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* which are available in the docket for this rulemaking.

TABLE 8—NATIONWIDE EMISSION REDUCTIONS AND COST IMPACTS OF CONTROL OPTIONS CONSIDERED FOR PROCESS VENTS, STORAGE TANKS, AND EQUIPMENT IN ETHYLENE OXIDE (ETO) SERVICE [1]

Control option	Total capital investment ($)	Total annualized costs ($/yr)	EtO emission reductions (tpy) [2]	Cost effectiveness ($/ton EtO) [3]
A—Process Vent Controls	2,180,000	914,000	1.2	783,000
B—Storage Tank Controls	466,000	796,000	8.6	93,100
C—Equipment Leak co-proposed Control Option 1	76,000	48,000	3.6	13,200
Total (A + B + C)	2,720,000	1,760,000	13.3	132,000
D—Equipment Leak co-proposed Control Option 2	673,000	148,000	4.5	33,000
Total (A + B + D)	3,320,000	1,860,000	14.2	131,000

[1] Costs are calculated for the year 2016 and assume that a scrubber was installed as the control device.
[2] Reductions shown are based on model plant emission estimates, not on emissions that were modeled in the risk assessment.
[3] Cost effectiveness presented is without recovery credits, which represent the savings in product that would not be lost from equipment leaks.

For the ample margin of safety analysis, we evaluated the cost and feasibility of available control technologies that could be applied in this source category to further reduce the risks (or potential risks) due to emissions of HAP, considering all of the health risks and other health information considered in the risk acceptability determination described above. We note that we did not identify any other controls for ethylene oxide emission sources so we are considering all the available options to reduce risk.

In the case that we apply the process vent, storage tank, and equipment leak co-proposed Control Option 1 in the first step (*i.e.,* determination of acceptable risk), we considered this option as well as three additional options in the second step to establish an ample margin of safety. For the three additional options, first, we considered implementing equipment leak co-proposed Control Option 2, which would require that the two facilities with cancer risks greater than 100-in-1 million comply with more stringent standards. Second, we considered expanding the applicability of equipment leak co-proposed Control Option 2 so that the more stringent controls would apply to all facilities with equipment in ethylene oxide service, regardless of cancer risks. Third, we considered the options identified in the technology review (*i.e.,* controls to equipment leaks for MON equipment not in ethylene oxide service and heat exchange systems). The ample margin of safety analysis for these options is discussed below.

First, in the case of implementing the ethylene oxide equipment leak co-proposed Control Option 2, we compared the costs of co-proposed Control Option 1 to co-proposed Control Option 2 ($76,000 vs. $673,000 total capital investment; $48,000 vs. $148,000 total annualized cost). From the ethylene oxide equipment leak co-proposed Option 1 to Option 2, the MIR would be reduced from 300-in-1 million to 200-in-1 million, the population exposed to cancer risks ≥1-in-1 million would be reduced from 2,300,000 to 2,100,000, and the incidence would remain unchanged at 0.1.

Second, in the case that we expand the applicability of equipment leak co-proposed Control Option 2 so that the more stringent controls would apply to all facilities with equipment in ethylene oxide service, costs were also found to be considerably higher compared to ethylene oxide equipment leak co-proposed Control Option 1 ($76,000 vs. $1,600,000 total capital investment; $48,000 vs. $300,000 total annualized cost). The estimated ethylene oxide emissions reductions are 5.8 tons per year with a cost effectiveness of $51,000 per ton of ethylene oxide. The population exposed to cancer risks greater than or equal to 1-in-1 million would be reduced by 14,000, but there are no additional reductions in the MIR or incidence when expanding these more stringent standards to apply to all facilities with equipment in ethylene oxide service. We solicit comment on whether we should apply the requirements of equipment leak co-proposed Control Option 2 that are specific to the two highest risk facilities more broadly, so that they apply to all facilities with equipment in ethylene oxide service.

Third, we considered control options identified in the technology review (section IV.D of this preamble), which apply to all HAP and are not specific to ethylene oxide. These options include controls for (1) equipment leaks for MON equipment not in ethylene oxide service (options 1 through 4), and (2) heat exchangers. For controls for equipment leaks for MON equipment not in ethylene oxide service (option 1, described in section IV.D.1 of this preamble) and heat exchangers, while cost-effective, neither lowered the source category MIR, incidence, or population exposed to cancer risks ≥1-in-1 million. For equipment leak controls for MON equipment not in ethylene oxide service, options 2, 3, and 4 (described in section IV.D.1 of this preamble) were not cost-effective and did not reduce the source category MIR, incidence, or population exposed to risks ≥1-in-1 million, with the exception of the equipment leak option 3 controls which lowered the population exposed to cancer risks ≥1-in-1 million by approximately 250,000 people.

Based on our ample margin of safety analysis, including all health information and the associated cost and feasibility as discussed above, we propose that the requirements that we are proposing to achieve acceptable risks would also provide an ample margin of safety to protect public health. We are soliciting comment on which of the available control options should be applied in order to provide an ample margin of safety to protect public health.

5. Adverse Environmental Effects

We do not expect there to be an adverse environmental effect as a result of HAP emissions from this source category, and we are proposing that it is not necessary to set a more stringent standard to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

D. What are the results and proposed decisions based on our technology review?

Sources of HAP emissions regulated by the MON are process vents, storage tanks, transfer racks, equipment leaks, wastewater streams, and heat exchange systems. MON processes can either be batch or continuous operations. Batch operations mean a non-continuous operation involving intermittent or discontinuous feed into equipment and, in general, involve the emptying of the equipment after the operation ceases and prior to beginning a new operation. To inform our technology reviews for these emissions sources, we reviewed the EPA's Reasonably Available Control Technology/Best Available Control Technology/Lowest Achievable Emission Rate (RACT/BACT/LAER) clearinghouse and regulatory development efforts published after the MON for similar sources. (See the memorandum titled *Review of the RACT/BACT/LAER Clearinghouse Database for the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking.) After reviewing information from the afore-mentioned sources, we have identified certain developments in practices, processes, or control technologies to reduce emissions from some of the sources of HAP emissions regulated by the MON. We then evaluated the impacts of applying these developments to the Miscellaneous Organic Chemical Manufacturing source category and are proposing revisions to the MON for equipment leaks and heat exchange systems pursuant to CAA section 112(d)(6).

1. Equipment Leaks

Emissions of HAP (*e.g.,* beyond ethylene oxide) from equipment leaks occur in the form of gases or liquids that escape to the atmosphere through many types of connection points (*e.g.,* threaded fittings) or through the moving parts of certain types of process equipment during normal operation. Equipment regulated by the MON includes pumps, compressors, agitators, PRDs, sampling collection systems, open-ended valves or lines, valves, connectors, and instrumentation systems that contain or contact material that is 5 percent by weight or more of organic HAP, operate 300 hours per year or more, and are not in vacuum service.

Depending on the type of equipment, the equipment leak requirements of the MON provide the option of meeting the control requirements of 40 CFR part 63, subparts H (National Emission Standards for Organic Hazardous Air Pollutants for Equipment Leaks), or UU (National Emission Standards for Equipment Leaks—Control Level 2 Standards), or 40 CFR part 65, subpart F (the Consolidated Air Rule for Equipment Leaks) for existing MON processes and 40 CFR part 63, subpart UU, or 40 CFR part 65, subpart F, for new MON processes. The equipment leak requirements vary by equipment (component) type but require LDAR using monitoring with EPA Method 21 of appendix A–7 to 40 CFR part 60 at certain frequencies (*e.g.,* monthly, quarterly, every 2 quarters, annually) and leak definitions (*e.g.,* 500 ppm, 1,000 ppm, 10,000 ppm) if the component is in either gas and vapor service or in light liquid service. The LDAR requirements for components in heavy liquid service require sensory monitoring and the use of EPA Method 21 monitoring if a leak is identified.

The practices, processes, and control technologies considered during MACT development for equipment leaks at MON facilities included LDAR. To identify developments for the technology review, we reviewed the control options that were considered for the proposed MON in 2003. As mentioned previously in section IV.C.2 of this preamble, the EPA conducted a general analysis in the 2011 equipment leaks study [43] to identify the latest developments in practices, processes, and control technologies for equipment leaks at chemical manufacturing facilities and petroleum refineries and estimated the impacts of applying those practices, processes, and control technologies to model facilities. We also used this 2011 equipment leaks analysis as a reference for conducting the technology review for equipment leaks at MON facilities. Additionally, we evaluated other federal regulations (*i.e.,* the finalized Petroleum Refinery Sector MACT,[44] NSPS subpart VVa,[45] and the Hazardous Organic NESHAP [46]) and state regulations (*e.g.,* the Texas fugitive emissions rules applicable to petrochemical processes [47] [48]) as part of this review.

Our technology review for equipment leaks of HAP (*e.g.,* beyond ethylene oxide) identified several developments in LDAR practices and processes: Option 1, lowering the leak definition for pumps in light liquid service at existing batch processes from 10,000 ppm to 1,000 ppm with monthly monitoring; option 2, lowering the leak definition for pumps in light liquid service at existing batch processes from 10,000 ppm to 500 ppm and at existing continuous processes from 1,000 ppm to 500 ppm with monthly monitoring; option 3, requiring monitoring of connectors in gas and vapor service or light liquid service at a leak definition of 500 ppm with monitoring every 8 years; and option 4, lowering the leak definition for valves in gas and vapor service or light liquid service from 500 ppm to 100 ppm at both batch and continuous processes with quarterly monitoring. For all other component types, we did not identify developments in LDAR practices and processes.

Emissions reductions were estimated for the new developments that we identified using component counts and emission factors. The component counts were derived using data from the original MON rule, which included model component counts for 224 facilities, with 167 using batch processes, 57 using continuous processes, and three not having information. The batch facilities contained 1,049 batch processes, or an average of 6.3 per facility. The continuous facilities contained 88 continuous processes, or an average of 1.5 per facility. These values were scaled to estimate the number of batch and continuous processes for the current count of 201 facilities, resulting in 943 batch processes and 79 continuous processes nationwide. The number of nationwide processes was then multiplied by the component counts to estimate the nationwide component counts. Subsequently, baseline emissions and emissions after implementation of the controls for each component were calculated for continuous and batch processes using the nationwide component counts for continuous and batch processes derived from the 2003 MON analysis and emission factors and leak frequencies for the chemical manufacturing industry from the 2011 equipment leaks study.[49]

Costs were then calculated for the baseline and control options, which reflect the cost to implement an LDAR program for each component. Note that the difference between the costs for the baseline and control options is the incremental cost to comply with the controls. Costs were calculated for the year 2016, and capital costs were annualized using a 5-percent interest rate. Furthermore, because the control options result in chemicals in process lines not leaking and, therefore, not being lost, we present costs both with and without this consideration. To estimate savings in chemicals not being emitted (*i.e.,* lost) due to the equipment leak control options, we applied a recovery credit of $900 per ton of VOC to the VOC emission reductions in the analyses. The $900 per ton recovery credit has historically been used by the EPA to represent the variety of chemicals that are used as reactants and produced at synthetic organic chemical manufacturing facilities,[50] however, we recognize that this value is from a 2007 analysis and may be outdated. Therefore, we solicit comment on the availability of more recent information to potentially update the value used in this analysis to estimate the recovery credits. The complete cost calculation methodology is documented in the memorandum, *Clean Air Act Section 112(d)(6) Technology Review for Equipment Leaks Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking.

We calculated the VOC and HAP cost effectiveness by dividing the incremental annual costs by the emissions reductions. Table 9 of this preamble presents the nationwide costs and impacts for the suite of equipment leak control options considered. See the technical memorandum titled *Clean Air Act Section 112(d)(6) Technology*

[43] Hancy. 2011. Memorandum from Hancy, C., RTI International to Howard, J., EPA/OAQPS. Analysis of Emissions Reduction Techniques for Equipment Leaks. December 21, 2011. EPA Docket ID No. EPA–HQ–OAR–2010–0869.

[44] 40 CFR part 63, subpart CC: National Emission Standards for Organic Hazardous Air Pollutants from Petroleum Refineries.

[45] 40 CFR part 60, subpart VVa: Standards of Performance for Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry for Which Construction, Reconstructions, or Modification Commenced After November 7, 2006.

[46] 40 CFR part 63, subpart H: National Emission Standards for Organic Hazardous Air Pollutants for Equipment Leaks.

[47] 30 TAC 115, subchapter D, Division 3: Control of Air Pollution from Volatile Organic Compounds; Petroleum Refining, Natural Gas Processing, and Petrochemical Processes; Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas.

[48] 30 TAC 115, subchapter H, Division 3: Control of Air Pollution from Volatile Organic Compounds; Highly-Reactive Volatile Organic Compounds; Fugitive Emissions (referred to as the TX HRVOC rule).

[49] Hancy. 2011. Memorandum from Hancy, C., RTI International to Howard, J., EPA/OAQPS. *Analysis of Emissions Reduction Techniques for Equipment Leaks.* December 21, 2011. EPA Docket ID No. EPA–HQ–OAR–2010–0869.

[50] U.S. EPA. 2007. Standards of Performance for Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry; Standards of Performance for Equipment Leaks of VOC in Petroleum Refineries (*https://www.federalregister.gov/documents/2007/07/09/E7-13203/standards-of-performance-for-equipment-leaks-of-voc-in-the-synthetic-organic-chemicals-manufacturing*). EPA–HQ–OAR–2006–0699.

Review for Equipment Leaks Located in the Miscellaneous Organic Chemical Manufacturing Source Category, which is available in the docket for this rulemaking, for details on the assumptions and methodologies used in this analysis.

Based on the costs and emission reductions for each of the options, we determined that option 1 is a cost-effective strategy for further reducing HAP emissions from equipment leaks from MON equipment not in ethylene oxide service, and we are proposing at 40 CFR 63.2480(b)(6) and (c)(10) to revise the MON for equipment leaks to lower the leak definition for pumps in light liquid service at existing batch processes from 10,000 ppmv to 1,000 ppmv with monthly monitoring, pursuant to CAA section 112(d)(6). We are also clarifying at 40 CFR 63.2480(b)(7) and (c)(11) that you must initially monitor for leaks within 30 days after initial startup of the equipment. We solicit comment on these proposed revisions. Considering the high cost per ton estimate, we determined that equipment leak options 2, 3, and 4 are not cost effective for the entire source category; therefore, we are not proposing to revise the MON to reflect the requirements of these options pursuant to CAA section 112(d)(6).

TABLE 9—NATIONWIDE EMISSIONS REDUCTION AND COST IMPACTS OF CONTROL OPTIONS CONSIDERED FOR EQUIPMENT LEAKS FOR MON EQUIPMENT NOT IN ETHYLENE OXIDE SERVICE [1]

Control option	Total capital investment ($)	Total annualized costs w/o credits [2] ($/yr)	Total annualized costs with credits [2] ($/yr)	VOC emission reductions (tpy)	HAP emission reductions (tpy)	VOC cost effectiveness w/o credits [2] ($/ton)	VOC cost effectiveness with credits [2] ($/ton)	HAP cost effectiveness w/o credits [2] ($/ton)	HAP cost effectiveness with credits [2] ($/ton)
1	863,100	156,600	85,200	79.3	7.93	1,980	1,075	19,760	10,760
2	1,416,800	303,000	223,900	87.9	8.79	3,450	2,550	34,480	25,480
3	9,326,800	1,381,900	910,600	524	52.4	2,640	1,740	26,390	17,390
4	650,800	116,300	93,300	25.5	2.55	4,560	3,660	45,630	36,630

[1] Costs are calculated for the year 2016.
[2] Recovery credits represent the cost savings in chemicals not being emitted (*i.e.,* lost) due to the equipment leak options.

2. Heat Exchange Systems

Heat exchangers are devices or collections of devices used to transfer heat from process fluids to another process fluid (typically water) without intentional direct contact of the process fluid with the cooling fluid (*i.e.,* non-contact heat exchanger). There are two types of heat exchange systems: Closed-loop recirculation systems and once-through systems. Closed-loop recirculation systems use a cooling tower to cool the heated water leaving the heat exchanger and then return the newly cooled water to the heat exchanger for reuse. Once-through systems typically use surface freshwater (*e.g.,* from rivers) as the influent cooling fluid to the heat exchangers, and the heated water leaving the heat exchangers is then discharged from the facility. At times, the internal tubing material of a heat exchanger can corrode or crack, allowing some process fluids to mix or become entrained with the cooling water. Pollutants in the process fluids may subsequently be released from the cooling water into the atmosphere when the water is exposed to air (*e.g.,* in a cooling tower for closed-loop systems or trenches/ponds in a once-through system). The term ''heat exchange system'' is not defined in the MON; therefore, we are proposing a definition for this term at 40 CFR 63.2550(i) that would apply only to the MON standards. We are proposing to define ''heat exchange system'' as a device or collection of devices used to transfer heat from process fluids to water without intentional direct contact of the process fluid with the water (*i.e.,* non-contact heat exchanger) and to transport and/or cool the water in a closed-loop recirculation system (cooling tower system) or a once-through system (*e.g.,* river or pond water). For closed-loop recirculation systems, the heat exchange system consists of a cooling tower, all miscellaneous organic chemical manufacturing process unit heat exchangers that are in organic HAP service, serviced by that cooling tower, and all water lines to and from these miscellaneous organic chemical manufacturing process unit heat exchangers. For once-through systems, the heat exchange system consists of all heat exchangers that are in organic HAP service, servicing an individual miscellaneous organic chemical manufacturing process unit and all water lines to and from these heat exchangers. Sample coolers or pump seal coolers are not considered heat exchangers for the purpose of this proposed definition and are not part of the heat exchange system. Intentional direct contact with process fluids results in the formation of a wastewater.

The MON includes an LDAR program for owners or operators of certain heat exchange systems which meets the requirements of 40 CFR 63.104 (National Emission Standards for Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry). The LDAR program specifies that heat exchange systems be monitored for leaks of process fluids into cooling water and that owners or operators take actions to repair detected leaks within 45 days. Owners or operators may delay the repair of leaks if they meet the applicable criteria in 40 CFR 63.104. The current MON, for heat exchange systems, allows the use of any method listed in 40 CFR part 136 for sampling cooling water for leaks for the HAP listed in Table 4 to 40 CFR part 63, subpart F, for recirculating systems and Table 9 to 40 CFR part 63, subpart G for once-through systems. A leak in the heat exchange system is detected if the exit mean concentration of HAP (or other representative substance) in the cooling water is at least 1 ppmw or 10 percent greater than (using a one-sided statistical procedure at the 0.05 level of significance) the entrance mean concentration of HAP (or other representative substance) in the cooling water. Furthermore, the MON allows owners or operators to monitor for leaks using a surrogate indicator of leaks (*e.g.,* ion-specific electrode monitoring, pH, conductivity), provided that certain criteria in 40 CFR 63.104(c) are met. The MON initially requires 6 months of monthly monitoring for existing heat exchange systems. Thereafter, the frequency can be reduced to quarterly. The leak monitoring frequencies are the same whether water sampling and analysis or surrogate monitoring is used to identify leaks.

Our technology review identified one development in LDAR practices and processes for heat exchange systems, the use of the Modified El Paso Method [51] to monitor for leaks. The Modified El Paso Method, which is included in the Petroleum Refinery Sector rule (*i.e.,* 40 CFR part 63, subpart CC), was identified in our review of the RACT/BACT/LAER clearinghouse database. It is also required by the TCEQ for facilities complying with their HRVOC rule (*i.e.,* 30 TAC Chapter 115, Subchapter H, Division 3). The Modified El Paso Method measures a larger number of compounds than the current methods required in the MON and is more effective in identifying leaks. For heat exchange system LDAR programs, the compliance monitoring option, leak definition, and frequency of monitoring for leaks are all important considerations affecting emission reductions by identifying when there is a leak and when to take corrective actions to repair the leak. Therefore, we evaluated the Modified El Paso Method for use at MON facilities, including an assessment of appropriate leak definitions and monitoring frequencies.

In order to identify an appropriate Modified El Paso Method leak definition for MON facilities, we identified two rules, TCEQ's HRVOC rule and the Petroleum Refinery Sector rule, both of which incorporate this monitoring method and have leak definitions corresponding to the use of this methodology. We also reviewed data submitted in response to a CAA section 114 request for the Ethylene Production RTR where facilities performed sampling using the Modified El Paso Method.

The Petroleum Refinery Sector rule and TCEQ's HRVOC rule have leak definitions of total strippable hydrocarbon concentration (as methane) in the stripping gas ranging from 3.1 ppmv to 6.2 ppmv. In addition, sources subject to the Petroleum Refinery Sector rule may not delay the repair of leaks for more than 30 days where, during subsequent monitoring, a total strippable hydrocarbon concentration (as methane) in the stripping gas of 62 ppmv or higher is found. In reviewing the Ethylene Production RTR CAA section 114 data, a clear delineation in the hydrocarbon mass emissions data was noticed at 6.1 ppmv of total strippable hydrocarbon (as methane) in the stripping gas. In addition, given that both the leak concentration and water recirculation rate of the heat exchange system are key variables affecting the hydrocarbon mass emissions from heat exchange systems, the overall Ethylene Production RTR CAA section 114 data for all heat exchange systems sampled generally showed lower hydrocarbon mass emissions for leaks at or below 6.1 ppmv of total strippable hydrocarbon (as methane) in the stripping gas compared to leaks found above 6.1 ppmv of total strippable hydrocarbon (as methane) in the stripping gas. Taking into account the range of actionable leak definitions in use by other rules that require use of the Modified El Paso Method currently (*i.e.,* 3.1 ppmv–6.2 ppmv of total strippable hydrocarbon (as methane) in the stripping gas), and the magnitude of emissions for leaks of total strippable hydrocarbon (as methane) in the stripping gas above 6.1 ppmv compared to other leaks identified in the CAA section 114 sampling data, we chose to evaluate a leak definition at the upper end of identified actionable leak definitions in our analysis. Thus, the Modified El Paso Method leak definition we evaluated was 6.2 ppmv of total strippable hydrocarbon concentration (as methane) in the stripping gas for both new and existing heat exchange systems, along with not allowing delay of repair of leaks for more than 30 days where, during subsequent monitoring, a total strippable hydrocarbon concentration (as methane) in the stripping gas of 62 ppmv or higher is found.

We determined an appropriate leak monitoring frequency by reviewing the current monitoring frequencies that MON facilities are subject to, along with frequencies for the Petroleum Refinery Sector rule and the TCEQ HRVOC rule, and information gathered in the Ethylene Production RTR CAA section 114 survey. As a first step, we reviewed whether it was still reasonable to specify more frequent monitoring for a 6-month period after repair of leaks. Our review of the Ethylene Production RTR CAA section 114 data showed that no leaks were identified during the 6-month period post repair for any of the facilities that reported heat exchange system compliance data that had leaks. Thus, we find that re-monitoring once after repair of a leak, at the monitoring location where the leak was identified, is sufficient from a continuous compliance perspective to demonstrate a successful repair. The monitoring frequencies currently required by MON for where no leaks are found were, thus, considered the base frequencies (*i.e.,* quarterly monitoring for existing and new heat exchange systems). Once we determined the base frequencies, we next considered more stringent monitoring frequencies. Both the Petroleum Refinery Sector rule, which includes monthly monitoring for existing sources, under certain circumstances, and the TCEQ HRVOC rule, which includes continuous monitoring provisions for existing and new sources, have more stringent monitoring frequencies. However, the incremental HAP cost effectiveness to change from quarterly to monthly monitoring and monthly to continuous monitoring was found to be $40,000/ton and $500,000/ton, respectively. We conclude that these costs are not reasonable for MON facilities. Thus, we chose to evaluate quarterly monitoring for existing and new heat exchange systems (*i.e.,* the base monitoring frequency currently in the rule).

Based on this technology review, we identified the following control option for heat exchanger systems as a development in practice that can be implemented at a reasonable cost: Quarterly monitoring for existing and new heat exchange systems (after an initial 6 months of monthly monitoring) with the Modified El Paso Method and a leak definition of 6.2 ppmv of total strippable hydrocarbon concentration (as methane) in the stripping gas.

We then estimated the impacts of this control option assuming that all 201 MON facilities would be affected by requiring the use of the Modified El Paso Method. As part of our analysis, we assumed owners or operators conducting quarterly monitoring for three or more of these heat exchange systems would elect to purchase a stripping column and FID analyzer and perform in-house Modified El Paso monitoring (because the total annualized costs for in-house Modified El Paso monitoring are less than the costs for contracted services). In addition, we assumed repairs could be performed by plugging a specific heat exchanger tube, and if a heat exchanger is leaking to the extent that it needs to be replaced, then it is effectively at the end of its useful life. Therefore, we determined that the cost of replacing a heat exchanger is an operational cost that would be incurred by the facility as a result of routine maintenance and equipment replacement, and it is not attributable to the control option.

Table 10 of this preamble presents the nationwide impacts for requiring owners or operators to use the Modified El Paso Method and repair leaks of total strippable hydrocarbon concentration (as methane) in the stripping gas of 6.2

[51] The Modified El Paso Method uses a dynamic or flow-through system for air stripping a sample of the water and analyzing the resultant off-gases for VOC using a common flame ionization detector (FID) analyzer. The method is described in detail in Appendix P of the TCEQ's Sampling Procedures Manual: *The Air Stripping Method (Modified El Paso Method) for Determination of Volatile Organic Compound (VOC) Emissions from Water Sources.* Appendix P is included in the docket for this rulemaking.

ppmv or greater. See the technical memorandum titled *Clean Air Act Section 112(d)(6) Technology Review for Heat Exchange Systems Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking, for details on the assumptions and methodologies used in this analysis.

Based on the costs and emission reductions for the identified control option, we are proposing to revise the MON for heat exchange systems pursuant to CAA section 112(d)(6). We are proposing at 40 CFR 63.2490(d)(1) to specify quarterly monitoring for existing and new heat exchange systems (after an initial 6 months of monthly monitoring) using the Modified El Paso Method and a leak definition of 6.2 ppmv of total strippable hydrocarbon concentration (as methane) in the stripping gas. We are also proposing at 40 CFR 63.2490(d)(4) a delay of repair action level of total strippable hydrocarbon concentration (as methane) in the stripping gas of 62 ppmv, that if exceeded during leak monitoring, would require immediate repair (*i.e.,* the leak found cannot be put on delay of repair and would be required to be repaired within 30 days of the monitoring event). This would apply to both monitoring heat exchange systems and individual heat exchangers by replacing the use of any 40 CFR part 136 water sampling method with the Modified El Paso Method and removing the option that allows for use of a surrogate indicator of leaks. We are also proposing at 40 CFR 63.2490(d)(2) and (3) re-monitoring at the monitoring location where a leak is identified to ensure that any leaks found are fixed. Finally, we are proposing that none of these proposed requirements would apply to heat exchange systems that have a maximum cooling water flow rate of 10 gallons per minute or less. We solicit comment on the proposed requirements.

TABLE 10—NATIONWIDE EMISSIONS REDUCTIONS AND COST IMPACT FOR REQUIRING THE MODIFIED EL PASO METHOD FOR HEAT EXCHANGE SYSTEMS AT MON FACILITIES [1]

Control option	Total capital investment ($)	Total annualized costs w/o credits [2] ($/yr)	VOC emission reductions (tpy)	HAP emission reductions (tpy)	HAP cost effectiveness w/o credits [2] ($/ton)	Total annualized costs with credits [2] ($/yr)	HAP cost effectiveness with credits [2] ($/ton)
1	1,483,000	261,000	306	31	8,530	(14,000)	(470)

[1] Costs are calculated for the year 2016.

[2] Recovery credits represent the cost savings of chemicals in process lines not leaking into heat exchange systems and, therefore, not being lost, due to application of the El Paso Method.

3. Process Vents, Storage Tanks, Transfer Racks, Wastewater

We did not identify any cost-effective developments in practices, processes, or control technologies for process vents, storage tanks, transfer racks, and waste streams that achieve a greater HAP emission reduction beyond the emission reduction already required by MON, with the exception of developments presented in section IV.C of this preamble to specifically control ethylene oxide emissions from process vents and storage tanks. Therefore, we are not proposing any changes to the NESHAP for these emission process groups based on our technology review. For further details on the assumptions and methodologies used in these analyses, see the technical memoranda titled *Clean Air Act Section 112(d)(6) Technology Review for Process Vents, Wastewater, Transfer Racks, and Storage Tanks Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* which is available in the docket for this rulemaking.

E. What other actions are we proposing?

In addition to the proposed actions described above, we are proposing additional revisions to the NESHAP. We are proposing revisions to the SSM provisions of the MACT rule in order to ensure that they are consistent with the Court decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), which vacated two provisions that exempted sources from the requirement to comply with otherwise applicable CAA section 112(d) emission standards during periods of SSM. We also are proposing revisions to require electronic reporting of emissions test results and to clarify text or correct typographical errors, grammatical errors, and cross-reference errors. Our analyses and proposed changes related to these issues are discussed below.

1. SSM Requirements

In its 2008 decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), the Court vacated portions of two provisions in the EPA's CAA section 112 regulations governing the emissions of HAP during periods of SSM. Specifically, the Court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), holding that under section 302(k) of the CAA, emissions standards or limitations must be continuous in nature and that the SSM exemption violates the CAA's requirement that some CAA section 112 standards apply continuously.

We are proposing the elimination of the SSM exemption in this rule which appears at 40 CFR 63.2450(a). Consistent with *Sierra Club* v. *EPA,* we are proposing standards in this rule that apply at all times. We are also proposing several revisions to Table 12 (the General Provisions Applicability Table) as is explained in more detail below. For example, we are proposing to eliminate the incorporation of the General Provisions' requirement that the source develop an SSM plan. We also are proposing to eliminate and revise certain recordkeeping and reporting requirements related to the SSM exemption as further described below. In addition, we are proposing to make the portion of the ''deviation'' definition in 40 CFR 63.2550(i) that specifically addresses SSM periods no longer applicable beginning 3 years after publication of the final rule in the **Federal Register**. Finally, we are proposing at 40 CFR 63.2450(e)(4), 40 CFR 63.2480(f), and 40 CFR 63.2485(p) and (q) to make references that are related to an SSM exemption in 40 CFR part 63, subpart G (for wastewater), 40 CFR part 63, subpart SS (for process vents, storage tanks, transfer racks), and 40 CFR part 63, subparts H and UU, and 40 CFR part 65, subpart F (for equipment leaks), will no longer be applicable.

The EPA has attempted to ensure that the provisions we are proposing to eliminate are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether we have successfully done so.

We are proposing that emissions from startup and shutdown activities be included when determining if all the standards are being attained. As currently proposed in 40 CFR 63.2450(a)(2), compliance with the emission limitations (including operating limits) in this subpart is required ''at all times.'' We solicit comment on whether owners and operators in the Miscellaneous Organic Chemical Manufacturing source category will be able to comply with the standards during these times. Emission reductions for process vents and transfer rack operations are typically achieved by routing vapors to an APCD such as a flare, thermal oxidizer, or carbon adsorber. It is common practice in this source category to start an APCD prior to startup of the emissions source it is controlling, so the APCD would be operating before emissions are routed to it. We expect APCDs would be operating during startup and shutdown events in a manner consistent with normal operating periods, and that these APCDs will be operated to maintain and meet the monitoring parameter operating limits set during the performance test.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead they are, by definition, sudden, infrequent, and not reasonably preventable failures of emissions control, process, or monitoring equipment (40 CFR 63.2) (Definition of malfunction). The EPA interprets CAA section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 112 standards and this reading has been upheld as reasonable by the Court in *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016). Under CAA section 112, emissions standards for new sources must be no less stringent than the level ''achieved'' by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation ''achieved'' by the best performing 12 percent of sources in the category. There is nothing in CAA section 112 that directs the Agency to consider malfunctions in determining the level ''achieved'' by the best performing sources when setting emission standards. As the Court has recognized, the phrase ''average emissions limitation achieved by the best performing 12 percent of'' sources ''says nothing about how the performance of the best units is to be calculated.'' *Nat'l Ass'n of Clean Water Agencies* v. *EPA,* 734 F.3d 1115, 1141 (D.C. Cir. 2013). While the EPA accounts for variability in setting emissions standards, nothing in CAA section 112 requires the Agency to consider malfunctions as part of that analysis. The EPA is not required to treat a malfunction in the same manner as the type of variation in performance that occurs during routine operations of a source.

As the Court recognized in *U.S. Sugar Corp.,* accounting for malfunctions in setting standards would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree, and duration of various malfunctions that might occur. *Id.* at 608 (''the EPA would have to conceive of a standard that could apply equally to the wide range of possible boiler malfunctions, ranging from an explosion to minor mechanical defects. Any possible standard is likely to be hopelessly generic to govern such a wide array of circumstances.''). As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. See, *e.g., Sierra Club* v. *EPA,* 167 F.3d 658, 662 (D.C. Cir. 1999) (''The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.' ''). See also, *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) (''In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.''). In addition, emissions during a malfunction event can be significantly higher than emissions at any other time of source operation. For example, if an APCD with 99-percent removal goes off-line as a result of a malfunction (as might happen if, for example, the bags in a baghouse catch fire) and the emission unit is a steady state type unit that would take days to shut down, the source would go from 99-percent control to zero control until the control device was repaired. The source's emissions during the malfunction would be 100 times higher than during normal operations. As such, the emissions over a 4-day malfunction period would exceed the annual emissions of the source during normal operations. As this example illustrates, accounting for malfunctions could lead to standards that are not reflective of (and significantly less stringent than) levels that are achieved by a well-performing non-malfunctioning source. It is reasonable to interpret CAA section 112 to avoid such a result. The EPA's approach to malfunctions is consistent with CAA section 112 and is a reasonable interpretation of the statute.

Although no statutory language compels the EPA to set standards for malfunctions, the EPA has the discretion to do so where feasible. For example, in the Petroleum Refinery Sector RTR, the EPA established a work practice standard for unique types of malfunction that result in releases from PRDs or emergency flaring events because the EPA had information to determine that such work practices reflected the level of control that applies to the best performers. 80 FR 75178, 75211–14 (December 1, 2015). The EPA will consider whether circumstances warrant setting standards for a particular type of malfunction in the Miscellaneous Organic Chemical Manufacturing source category, and, if so, whether the EPA has sufficient information to identify the relevant best performing sources and establish a standard for such malfunctions. We also encourage commenters to provide any such information.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions.

a. General Duty

We are proposing to revise the General Provisions table (Table 12) entry for 40 CFR 63.6(e)(1)(i) by adding a separate row for 40 CFR 63.6(e)(1)(i) and changing the ''yes'' in column 3 to a ''no'' in which 40 CFR 63.6(e)(1)(i) would no longer be applicable beginning 3 years after publication of the final rule in the **Federal Register**. We are proposing to add general duty regulatory text at 40 CFR 63.2450(u) that reflects the general duty to minimize emissions ''at all times'' while eliminating the reference to periods covered by an SSM exemption. The current language in 40 CFR 63.6(e)(1)(i) characterizes what the general duty entails during periods of SSM. With the elimination of the SSM exemption, there is no need to differentiate between normal operations, startup and shutdown, and malfunction events in describing the general duty. Therefore, the language the EPA is proposing for 40 CFR 63.2450(u) does not include that language from 40 CFR 63.6(e)(1).

We are also proposing to revise the General Provisions table (Table 12) entry for 40 CFR 63.6(e)(1)(ii) by adding a separate row for 40 CFR 63.6(e)(1)(ii) and changing the ''yes'' in column 3 to a ''no'' in which 40 CFR 63.6(e)(1)(ii) would no longer be applicable beginning 3 years after publication of the final rule in the **Federal Register**. Section 63.6(e)(1)(ii) imposes requirements that are not necessary with the elimination of the SSM exemption or are redundant with the general duty requirement being added at 40 CFR 63.2450(u).

b. SSM Plan

We are proposing to revise the General Provisions table (Table 12) entries for 40 CFR 63.6(e)(3)(i), (ii), (v) through (viii), and (ix) by changing the ''yes'' in column 3 to a ''no'' in which these provisions would no longer be applicable beginning 3 years after publication of the final rule in the **Federal Register**. Generally, these paragraphs require development of an SSM plan and specify SSM recordkeeping and reporting requirements related to the SSM plan. As noted, the EPA is proposing to remove the SSM exemptions. Therefore, affected units will be subject to an emission standard during such events. The applicability of a standard during such events will ensure that sources have ample incentive to plan for and achieve compliance and, thus, the SSM plan requirements are no longer necessary.

c. Compliance With Standards

We are proposing to revise the General Provisions table (Table 12) entry for 40 CFR 63.6(f)(1) by changing the ''yes'' in column 3 to a ''no'' in which 40 CFR 63.6(f)(1) would no longer be applicable beginning 3 years after publication of the final rule in the **Federal Register**. The current language of 40 CFR 63.6(f)(1) exempts sources from non-opacity standards during periods of SSM. As discussed above, the court in *Sierra Club* vacated the exemptions contained in this provision and held that the CAA requires that some CAA section 112 standards apply continuously. Consistent with *Sierra Club,* the EPA is proposing to revise standards in this rule to apply at all times.

We are proposing to revise the General Provisions table (Table 12) entry for 40 CFR 63.6(h)(1) by adding a separate row for 40 CFR 63.6(h)(1) and changing the ''yes'' in column 3 to a ''no'' in which 40 CFR 63.6(h)(1) would no longer be applicable beginning 3 years after publication of the final rule in the **Federal Register**. The current language of 40 CFR 63.6(h)(1) exempts sources from opacity standards during periods of SSM. As discussed above, the Court in *Sierra Club* vacated the exemptions contained in this provision and held that the CAA requires that some CAA section 112 standard apply continuously. Consistent with *Sierra Club,* the EPA is proposing to revise standards in this rule to apply at all times.

d. Performance Testing

We are proposing to revise the General Provisions table (Table 12) entry for 40 CFR 63.7(e)(1) by changing the ''yes'' in column 3 to a ''no'' in which 40 CFR 63.7(e)(1) would no longer be applicable beginning 3 years after publication of the final rule in the **Federal Register**. Section 63.7(e)(1) describes performance testing requirements. The EPA is instead proposing to add performance testing at 40 CFR 63.2450(g)(6). The performance testing we are proposing to add differs from the General Provisions performance testing provisions in several respects. The proposed regulatory text does not include the language in 40 CFR 63.7(e)(1) that restated the SSM exemption and language that precluded startup and shutdown periods from being considered ''representative'' for purposes of performance testing. The proposed performance testing provisions will exclude periods of startup or shutdown as representative conditions for conducting performance testing. As in 40 CFR 63.7(e)(1), performance tests conducted under this subpart should not be conducted during malfunctions because conditions during malfunctions are often not representative of normal operating conditions. The EPA is proposing to add language that requires the owner or operator to record the process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. Section 63.7(e) requires that the owner or operator make available to the Administrator upon request such records ''as may be necessary to determine the condition of the performance test,'' but does not specifically require the information to be recorded. The regulatory text the EPA is proposing to add to this provision builds on that requirement and makes explicit the requirement to record the information.

e. Monitoring

We are proposing to revise the General Provisions table (Table 12) entries for 40 CFR 63.8(c)(1)(i) through (iii) by changing the ''yes'' in column 3 to a ''no'' in which these provisions would no longer be applicable beginning 3 years after publication of the final rule in the **Federal Register**. The cross-references to the general duty and SSM plan requirements in those subparagraphs are not necessary in light of other requirements of 40 CFR 63.8 that require good air pollution control practices (40 CFR 63.8(c)(1)) and that set out the requirements of a quality control program for monitoring equipment (40 CFR 63.8(d)).

We are proposing to revise the General Provisions table (Table 12) entry for 40 CFR 63.8(d) by adding separate rows for 40 CFR 63.8(d)(1) through (3) and changing the ''yes'' in column 3 to a ''no'' in which 40 CFR 63.8(d)(3) would no longer be applicable beginning 3 years after publication of the final rule in the **Federal Register**. The final sentence in 40 CFR 63.8(d)(3) refers to the General Provisions' SSM plan requirement which is no longer applicable. The EPA is proposing to add to the rule at 40 CFR 63.2450(j)(6) text that is identical to 40 CFR 63.8(d)(3) except that the final sentence is replaced with the following sentence: ''The program of corrective action should be included in the plan required under § 63.8(d)(2).''

f. Recordkeeping

We are proposing to revise the General Provisions table (Table 12) entry for 40 CFR 63.10(b)(2)(i), (ii), (iv), and (v) by adding separate rows for each provision and changing the ''yes'' in column 3 to a ''no'' in which 40 CFR 63.10(b)(2)(ii), (iv), and (v) would no longer be applicable beginning 3 years after publication of the final rule in the **Federal Register**. 40 CFR 63.10(b)(2)(ii) describes the recordkeeping requirements during a malfunction. The EPA is proposing to add such requirements to 40 CFR 63.2525(h) and (l). The regulatory text we are proposing to add differs from the General Provisions it is replacing in that the

General Provisions requires the creation and retention of a record of the occurrence and duration of each malfunction of process, air pollution control, and monitoring equipment. The EPA is proposing that this requirement apply to any failure to meet an applicable standard and is requiring that the source record the date, time, and duration of the failure rather than the ''occurrence.'' The EPA is also proposing to add to 40 CFR 63.2525(l) a provision that sources keep records that include a list of the affected source or equipment and actions taken to minimize emissions, an estimate of the quantity of each regulated pollutant emitted over the standard for which the source failed to meet the standard, and a description of the method used to estimate the emissions. Examples of such methods would include product-loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters. The EPA is proposing to require that sources keep records of this information to ensure that there is adequate information to allow the EPA to determine the severity of any failure to meet a standard, and to provide data that may document how the source met the general duty to minimize emissions when the source has failed to meet an applicable standard.

When applicable, 40 CFR 63.10(b)(2)(iv) requires sources to record actions taken during SSM events when actions were inconsistent with their SSM plan. The requirement is no longer appropriate because SSM plans will no longer be required. The requirement previously applicable under 40 CFR 63.10(b)(2)(iv)(B) to record actions to minimize emissions and record corrective actions is now applicable by reference to 40 CFR 63.2525(l). Finally, when applicable, 40 CFR 63.10(b)(2)(v) requires sources to record actions taken during SSM events to show that actions taken were consistent with their SSM plan. The requirement is no longer appropriate because SSM plans will no longer be required.

We are proposing to revise the General Provisions table (Table 12) entry for 40 CFR 63.10(c)(15) by adding a separate row for this provision and changing column 3 to a ''no'' in which 40 CFR 63.10(c)(15) would no longer be applicable to CEMS beginning 3 years after publication of the final rule in the **Federal Register**. When applicable, the provision allows an owner or operator to use the affected source's SSM plan or records kept to satisfy the recordkeeping requirements of the SSM plan, specified in 40 CFR 63.6(e), to also satisfy the requirements of 40 CFR 63.10(c)(10) through (12). The EPA is proposing to eliminate this requirement because SSM plans would no longer be required, and, therefore, 40 CFR 63.10(c)(15) no longer serves any useful purpose for affected units.

2. Monitoring, Recordkeeping, and Reporting Requirements

a. Monitoring for Adsorbers That Cannot Be Regenerated and Regenerative Adsorbers That Are Regenerated Offsite

We are proposing to add monitoring requirements at 40 CFR 63.2450(e)(7) for adsorbers that cannot be regenerated and regenerative adsorbers that are regenerated offsite because the MON does not currently include specific monitoring requirements for this type of APCD. We are proposing owners and operators of this type of APCD use dual adsorbent beds in series and conduct daily monitoring. We have prescribed a dual bed system because the use of a single bed does not ensure continuous compliance unless the bed is replaced significantly before breakthrough.[52] A dual bed system will allow one bed to be saturated before it is replaced and, therefore, makes efficient use of the adsorber bed without exceeding the emission limits. Facilities utilizing non-regenerative adsorbers must typically replace the adsorber bed at the end of the absorbent life and already have a second bed onsite. Therefore, we have determined that these proposed requirements would not impose a cost increase; it would only require a second adsorber bed to be purchased earlier than it would have under previous rules. In addition, once the second adsorber was purchased, the source would need to purchase and install canisters at the same rate they would have under previous rules. In fact, the source could likely reduce costs over time because the adsorber beds can be used to a greater saturation level without risking non-compliance. Without the proposed requirement to use dual adsorbent beds in series, sources might replace the beds based on temperature readings, the vendor's bed life expectancy estimates or past history, and may replace the bed prematurely in order to avoid non-compliance. The burden of purchasing the initial additional adsorber bed, when compared to the large increase in compliance assurance, is small.

[52] We are proposing to define the term ''breakthrough'' at 40 CFR 63.2550(i) to mean the time when the level of HAP or total organic compound (TOC) detected is at the highest concentration allowed to be discharged from an adsorber system.

Similar to regenerative adsorbers, in order to monitor performance deterioration, we are proposing measurements of HAP or TOC using a portable analyzer or chromatographic analysis for non-regenerative absorbers. We are proposing that these measurements be taken daily on the outlet of the first adsorber bed in series using a sample port. Furthermore, in order to relieve some monitoring burden, we have included the option to reduce the frequency of monitoring with the portable analyzer from daily to weekly or monthly. If you choose this option, you would first be required to establish an average adsorber bed life. For periods when more than 2 months remain on the bed life, monthly monitoring can be conducted, and when more than 2 weeks remain on the bed life, weekly monitoring can be conducted.

b. Electronic Reporting

The EPA is proposing that owners and operators of MON facilities submit electronic copies of required flare management plans (at 40 CFR 63.2450(e)(5)(iv)), compliance reports (at 40 CFR 63.2520(e)), performance test reports (at 40 CFR 63.2520(f)), and performance evaluation reports (at 40 CFR 63.2520(g)) through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). A description of the electronic data submission process is provided in the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* which is available in the docket for this rulemaking. The proposed rule requires that performance test results collected using test methods that are supported by the EPA's Electronic Reporting Tool (ERT) as listed on the ERT website [53] at the time of the test be submitted in the format generated through the use of the ERT and that other performance test results be submitted in portable document format (PDF) using the attachment module of the ERT. Similarly, performance evaluation results of continuous monitoring systems measuring relative accuracy test audit pollutants that are supported by the ERT at the time of the test must be submitted in the format generated through the use of the ERT and other performance evaluation results be submitted in PDF using the attachment module of the ERT. Flare

[53] *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.*

management plans would be uploaded as a PDF file. For compliance reports, the proposed rule requires that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. A draft version of the proposed template for these reports is included in the docket for this rulemaking.[54] The EPA specifically requests comment on the content, layout, and overall design of the template.

Additionally, the EPA has identified two broad circumstances in which electronic reporting extensions may be provided. In both circumstances, the decision to accept the claim of needing additional time to report is within the discretion of the Administrator, and reporting should occur as soon as possible. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a report by the reporting deadline for reasons outside of their control. The situation where an extension may be warranted due to outages of the EPA's CDX or CEDRI which precludes an owner or operator from accessing the system and submitting required reports is addressed in 40 CFR 63.2520(h). The situation where an extension may be warranted due to a force majeure event, which is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents an owner or operator from complying with the requirement to submit a report electronically as required by this rule is addressed in 40 CFR 63.2520(i). Examples of such events are acts of nature, acts of war or terrorism, or equipment failure or safety hazards beyond the control of the facility.

The electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability and transparency, will further assist in the protection of public health and the environment, will improve compliance by facilitating the ability of regulated facilities to demonstrate compliance with requirements and by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance, and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic reporting also eliminates paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors, and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan[55] to implement Executive Order 13563 and is in keeping with the EPA's agency-wide policy[56] developed in response to the White House's Digital Government Strategy.[57] For more information on the benefits of electronic reporting, see the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* which is available in the docket for this rulemaking.

3. Other Corrections

There are several additional revisions that we are proposing to 40 CFR part 63, subpart FFFF, to clarify text or correct typographical errors, grammatical errors, and cross-reference errors. These proposed editorial corrections and clarifications are summarized in Table 11 of this preamble.

TABLE 11—SUMMARY OF PROPOSED EDITORIAL AND MINOR CORRECTIONS TO 40 CFR PART 63, SUBPART FFFF

Provision	Proposed revision
40 CFR 63.2435(c)(3)	Remove the word "future."
40 CFR 63.2450(c)(2)	Correct cross-reference error by changing "§ 63.2525(f)" to "§ 63.2525(e)(3) and (4)."
40 CFR 63.2450(j)(1)(i)	Correct typo by changing "an Fourier" to "a Fourier"; and clarify performance specification requirements.
40 CFR 63.2450(k)(4)(iv)	Correct cross-reference error by changing "(b)(2)(ii)" to "(c)(2)(ii)."
40 CFR 63.2450(l)	Correct typo by adding the "§" symbol.
40 CFR 63.2460(b)(5)	Change "under either" to "if you comply with one."
40 CFR 63.2470(e)(3)	Replace the phrase "pounds per square inch gage pressure (psig)" with "psig" because the term is defined earlier in the rule text.
40 CFR 63.2475(a)	Correct cross-reference error by changing "in paragraphs (b) and (c) of this section" to "in paragraph (b) of this section."
40 CFR 63.2520(c)(2)	Correct cross-reference error by changing "§ 63.2460(c)(5)" to "§ 63.2450(k)(6)."
40 CFR 63.2520(e)(5)(iii)(A)	For clarification, change "The date and time" to "The start date, start time, and duration in hours."
40 CFR 63.2520(e)(5)(iii)(B)	For clarification, change "The date, time, and duration that each CEMS was out-of-control, including the information in 63.8(c)(8)." to "The start date, start time, and duration in hours that each CEMS was out-of-control and a description of the corrective actions taken."
40 CFR 63.2520(e)(5)(iii)(D)	For clarification, change "A summary of the total duration of the deviation during the reporting period" to "The total duration in hours of all deviations for each CMS during the reporting period" and add "the total operating time in hours of the affected source during the reporting period."
40 CFR 63.2520(e)(5)(iii)(F)	For clarification, change "A summary of the total duration of CMS downtime" to "The total duration in hours of CMS downtime for each CMS."
40 CFR 63.2520(e)(5)(iii)(I)	For clarification, change "A brief description of the CMS" to "The monitoring equipment manufacturer(s) and model number(s) and the pollutant or parameter monitored."

[54] See *MON_Compliance_Report_Draft_Template.xlsx,* which is available in the docket for this rulemaking.

[55] *EPA's Final Plan for Periodic Retrospective Reviews,* August 2011. Available at: *https://www.regulations.gov/document?D=EPA-HQ-OA-2011-0156-0154.*

[56] *E-Reporting Policy Statement for EPA Regulations,* September 2013. Available at: *https://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf.*

[57] *Digital Government: Building a 21st Century Platform to Better Serve the American People,* May 2012. Available at: *https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html.*

TABLE 11—SUMMARY OF PROPOSED EDITORIAL AND MINOR CORRECTIONS TO 40 CFR PART 63, SUBPART FFFF—Continued

Provision	Proposed revision
40 CFR 63.2520(e)(8)	For clarification, change "Records of process units added to a PUG as specified in § 63.2525(i)(4) and records of primary product redeterminations as specified in § 63.2525(i)(5)" to "For process units added to a PUG, you must report the description and rationale specified in § 63.2525(i)(4). You must report your primary product redeterminations specified in § 63.2525(i)(5)."
40 CFR 63.2525(f)	Correct cross-reference error by changing "§ 63.2450(s)" to "§ 63.2450(p)."
40 CFR 63.2550(i)	Add definition for "bench-scale process."
40 CFR 63.2550(i)	Change "it is up to and including the extruder, die plate" to remove "extruder," in the definition of "miscellaneous organic chemical manufacturing process" in bullet (6).
40 CFR 63.2550(i)	Define "loading rack" as a single system used to fill tank trucks and railcars at a single geographic site. Loading equipment and operations that are physically separate (*i.e.,* do not share common piping, valves, and other equipment) are considered to be separate loading racks. The term "loading rack" is used in the definition of "transfer rack" but "loading rack" is not defined in the MON.
All Equations	For clarification, renumber equations in numerical order.
Table 12 to 40 CFR part 63, Subpart FFFF	Add a row for "§ 63.7(e)(4)."

F. What compliance dates are we proposing?

Amendments to the MON proposed in this rulemaking for adoption under CAA section 112(d)(2) and (3) and CAA section 112(d)(6) are subject to the compliance deadlines outlined in the CAA under section 112(i).

For all of the requirements we are proposing under CAA sections 112(d)(2), (3), and (d)(6), we are proposing all affected sources must comply with all of the amendments no later than 3 years after the effective date of the final rule, or upon startup, whichever is later. For existing sources, CAA section 112(i) provides that the compliance date shall be as expeditious as practicable, but no later than 3 years after the effective date of the standard. (''Section 112(i)(3)'s three-year maximum compliance period applies generally to any emission standard . . . promulgated under [section 112].'' *Association of Battery Recyclers* v. *EPA,* 716 F.3d 667, 672 (D.C. Cir. 2013)). In determining what compliance period is as expeditious as practicable, we consider the amount of time needed to plan and construct projects and change operating procedures. As provided in CAA section 112(i), all new affected sources would be required to comply with these requirements by the effective date of the final amendments to the MON standards or startup, whichever is later.

We are proposing new operating and monitoring requirements for flares under CAA section 112(d)(2) and (3). We anticipate that these requirements would require the installation of new flare monitoring equipment and we project most MCPUs would install new control systems to monitor and adjust assist gas (air or steam) addition rates. Similar to the addition of new control equipment, these new monitoring requirements for flares would require engineering evaluations, solicitation and review of vendor quotes, contracting and installation of the equipment, and operator training. Installation of new monitoring and control equipment on flares will require the flare to be taken out of service. Depending on the configuration of the flares and flare header system, taking the flare out of service may also require a significant portion of the MCPU to be shutdown. Therefore, for all existing affected sources, and all new affected sources that commence construction or reconstruction after April 4, 2002, and on or before December 17, 2019, we are proposing that it is necessary to provide 3 years after the effective date of the final rule (or upon startup, whichever is later) for owners or operators to comply with the new operating and monitoring requirements for flares. For all new affected sources that commenced construction or reconstruction after December 17, 2019, we are proposing owners or operators comply with the new operating and monitoring requirements for flares by the effective date of the final rule (or upon startup, whichever is later).

Under CAA section 112(d)(2) and (3), we are proposing new vent control requirements for bypasses. These requirements would typically require the addition of piping and potentially new control requirements. As these vent controls would most likely be routed to the flare, we are proposing, for all existing affected sources, and all new affected sources that commence construction or reconstruction after April 4, 2002, and on or before December 17, 2019, to provide 3 years after the effective date of the final rule for owners or operators to allow coordination of these bypass modifications with the installation of the new monitoring equipment for the flares. For all new affected sources that commenced construction or reconstruction after December 17, 2019, we are proposing owners or operators comply with the new vent control requirements for bypasses by the effective date of the final rule (or upon startup, whichever is later).

For atmospheric PRD in HAP service, we are establishing a work practice standard that requires a process hazard analysis and implementation of a minimum of three redundant measures to prevent atmospheric releases. Alternately, owners or operators may elect to install closed-vent systems to route these PRDs to a flare, drain (for liquid thermal relief valves), or other control system. We anticipate that sources will need to identify the most appropriate preventive measures or control approach; design, install, and test the system; install necessary process instrumentation and safety systems; and may need to time installations with equipment shutdown or maintenance outages. Therefore, for all existing affected sources, and all new affected sources that commence construction or reconstruction after April 4, 2002, and on or before December 17, 2019, we are proposing a compliance date of 3 years from the effective date of the final rule (or upon startup, whichever is later) for owners or operators to comply with the work practice standards for atmospheric PRD releases. For all new affected sources that commenced construction or reconstruction after December 17, 2019, we are proposing owners or operators comply with the work practice standards for atmospheric PRD releases by the effective date of the final rule (or upon startup, whichever is later).

Under our technology review for equipment leaks under CAA section 112(d)(6), we are revising the leak definition for light liquid pumps at batch processes from 10,000 ppm to 1,000 ppm. Affected sources are currently monitoring light liquid pumps on a monthly basis, and the change we are proposing to lower the leak definition would require no additional equipment and would only result in identifying smaller leaks that require repair. Therefore, we believe that this change could be implemented quickly and are proposing a compliance date of 1 year after the effective date of the final rule, or upon startup, whichever is later, for all existing affected sources, and all new affected sources that commence construction or reconstruction after April 4, 2002, and on or before December 17, 2019 to comply with the proposed leak definition for light liquid pumps at batch processes. For all new affected sources that commenced construction or reconstruction after December 17, 2019, we are proposing owners or operators comply with the proposed leak definition for light liquid pumps at batch processes by the effective date of the final rule (or upon startup, whichever is later).

As a result of our technology review for heat exchange systems, we are proposing to replace the existing leak definition and monitoring method with a new leak definition and monitoring method. We project some owners and operators would require engineering evaluations, solicitation and review of vendor quotes, contracting and installation of monitoring equipment, and operator training. In addition, facilities will need time to read and understand the amended rule requirements and update standard operating procedures. Therefore, we are proposing that all existing affected sources, and all new affected sources that commence construction or reconstruction after April 4, 2002, and on or before December 17, 2019 must comply with the new monitoring requirements for heat exchange systems no later than 3 years after the effective date of the final rule, or upon startup, whichever is later. For all new affected sources that commenced construction or reconstruction after December 17, 2019, we are proposing owners or operators comply with the new monitoring requirements for heat exchange systems by the effective date of the final rule (or upon startup, whichever is later).

Additionally, as previously mentioned in this preamble, we are proposing under CAA section 112(f), new provisions for process vents and storage tanks at MON facilities emitting ethylene oxide, as well as proposing to implement one of two co-proposed control options for equipment leaks. The proposed provisions may require additional time to plan, purchase, and install equipment for ethylene oxide control. For example, for process vents, if the affected source cannot demonstrate 99.9-percent control of ethylene oxide emissions, or reduce ethylene oxide emissions to less than 1 ppmv (from each process vent) or 5 pounds per year (for all combined process vents), then a new control system will need to be installed. Therefore, we are proposing a compliance date of 2 years after the effective date of the final rule, or upon startup, whichever is later for all existing affected sources, and all new affected sources that commence construction or reconstruction after April 4, 2002, and on or before December 17, 2019 to comply with the proposed ethylene oxide requirements. For all new affected sources that commenced construction or reconstruction after December 17, 2019, we are proposing owners or operators comply with the ethylene oxide requirements by the effective date of the final rule (or upon startup, whichever is later).

Finally, we are proposing to change the requirements for SSM by removing the exemption from the requirements to meet the standard during SSM periods and by removing the requirement to develop and implement an SSM plan. We are also proposing electronic reporting requirements. We are positing that facilities would need some time to successfully accomplish these revisions, including time to read and understand the amended rule requirements, to evaluate their operations to ensure that they can meet the standards during periods of startup and shutdown, as defined in the rule, and make any necessary adjustments, including making adjustments to standard operating procedures, and to convert reporting mechanisms to install necessary hardware and software. The EPA recognizes the confusion that multiple different compliance dates for individual requirements would create and the additional burden such an assortment of dates would impose. From our assessment of the timeframe needed for compliance with the entirety of the proposed revisions to SSM requirements as well as the new proposed electronic reporting requirements for flare management plans, compliance reports, and performance evaluation reports, the EPA considers a period of 3 years after the effective date of the final rule to be the most expeditious compliance period practicable and, thus, is proposing that all affected sources be in compliance with these revised requirements upon initial startup or within 3 years of the effective date of the final rule, whichever is later. However, we are proposing to provide 60 days after the effective date of the final rule (or upon startup, whichever is later) for owners or operators to comply with the requirement to report performance test results and reports electronically.

V. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected sources?

There are 201 MON facilities currently operating. A complete list of facilities that are currently subject to the MON is available in Appendix 1 of the document titled *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this rulemaking.

B. What are the air quality impacts?

At the current level of control, estimated ethylene oxide emissions from the modeling file were approximately 9.5 tpy from the eight facilities with emission process groups in ethylene oxide service. For co-proposed Control Option 1, we estimated ethylene oxide emissions reductions of 8.8 tpy for equipment leaks, storage tanks, and process vents in ethylene oxide service. For co-proposed Control Option 2, we estimated ethylene oxide emissions reductions of 9.0 tpy for equipment leaks, storage tanks, and process vents in ethylene oxide service.

At the current level of control, we estimate HAP emissions for 194 MON facilities of approximately 2,558 tpy and VOC emissions of approximately 19,719 tpy, based on the MON emissions inventory. We estimate that HAP emissions reductions would range from 52 tpy (based on model plant estimates) to 116 tpy (based on the MON emissions inventory) and VOC emissions reductions range from 283 tpy (based on the MON emissions inventory) to 385 tpy (based on model plant estimates) as a result of the proposed amendments for MON equipment leaks and heat exchange systems. Note, these emissions reductions do not consider the potential excess emissions reductions from flares that could result from the proposed requirements; we estimated flare excess emissions reductions of 263 tpy HAP (based on model plant estimates) and 1,254 tpy VOC (based on model plant estimates). If we considered the flare excess emissions, the total emissions reductions as a result of the proposed amendments were estimated between 315 and 379 tpy of HAP and between 1,537 and 1,639 tpy of VOC. These emissions reductions are documented in the following memoranda, which is available in the docket for this rulemaking: *Clean Air Act Section 112(d)(6) Technology Review for Equipment Leaks Located in the Miscellaneous Organic Chemical Manufacturing Source Category, Clean Air Act Section 112(d)(6) Technology Review for Heat Exchange Systems Located in the Miscellaneous Organic Chemical Manufacturing Source Category, Analysis of Control Options for Storage Tanks and Process Vents Emitting Ethylene Oxide Located in the Miscellaneous Organic Chemical Manufacturing Source Category, Analysis of Control Options for Equipment Leaks at Processes that use Ethylene Oxide Located in the Miscellaneous Organic Chemical Manufacturing Source Category, Control Option Impacts for Flares Located in the Miscellaneous Organic Chemical Manufacturing Source Category, and Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule.*

C. What are the cost impacts?

The nationwide costs of the proposed amendments are presented in Table 12 of this preamble for (1) all MON sources, (2) only MON sources not expected to be affected by the proposed ethylene oxide-specific controls (*i.e.,* equipment leaks, heat exchange systems, flares, PRDs, maintenance vents, recordkeeping and reporting), and (3) only MON sources expected to be affected by the proposed ethylene oxide controls (*i.e.,* storage tanks, process vents, equipment leaks). As described in this preamble, for ethylene oxide sources, we are co-proposing two options which differ only by the proposed equipment leak standards. The first option (*i.e.,* Control Option 1) proposes that the same equipment leak standards (*i.e.,* lower the leak definition for batch pumps to 1,000 ppm and require connector monitoring at a leak definition of 500 ppm) will apply to all facilities in ethylene oxide service. The second option (*i.e.,* Control Option 2) proposes that different equipment leak standards will apply to facilities in ethylene oxide service, depending on whether their cancer risk is lower than 100-in-1 million (*i.e.,* lower the leak definition for batch pumps to 1,000 ppm and require connector monitoring at a leak definition of 500 ppm) or greater than 100-in-1 million (*i.e.,* require leakless pumps, leakless valves, and connector monitoring at a leak definition of 100 ppm). These costs are presented in different columns in Table 12 of this preamble, and are referred to as ‘‘Option 1’’ and ‘‘Option 2,’’ respectively.

TABLE 12—TOTAL CAPITAL AND ANNUALIZED COSTS

[2016$]

	Option 1			Option 2		
	Total capital costs	Total annualized costs w/o recovery credits	Total annualized costs w/recovery credits	Total capital costs	Total annualized costs w/o recovery credits	Total annualized costs w/recovery credits
All MON Sources—Total	42,400,000	12,600,000	12,300,000	43,000,000	12,700,000	12,400,000
MON Sources w/o Ethylene Oxide Controls—Total	39,700,000	10,900,000	10,500,000	39,700,000	10,900,000	10,500,000
Flares [1]	17,200,000	4,090,000	4,090,000	17,200,000	4,090,000	4,090,000
Equipment Leaks [2]	829,000	150,000	82,000	829,000	150,000	82,000
Pressure Relief Devices [3]	18,700,000	4,770,000	4,770,000	18,700,000	4,770,000	4,770,000
Maintenance Vents [3]		2,340	2,340		2,340	2,340
Heat Exchange Systems [4]	1,480,000	261,000	(14,300)	1,480,000	261,000	(14,300)
Recordkeeping and Reporting	1,490,000	1,610,000	1,610,000	1,490,000	1,610,000	1,610,000
MON Sources w/Ethylene Oxide Controls—Total	2,720,000	1,760,000	1,750,000	3,320,000	1,860,000	1,850,000
Equipment Leaks [5]	76,200	48,500	45,300	674,000	149,000	145,000
Process Vents [6]	2,180,000	914,000	914,000	2,180,000	914,000	914,000
Storage Tanks [6]	466,000	796,000	796,000	466,000	796,000	796,000

[1] The flare costs include purchasing analyzers, monitors, natural gas and steam, developing a flare management plan, and performing root cause analysis and corrective action, and are discussed in the memorandum titled *Control Option Impacts for Flares Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* in the docket for this rulemaking.

[2] Equipment leak costs include LDAR at a leak definition of 1,000 ppmv for light liquid pumps at batch processes, and are discussed in the memorandum titled *Clean Air Act Section 112(d)(6) Technology Review for Equipment Leaks Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* in the docket for this rulemaking.

[3] Pressure relief device costs were developed to comply with the proposed work practice standard and include implementation of three prevention measures, performing root cause analysis and corrective action, and purchasing pressure relief device monitors. Maintenance costs were estimated to document equipment opening procedures and circumstances under which the alternative maintenance vent limit is used. Costs are discussed in the memorandum titled *Review of Regulatory Alternatives for Certain Vent Streams in the Miscellaneous Organic Chemical Manufacturing Source Category,* in the docket for this rulemaking.

[4] Heat exchange systems costs include the use of the Modified El Paso Method to monitor for leaks, and are discussed in the memorandum titled *Clean Air Act Section 112(d)(6) Technology Review for Heat Exchange Systems in the Miscellaneous Organic Chemical Manufacturing Source Category,* in the docket for this rulemaking.

[5] Equipment leak costs for equipment in ethylene oxide service include two co-proposed options, Control Options 1 and 2. Control Option 1 includes LDAR at a leak definition of 1,000 ppmv for light liquid pumps at batch processes with monthly monitoring and connector monitoring at a leak definition of 500 ppmv with annual monitoring. Control Option 2 includes the same controls as Control Option 1 for streams in ethylene oxide service, except that more stringent controls are applied to the two facilities with risks above 100-in-1 million. These more stringent controls include requiring light liquid pumps in ethylene oxide service to be leakless with annual monitoring, gas/vapor and light liquid valves in ethylene oxide service to either be leakless with annual monitoring or not be leakless and be monitored quarterly with equipment considered to be leaking if an instrument reading above background is found, and connector monitoring for connectors in ethylene oxide service at a leak definition of 100 ppmv with monthly monitoring. Costs are discussed in the memorandum titled *Analysis of Control Options for Equipment Leaks at Processes that use Ethylene Oxide Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* in the docket for this rulemaking.

[6] Costs for process vents and storage tanks in ethylene oxide service include the requirement to control all storage tanks in ethylene oxide service, the installation of a control device that achieves 99.9-percent ethylene oxide emissions reductions, and initial and periodic performance testing of the control device, and are discussed in the memorandum titled *Analysis of Control Options for Storage Tanks and Process Vents Emitting Ethylene Oxide Located in the Miscellaneous Organic Chemical Manufacturing Source Category,* in the docket for this rulemaking.

D. What are the economic impacts?

The EPA conducted economic impact analyses for this proposal, as detailed in the memorandum, *Economic Impact and Small Business Screening Assessments for the Proposed Amendments to the National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing,* which is available in the docket for this action. For the proposed amendments, the EPA performed a screening analysis for impacts on all affected facilities by comparing compliance costs to revenues at the ultimate parent company level. This is known as the cost-to-revenue or cost-to-sales ratio, or the ''sales test.'' The ''sales test'' is an impact methodology the EPA employs in analyzing entity impacts as opposed to a ''profits test,'' in which annualized compliance costs are calculated as a share of profits. The use of a ''sales test'' for estimating small business impacts for a rulemaking is consistent with guidance offered by the EPA on compliance with the Regulatory Flexibility Act (RFA) and is consistent with guidance published by the U.S. Small Business Administration's Office of Advocacy that suggests that cost as a percentage of total revenues is a metric for evaluating cost increases on small entities in relation to increases on large entities.

There are 201 facilities affected by the proposed amendments. Of these, 17 facilities, or 8.5 percent, are small entities. We calculated the cost-to-sales ratios for all the affected facilities to determine (1) the magnitude of the costs of the proposed amendments and (2) whether there would be a significant impact on small entities. To be conservative, we used facility-specific costs without recovery credits. For the two options for all firms the average cost-to-sales ratio is approximately 0.02 percent; the median cost-to-sales ratio is less than 0.01 percent; and the maximum cost-to-sales ratio is approximately 0.89 percent. For large firms, the average cost-to-sales ratio is less than 0.01 percent; the median cost-to-sales ratio is less than 0.01 percent; and the maximum cost-to-sales ratio is approximately 0.47 percent. For small firms, the average cost-to-sales ratio is approximately 0.23 percent, the median cost-to-sales ratio is 0.10 percent, and the maximum cost-to-sales ratio is 0.89 percent. The costs of the proposal are not expected to result in a significant market impact, regardless of whether they are passed on to the purchaser or absorbed by the firms.

E. What are the benefits?

EPA did not monetize the benefits from the estimated emission reductions of HAP associated with this proposed action. However, we expect this proposed action would provide benefits associated with HAP emission reductions and lower risk of adverse health effects in communities near facilities subject to the MON.

VI. Request for Comments

We solicit comments on this proposed action. In addition to general comments on this proposed action, we are also interested in additional data that may improve the risk assessments and other analyses. We are specifically interested in receiving any improvements to the data in the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses and instructions are available for download on the RTR website at *https://www.epa.gov/stationary-sources-air-pollution/miscellaneous-organic-chemical-manufacturing-national-emission.* The data files include detailed information for each HAP emissions release point for the facilities in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any ''improved'' data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR website, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information.
2. Fill in the commenter information fields for each suggested revision (*i.e.,* commenter name, commenter organization, commenter email address, commenter phone number, and revision comments).
3. Gather documentation for any suggested emissions revisions (*e.g.,* performance test reports, material balance calculations).
4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID No. EPA–HQ–OAR–2018–0746 (through the method described in the **ADDRESSES** section of this preamble).
5. If you are providing comments on a single facility or multiple facilities, you need only submit one file for all facilities. The file should contain all suggested changes for all sources at that facility (or facilities). We request that all data revision comments be submitted in the form of updated Microsoft® Excel files that are generated by the Microsoft® Access file. These files are provided on the RTR website at *https://www.epa.gov/stationary-sources-air-pollution/miscellaneous-organic-chemical-manufacturing-national-emission.*

VIII. Statutory and Executive Order Reviews

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

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

This action is a significant regulatory action that was submitted to OMB for review because it raises novel legal or policy issues. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an analysis of the potential economic impacts associated with this action. This analysis, *Economic Impact and Small Business Screening Assessments for Proposed Amendments to the National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing,* is available in the docket for this rulemaking.

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

This action is expected to be an Executive Order 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the EPA's analysis of the potential costs and benefits associated with this action.

C. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 1969.08. You can find a copy of the ICR in the docket for this rulemaking, and it is briefly summarized here.

We are proposing amendments that change the reporting and recordkeeping requirements for several emission sources at MON facilities (*e.g.,* flares, heat exchangers, PRDs, storage tanks, and process vents). The proposed amendments also require electronic reporting, remove the malfunction exemption, and impose other revisions that affect reporting and recordkeeping. This information would be collected to assure compliance with 40 CFR part 63, subpart FFFF.

Respondents/affected entities: Owners or operators of MON facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart FFFF).

Estimated number of respondents: 201 facilities.

Frequency of response: Semiannual or annual. Responses include notification of compliance status reports and semiannual compliance reports.

Total estimated burden: 12,118 hours (per year) for the responding facilities and 2,413 hours (per year) for the Agency. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $3,639,019 (per year), which includes $2,412,332 annualized capital and operation and maintenance costs for the responding facilities.

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 OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submission@omb.eop.gov,* Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than January 16, 2020. The EPA will respond to any ICR-related comments in the final rule.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will impose requirements on the small entities in the NESHAP and associated regulated industrial source category described in section I.A of this preamble. This action is projected to affect 201 facilities, and 17 of these facilities are small entities. For the small entities, the average cost-to-sales ratio is approximately 0.23 percent. Additional details of the associated analysis are presented in the memorandum, *Economic Impact and Small Business Screening Assessments Analysis for the Proposed Amendments to the National Emissions Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing,* which is available in the docket for this action.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. None of the MON facilities that have been identified as being affected by this action are owned or operated by tribal governments or located within tribal lands. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in sections III.A and C and sections IV.B and C of this preamble and further documented in the risk report, *Residual Risk Assessment for the Miscellaneous Organic Chemical Manufacturing Source Category in Support of the 2019 Risk and Technology Review Proposed Rule,* which is available in the docket for this rulemaking.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The overall economic impact of this proposed rule should be minimal for MON facilities and their parent companies (which are engaged in the energy sector).

J. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This action involves technical standards. Therefore, the EPA conducted searches for the Miscellaneous Organic Chemical Manufacturing NESHAP through the Enhanced National Standards Systems Network (NSSN) Database managed by the American National Standards Institute (ANSI). We also contacted voluntary consensus standards (VCS) organizations and accessed and searched their databases. We conducted searches for EPA Methods 1, 1A, 2, 2A, 2C, 2D, 2F, 2G, 3, 3A, 3B, 4, 5, 15, 18, 21, 22, 25, 25A, 25D, 26, 26A, 29 of 40 CFR part 60, appendix A, 301, 305, 316, 320 of 40 CFR part 63, 624, 625 of 40

CFR part 136, appendix A, 1624, 1625, 1666, 1671 of CFR part 136, appendix A, 5030B (SW–846), 5031, 8260, 8260B (SW–846), 8260D (SW–846), 8270, 8430 (SW–846) Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, EPA Publication SW–846 third edition. During the EPA's VCS search, if the title or abstract (if provided) of the VCS described technical sampling and analytical procedures that are similar to the EPA's reference method, the EPA considered it as a potential equivalent method. We reviewed all potential standards to determine the practicality of the VCS for this rule. This review requires significant method validation data that meet the requirements of EPA Method 301 of appendix A to 40 CFR part 63 for accepting alternative methods or scientific, engineering, and policy equivalence to procedures in the EPA reference methods. The EPA may reconsider determinations of impracticality when additional information is available for particular VCS.

No applicable VCS were identified for EPA Methods 1A, 2A, 2D, 2F, 2G, 21, 22, 25D, 305, 316, 625, 1624, 1625, 1666, 1671, 5030B, 8260, 8260B, 8260D, 8270C, and 8430 (SW–846). The following five VCS were identified as acceptable alternatives to the EPA test methods for the purpose of this rule.

The EPA proposes to use the VCS ANSI/ASME PTC 19.10–1981 Part 10 (2010), ''Flue and Exhaust Gas Analyses,'' [58] as an acceptable alternative to EPA Method 3B for the manual procedures only and not the instrumental procedures. The ANSI/ASME PTC 19.10–1981-Part 10 method incorporates both manual and instrumental methodologies for the determination of oxygen content. The manual method segment of the oxygen determination is performed through the absorption of oxygen. The EPA is not proposing to incorporate this VCS by reference. This method is available both in the docket for this rulemaking and at the American National Standards Institute (ANSI), 1899 L Street NW, 11th floor, Washington, DC 20036 and the American Society of Mechanical Engineers (ASME), Three Park Avenue, New York, NY 10016–5990. See *https://wwww.ansi.org* and *https://www.asme.org.*

Additionally, the EPA proposes to use the VCS ASTM D6420–18, ''Standard Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography/Mass Spectrometry,'' as an acceptable alternative to EPA Method 18 of appendix A–6 to 40 CFR part 60 with the following caveats. This ASTM procedure has been approved by the EPA as an alternative to EPA Method 18 only when the target compounds are all known and the target compounds are all listed in ASTM D6420 as measurable. We are proposing that ASTM D6420–18 should not be used for methane and ethane because the atomic mass is less than 35; and ASTM D6420 should never be specified as a total VOC method. The ASTM D6420–18 test method employs a direct interface gas chromatograph-mass spectrometer to measure 36 VOCs. The test method provides on-site analysis of extracted, unconditioned, and unsaturated (at the instrument) gas samples from stationary sources.

Also, the EPA proposes to use the VCS ASTM D6784–02 (2008) reapproved, ''Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method),'' as an acceptable alternative to EPA Method 101A of appendix B to 40 CFR part 61 and EPA Method 29 of appendix A–8 to 40 CFR part 60 (portion for mercury only) as a method for measuring mercury. Note that this applies to concentrations of approximately 0.5 to 100 micrograms per normal cubic meter of air. This method describes equipment and procedures for obtaining samples from effluent ducts and stacks, equipment and procedures for laboratory analysis, and procedures for calculating results. This method is applicable for sampling elemental, oxidized, and particle-bound mercury in flue gases of coal-fired stationary sources

In addition, the EPA proposes to use the VCS ASTM D6348–12e1, ''Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform (FTIR) Spectroscopy,'' [58] as an acceptable alternative to EPA Method 320 of appendix A to 40 CFR part 63 with caveats requiring inclusion of selected annexes to the standard as mandatory. The ASTM D6348–12e1 method is an extractive FTIR Spectroscopy-based field test method and is used to quantify gas phase concentrations of multiple target compounds in emission streams from stationary sources. The EPA is not proposing to incorporate this VCS by reference. We are proposing the test plan preparation and implementation in the Annexes to ASTM D 6348–03, Sections Al through A8 are mandatory; and in ASTM D6348–03 Annex A5 (Analyte Spiking Technique), the percent (%) R must be determined for each target analyte (Equation A5.5). We are proposing that in order for the test data to be acceptable for a compound, %R must be 70% ≥ R ≤ 130%. If the %R value does not meet this criterion for a target compound, the test data is not acceptable for that compound and the test must be repeated for that analyte (*i.e.,* the sampling and/or analytical procedure should be adjusted before a retest). We are proposing that the %R value for each compound be reported in the test report, and all field measurements be corrected with the calculated %R value for that compound by using the following equation:

Reported Results = ((Measured Concentration in the Stack))/(% R) × 100.

Furthermore, the EPA proposes to use the VCS ASTM D5790–95 (2012), ''Standard Test Method for Measurement of Purgeable Organic Compounds in Water by Capillary Column Gas Chromatography/Mass Spectrometry,'' as an acceptable alternative to EPA Method 624 (and for the analysis of total organic HAP in wastewater samples). We are proposing that, for wastewater analyses, this ASTM method should be used with the sampling procedures of EPA Method 25D or an equivalent method to be a complete alternative. The ASTM standard is validated for all of the 21 volatile organic HAP (including toluene) targeted by EPA Method 624 but is also validated for an additional 14 HAP not targeted by the EPA method. This test method covers the identification and simultaneous measurement of purgeable volatile organic compounds. This method is applicable to a wide range of organic compounds that have sufficiently high volatility and low water solubility to be efficiently removed from water samples using purge and trap procedures. We note that because the Cellulose Products Manufacturing proposed rule has already proposed to revise the performance test requirements table (Table 4 to Subpart UUUU of Part 63) to add IBR for ASTM D5790–95 (2012) (see 84 FR 47375), the EPA is not proposing to incorporate this specific aspect of this VCS by reference.

The four ASTM methods (ASTM D6420–18, ASTM D6784–02 (2008) reapproved, ASTM D6348–12e1, and ASTM D5790–95 (2012)) are available both in the docket for this rulemaking and at ASTM International, 1850 M Street NW, Suite 1030, Washington, DC 20036. See *https://www.astm.org/.*

[58] We identified this same 40 CFR part 63, subpart SS VCS that was also identified in the NTTAA review for the Ethylene Production RTR and is already being proposed as an amendment in that action (for further information, see EPA Docket ID No. EPA–HQ–OAR–2017–0357 and 84 FR 54330).

Finally, the search identified 23 other VCS that were potentially applicable for this rule in lieu of the EPA reference methods. After reviewing the available standards, the EPA determined that 23 candidate VCS identified for measuring emissions of pollutants or their surrogates subject to emission standards in the rule would not be practical due to lack of equivalency, documentation, validation data, and other important technical and policy considerations. Additional information for the VCS search and determinations can be found in the memorandum, *Voluntary Consensus Standard Results for National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing NESHAP RTR,* which is available in the docket for this action.

The EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially applicable VCS, and to explain why the EPA should use such standards in this regulation.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (58 FR 7629, February 16, 1994). Our analysis of the demographics of the population with estimated risks greater than 1-in-1 million indicates potential disparities in risks between demographic groups, including the African American, Hispanic or Latino, Over 25 Without a High School Diploma, and Below the Poverty Level groups. In addition, the population living within 50 km of the MON facilities has a higher percentage of minority, lower income, and lower education people when compared to the nationwide percentages of those groups. However, acknowledging these potential disparities, the risks for the source category were determined to be acceptable after implementation of the proposed controls, and emissions reductions from the proposed revisions will benefit these groups the most.

The documentation for this decision is contained in sections IV.B and C of this preamble, and the technical report, *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Miscellaneous Organic Chemical Manufacturing Source Category Operations,* which is available in the docket for this action.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: November 1, 2019.

Andrew R. Wheeler,

Administrator.

For the reasons set forth in the preamble, the Environmental Protection Agency proposes to amend 40 CFR part 63 as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart A—[Amended]

■ 2. Section 63.14 is amended by:

■ a. Revising paragraph (h)(72);

■ b. Redesignating paragraphs (h)(92) through (111) as paragraphs (h)(93) through (1112);

■ c. Adding new paragraph (h)(92); and

■ d. Revising newly redesignated paragraph (h)(98).

The revisions and addition read as follows:

§ 63.14 Incorporations by reference.

* * * * *

(h) * * *

(72) ASTM D5790–95 (2012), Standard Test Method for Measurement of Purgeable Organic Compounds in Water by Capillary Column Gas Chromatography/Mass Spectrometry, IBR approved for § 63.2485(h) and Table 4 to subpart UUUU.

* * * * *

(92) ASTM D6420–18, Standard Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography-Mass Spectrometry, IBR approved for § 63.2450(j).

* * * * *

(98) ASTM D6784–02 (Reapproved 2008), Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), (Approved April 1, 2008), IBR approved for §§ 63.2465(d), 63.11646(a), 63.11647(a) and (d), tables 1, 2, 5, 11, 12t, and 13 to subpart DDDDD, tables 4 and 5 to subpart JJJJJ, tables 4 and 6 to subpart KKKKK, table 4 to subpart JJJJJJ, table 5 to subpart UUUUU, and appendix A to subpart UUUUU.

* * * * *

Subpart FFFF—[Amended]

■ 3. Section 63.2435 is amended by revising paragraph (c)(3) to read as follows:

§ 63.2435 Am I subject to the requirements in this subpart?

* * * * *

(c) * * *

(3) The affiliated operations located at an affected source under subparts GG (National Emission Standards for Aerospace Manufacturing and Rework Facilities), KK (National Emission Standards for the Printing and Publishing Industry), JJJJ (NESHAP: Paper and Other Web Coating), MMMM (NESHAP: Surface Coating of Miscellaneous Metal Parts and Products), and SSSS (NESHAP: Surface Coating of Metal Coil) of this part 63. Affiliated operations include, but are not limited to, mixing or dissolving of coating ingredients; coating mixing for viscosity adjustment, color tint or additive blending, or pH adjustment; cleaning of coating lines and coating line parts; handling and storage of coatings and solvent; and conveyance and treatment of wastewater.

* * * * *

■ 4. Section 63.2445 is amended by revising paragraph (a) introductory text and paragraph (b) and adding paragraphs (g) through (i) to read as follows:

§ 63.2445 When do I have to comply with this subpart?

(a) Except as specified in paragraphs (g) through (i) of this section, if you have a new affected source, you must comply with this subpart according to the requirements in paragraphs (a)(1) and (2) of this section.

* * * * *

(b) Except as specified in paragraphs (g) through (i) of this section, if you have an existing source on November 10, 2003, you must comply with the requirements for existing sources in this subpart no later than May 10, 2008.

* * * * *

(g) All affected sources that commenced construction or reconstruction on or before December 17, 2019, must be in compliance with the requirements listed in paragraphs (g)(1) through (6) of this section upon initial startup or [date 3 years after date of publication of final rule in the **Federal Register**], whichever is later. All affected sources that commenced construction or reconstruction after

December 17, 2019, must be in compliance with the requirements listed in paragraphs (g)(1) through (6) of this section upon initial startup, or [date of publication of final rule in the **Federal Register**], whichever is later.

(1) The general requirements specified in § 63.2450(a)(2), (e)(4) through (7), (g)(6) and (7), (i)(3), (j)(5)(ii) and (6), (k)(1)(ii), (7), and (8), (t), and (u), § 63.2520(d)(3), (e)(11) through (13), § 63.2525(m) and (n), and § 63.2535(m).

(2) For process vents, the requirements specified in § 63.2455(d), § 63.2520(e)(14), and § 63.2525(p).

(3) For equipment leaks and pressure relief devices, the requirements specified in § 63.2480(e) and (f), § 63.2520(d)(4) and (e)(14), and § 63.2525(q).

(4) For wastewater streams and liquid streams in open systems within an MCPU, the requirements specified in § 63.2485(i)(2)(iii), (n)(2)(vii), and (p) and (q).

(5) For heat exchange systems, the requirements specified in § 63.2490(d), § 63.2520(e)(16), and § 63.2525(r).

(6) The other notification, reports, and records requirements specified in § 63.2500(g), § 63.2520(e)(5)(ii)(D), § 63.2520(e)(5)(iii)(M) and (N), and § 63.2525(l) and (u).

(h) All affected sources that commenced construction or reconstruction on or before December 17, 2019, must be in compliance with the requirements for light liquid pumps in § 63.2480(b)(6) and (c)(10) upon initial startup or [date 1 year after date of publication of final rule in the **Federal Register**], whichever is later. All affected sources that commenced construction or reconstruction after December 17, 2019, must be in compliance with the requirements for light liquid pumps in § 63.2480(b)(6) and (c)(10), except for equipment in ethylene oxide service, upon initial startup, or [date of publication of final rule in the **Federal Register**], whichever is later.

(i) All affected sources that commenced construction or reconstruction on or before December 17, 2019, must be in compliance with the ethylene oxide requirements in § 63.2470(b) and (c)(4), § 63.2492, § 63.2493, § 63.2520(d)(5) and (e)(17), § 63.2525(s), Table 1 to this subpart, item 5, Table 2 to this subpart, item 3, Table 4 to this subpart, item 3, and Table 6 to this subpart, item 3 upon initial startup or [date 2 years after date of publication of final rule in the **Federal Register**], whichever is later. All affected sources that commenced construction or reconstruction after December 17, 2019, must be in compliance with the ethylene oxide requirements listed in § 63.2470(b) and (c)(4), § 63.2492, § 63.2493, § 63.2520(d)(5) and (e)(17), § 63.2525(s), Table 1 to this subpart, item 5, Table 2 to this subpart, item 3, Table 4 to this subpart, item 3, and Table 6 to this subpart, item 3 upon initial startup, or [date of publication of final rule in the **Federal Register**], whichever is later.

■ 5. Section 63.2450 is amended by:

■ a. Revising paragraph (a), paragraph (c)(2) introductory text, and paragraphs (e)(1) through (3);

■ b. Adding paragraphs (e)(4) through (7);

■ c. Revising paragraph (f) introductory text, paragraph (g) introductory text, paragraphs (g)(3)(ii), and (g)(5);

■ d. Adding paragraphs (g)(6) and (7);

■ e. Revising paragraphs (i) introductory text and (i)(2);

■ f. Adding paragraph (i)(3);

■ g. Revising paragraph (j) introductory text, paragraph (j)(1) introductory text, paragraphs (j)(1)(i), (j)(2)(iii), and (j)(3) through (j)(5);

■ h. Adding paragraph (j)(6);

■ i. Revising paragraphs (k) introductory text, (k)(1), and (k)(4)(iv);

■ j. Adding paragraphs (k)(7) and (k)(8);

■ k. Revising paragraphs (l), (o), and (p); and

■ l. Adding paragraphs (t) and (u).

The revisions and additions read as follows:

§ 63.2450 What are my general requirements for complying with this subpart?

(a) You must comply with paragraphs (a)(1) and (2) of this section.

(1) Except as specified in paragraph (a)(2) of this section, you must be in compliance with the emission limits and work practice standards in tables 1 through 7 to this subpart at all times, except during periods of startup, shutdown, and malfunction (SSM), and you must meet the requirements specified in §§ 63.2455 through 63.2490 (or the alternative means of compliance in § 63.2495, § 63.2500, or § 63.2505), except as specified in paragraphs (b) through (s) of this section. You must meet the notification, reporting, and recordkeeping requirements specified in §§ 63.2515, 63.2520, and 63.2525.

(2) Beginning no later than the compliance dates specified in § 63.2445(g), paragraph (a)(1) of this section no longer applies. Instead, you must be in compliance with the emission limits and work practice standards in tables 1 through 7 to this subpart at all times, and you must meet the requirements specified in §§ 63.2455 through 63.2490 (or the alternative means of compliance in § 63.2495, § 63.2500, or § 63.2505), except as specified in paragraphs (b) through (u) of this section. You must meet the notification, reporting, and recordkeeping requirements specified in §§ 63.2515, 63.2520, and 63.2525.

* * * * *

(c) * * *

(2) Determine the applicable requirements based on the hierarchy presented in paragraphs (c)(2)(i) through (vi) of this section. For a combined stream, the applicable requirements are specified in the highest-listed paragraph in the hierarchy that applies to any of the individual streams that make up the combined stream. For example, if a combined stream consists of emissions from Group 1 batch process vents and any other type of emission stream, then you must comply with the requirements in paragraph (c)(2)(i) of this section for the combined stream; compliance with the requirements in paragraph (c)(2)(i) of this section constitutes compliance for the other emission streams in the combined stream. Two exceptions are that you must comply with the requirements in table 3 to this subpart and § 63.2465 for all process vents with hydrogen halide and halogen HAP emissions, and recordkeeping requirements for Group 2 applicability or compliance are still required (*e.g.,* the requirement in § 63.2525(e)(3) and (4) to track the number of batches produced and calculate rolling annual emissions for processes with Group 2 batch process vents).

* * * * *

(e) * * *

(1) Except when complying with § 63.2485, if you reduce organic HAP emissions by venting emissions through a closed-vent system to any combination of control devices (except a flare) or recovery devices, you must meet the requirements of paragraph (e)(4) of this section, and the requirements of § 63.982(c) and the requirements referenced therein.

(2) Except as specified in paragraph (e)(5) of this section or except when complying with § 63.2485, if you reduce organic HAP emissions by venting emissions through a closed-vent system to a flare, you must meet the requirements of paragraph (e)(4) of this section, and the requirements of § 63.982(b) and the requirements referenced therein.

(3) Except as specified in paragraphs (e)(3)(i) and (ii) of this section, if you use a halogen reduction device to reduce hydrogen halide and halogen HAP emissions from halogenated vent streams, you must meet the requirements of paragraph (e)(4) of this

section, and the requirements of § 63.994 and the requirements referenced therein. If you use a halogen reduction device before a combustion device, you must determine the halogen atom emission rate prior to the combustion device according to the procedures in § 63.115(d)(2)(v).

(i) Beginning on and after [date 60 days after date of publication of final rule in the **Federal Register**], performance test reports must be submitted according to the procedures in § 63.2520(f).

(ii) If you use a halogen reduction device other than a scrubber, then you must submit procedures for establishing monitoring parameters to the Administrator as part of your precompliance report as specified in § 63.2520(c)(8).

(4) Beginning no later than the compliance dates specified in § 63.2445(g), the referenced provisions specified in paragraphs (e)(4)(i) through (xvi) of this section do not apply when demonstrating compliance with 40 CFR part 63, subpart SS.

(i) The phrase ''Except for equipment needed for safety purposes such as pressure relief devices, low leg drains, high point bleeds, analyzer vents, and open-ended valves or lines'' in § 63.983(a)(3) of subpart SS.

(ii) § 63.983(a)(5) of subpart SS.

(iii) The phrase ''except during periods of start-up, shutdown and malfunction as specified in the referencing subpart'' in § 63.984(a) of subpart SS.

(iv) The phrase ''except during periods of start-up, shutdown and malfunction as specified in the referencing subpart'' in § 63.985(a) of subpart SS.

(v) The phrase ''other than start-ups, shutdowns, or malfunctions'' in § 63.994(c)(1)(ii)(D) of subpart SS.

(vi) § 63.996(c)(2)(ii) of subpart SS.

(vii) § 63.997(e)(1)(i) of subpart SS.

(viii) The term ''breakdowns'' in §§ 63.998(b)(2)(i) of subpart SS.

(ix) § 63.998(b)(2)(iii) of subpart SS.

(x) The phrase ''other than start-ups, shutdowns or malfunctions'' in § 63.998(b)(5)(i)(A) of subpart SS.

(xi) The phrase ''other than start-ups, shutdowns or malfunctions'' in § 63.998(b)(5)(i)(C) of subpart SS.

(xii) The phrase ''except as provided in paragraphs (b)(6)(i)(A) and (B) of this section'' in § 63.998(b)(6)(i) of subpart SS.

(xiii) The second sentence of § 63.998(b)(6)(ii) of subpart SS.

(xiv) § 63.998(c)(1)(ii)(D), (E), (F), and (G) of subpart SS.

(xv) § 63.998(d)(1)(ii) of subpart SS.

(xvi) § 63.998(d)(3)(i) and (ii) of subpart SS.

(5) For any flare that is used to reduce organic HAP emissions from an MCPU, you may elect to comply with the requirements in this paragraph in lieu of the requirements of § 63.982(b) and the requirements referenced therein. However, beginning no later than the compliance dates specified in § 63.2445(g), paragraphs (e)(2) and (f) of this section no longer apply to flares that control ethylene oxide emissions and flares used to control emissions from MCPUs that produce olefins or polyolefins. Instead, if you reduce organic HAP emissions by venting emissions through a closed-vent system to a steam-assisted, air-assisted, non-assisted, or pressure-assisted multi-point flare that controls ethylene oxide emissions or is used to control emissions from an MCPU that produces olefins or polyolefins, then you must meet the applicable requirements for flares as specified in §§ 63.670 and 63.671 of subpart CC, including the provisions in Tables 12 and 13 to subpart CC of this part, except as specified in paragraphs (e)(5)(i) through (xi) of this section. This requirement also applies to any flare using fuel gas from a fuel gas system, of which 50 percent or more of the fuel gas is derived from an MCPU that has processes and/or equipment in ethylene oxide service or that produces olefins or polyolefins. For purposes of compliance with this paragraph, the following terms are defined in § 63.641 of subpart CC: Assist air, assist steam, center steam, combustion zone, combustion zone gas, flare, flare purge gas, flare supplemental gas, flare sweep gas, flare vent gas, lower steam, net heating value, perimeter assist air, pilot gas, premix assist air, total steam, and upper steam.

(i) You may elect to comply with the alternative means of emissions limitation requirements specified in paragraph (r) of § 63.670 of subpart CC in lieu of the requirements in paragraphs (d) through (f) of § 63.670 of subpart CC, as applicable. However, instead of complying with paragraph (r)(3)(iii) of § 63.670 of subpart CC, you must also submit the alternative means of emissions limitation request to the following address: U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, U.S. EPA Mailroom (C404–02), Attention: Miscellaneous Organic Chemical Manufacturing Sector Lead, 4930 Old Page Rd., Durham, NC 27703.

(ii) When determining compliance with the flare tip velocity and combustion zone operating limits specified in § 63.670(d) and (e), the initial 15-minute block period starts with the 15-minute block that includes a full 15 minutes of the flaring event.

(iii) Instead of complying with paragraph (o)(2)(i) of § 63.670 of subpart CC, you must develop and implement the flare management plan no later than the compliance dates specified in § 63.2445(g).

(iv) Instead of complying with paragraph (o)(2)(iii) of § 63.670 of subpart CC, if required to develop a flare management plan and submit it to the Administrator, then you must also submit all versions of the plan in portable document format (PDF) to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI), which can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). If you claim some of the information in your flare management plan is confidential business information (CBI), submit a version with the CBI omitted via CEDRI. A complete plan, including information claimed to be CBI and clearly marked as CBI, must be mailed to the following address: U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, CORE CBI Office, U.S. EPA Mailroom (C404–02), Attention: Miscellaneous Organic Chemical Manufacturing Sector Lead, 4930 Old Page Rd., Durham, NC 27703.

(v) Substitute ''MCPU'' for each occurrence of ''petroleum refinery.''

(vi) Each occurrence of ''refinery'' does not apply.

(vii) If a pressure-assisted multi-point flare is used as a control device, then you must meet the following conditions:

(A) You are not required to comply with the flare tip velocity requirements in paragraph (d) and (k) of § 63.670 of subpart CC;

(B) You must substitute ''800'' for each occurrence of ''270'' in paragraph (e) of § 63.670 of subpart CC;

(C) You must determine the 15-minute block average NHVvg using only the direct calculation method specified in in paragraph (l)(5)(ii) of § 63.670 of subpart CC;

(D) Instead of complying with paragraph (b) and (g) of § 63.670 of subpart CC, if a pressure-assisted multi-point flare uses cross-lighting on a stage of burners rather than having an individual pilot flame on each burner, then you must operate each stage of the pressure-assisted multi-point flare with a flame present at all times when regulated material is routed to that stage of burners. Each stage of burners that cross-lights in the pressure-assisted multi-point flare must have at least two pilots with a continuously lit pilot flame capable of igniting all regulated material that is routed to that stage of burners. Each 15-minute block during which there is at least one minute where no pilot flame is present on a stage of burners when regulated material is routed to the flare is a deviation of the standard. Deviations in different 15-minute blocks from the same event are considered separate deviations. The pilot flame(s) on each stage of burners that use cross-lighting must be continuously monitored by a thermocouple or any other equivalent device used to detect the presence of a flame;

(E) You must ensure that if a stage of burners on the pressure-assisted multi-point flare uses cross-lighting, that the distance between any two burners in series on that stage is no more than 6 feet; and

(F) You must install and operate pressure monitor(s) on the main flare header, as well as a valve position indicator monitoring system for each staging valve to ensure that the flare operates within the proper range of conditions as specified by the manufacturer. The pressure monitor must meet the requirements in Table 13 of subpart CC of this part.

(viii) If you choose to determine compositional analysis for net heating value with a continuous process mass spectrometer, then you must comply with the requirements specified in paragraphs (e)(5)(viii)(A) through (G) of this section.

(A) You must meet the requirements in § 63.671(e)(2). You may augment the minimum list of calibration gas components found in § 63.671(e)(2) with compounds found during a pre-survey or known to be in the gas through process knowledge.

(B) Calibration gas cylinders must be certified to an accuracy of 2 percent and traceable to National Institute of Standards and Technology (NIST) standards.

(C) For unknown gas components that have similar analytical mass fragments to calibration compounds, you may report the unknowns as an increase in the overlapped calibration gas compound. For unknown compounds that produce mass fragments that do not overlap calibration compounds, you may use the response factor for the nearest molecular weight hydrocarbon in the calibration mix to quantify the unknown component's NHVvg.

(D) You may use the response factor for n-pentane to quantify any unknown components detected with a higher molecular weight than n-pentane.

(E) You must perform an initial calibration to identify mass fragment overlap and response factors for the target compounds.

(F) You must meet applicable requirements in Performance Specification 9 of 40 CFR part 60, appendix B, for continuous monitoring system acceptance including, but not limited to, performing an initial multi-point calibration check at three concentrations following the procedure in Section 10.1 and performing the periodic calibration requirements listed for gas chromatographs in Table 13 of 40 CFR part 63, subpart CC, for the process mass spectrometer. You may use the alternative sampling line temperature allowed under Net Heating Value by Gas Chromatograph in Table 13 of 40 CFR part 63, subpart CC.

(G) The average instrument calibration error (CE) for each calibration compound at any calibration concentration must not differ by more than 10 percent from the certified cylinder gas value. The CE for each component in the calibration blend must be calculated using Equation 1 of this subpart.

$$CE = \frac{C_m - C_a}{C_a} x\ 100 \qquad \text{(Eq. 1)}$$

Where:

Cm = Average instrument response (ppm)
Ca = Certified cylinder gas value (ppm)

(ix) If you use a gas chromatograph or mass spectrometer for compositional analysis for net heating value, then you may choose to use the CE of NHVmeasured versus the cylinder tag value NHV as the measure of agreement for daily calibration and quarterly audits in lieu of determining the compound-specific CE. The CE for NHV at any calibration level must not differ by more than 10 percent from the certified cylinder gas value. The CE for must be calculated using Equation 2 of this subpart.

$$CE = \frac{NHV_{measured} - NHV_a}{NHV_a} x\ 100 \qquad \text{(Eq. 2)}$$

Where:

NHVmeasured = Average instrument response (Btu/scf)
NHVa = Certified cylinder gas value (Btu/scf)

(x) Instead of complying with paragraph (q) of § 63.670 of subpart CC, you must comply with the reporting requirements specified in § 63.2520(d)(3) and § 63.2520(e)(11).

(xi) Instead of complying with paragraph (p) of § 63.670 of subpart CC, you must keep the flare monitoring records specified in § 63.2525(m).

(6) Beginning no later than the compliance dates specified in § 63.2445(g), the use of a bypass line at any time on a closed vent system to divert a vent stream to the atmosphere or to a control device not meeting the requirements specified in Table 1 through Table 7 of this subpart is an emissions standards deviation. Equipment such as low leg drains and equipment subject to § 63.2480 are not subject to this paragraph (e)(6). Open-ended valves or lines that use a cap, blind flange, plug, or second valve and follow the requirements specified in § 60.482–6(a)(2), (b), and (c) are also not subject to this paragraph (e)(6). You must also comply with the requirements specified in paragraphs (e)(6)(i) through (iv) of this section, as applicable:

(i) If you are subject to the bypass monitoring requirements of § 63.148(f) of subpart G, then you must continue to comply with the requirements in § 63.148(f) of subpart G and the recordkeeping and reporting requirements in § 63.148(j)(2) and (3) of subpart G, and § 63.148(h)(3) of subpart G, in addition to the applicable requirements specified in § 63.2485(q) of this section, the recordkeeping requirements specified in § 63.2525(n), and the reporting requirements specified in § 63.2520(e)(12).

(ii) If you are subject to the bypass monitoring requirements of § 63.172(j) of subpart H, then you must continue to comply with the requirements in § 63.172(j) of subpart H and the recordkeeping and reporting requirements in § 63.118(a)(3) and (4) of subpart G, and § 63.118(f)(3) and (4) of subpart G, in addition to the applicable requirements specified in § 63.2480(f) and § 63.2485(q), the recordkeeping requirements specified in § 63.2525(n), and the reporting requirements specified in § 63.2520(e)(12).

(iii) If you are subject to the bypass monitoring requirements of § 63.983(a)(3) of subpart SS, then you must continue to comply with the requirements in § 63.983(a)(3) of subpart SS and the recordkeeping and reporting requirements in § 63.998(d)(1)(ii) and § 63.999(c)(2) of subpart SS, in addition to the requirements specified in § 63.2450(e)(4), the recordkeeping requirements specified in § 63.2525(n), and the reporting requirements specified in § 63.2520(e)(12).

(iv) If you are subject to the bypass monitoring requirements of § 65.143(a)(3) of subpart G, then you must continue to comply with the requirements in § 65.143(a)(3) of subpart G and the recordkeeping and reporting requirements in § 65.163(a)(1) of subpart G and § 65.166(b) of subpart G; in addition to the applicable requirements specified in § 63.2480(f), the recordkeeping requirements specified in § 63.2525(n), and the reporting requirements specified in § 63.2520(e)(12).

(7) Beginning no later than the compliance dates specified in § 63.2445(g), if you reduce organic HAP emissions by venting emissions through a closed-vent system to an adsorber(s) that cannot be regenerated or a regenerative adsorber(s) that is regenerated offsite, then you must comply with paragraphs (e)(4) and (6) and the requirements in § 63.983, and you must install a system of dual adsorber units in series and comply with the requirements specified in paragraphs (e)(7)(i) through (iii) of this section.

(i) Conduct an initial performance test or design evaluation of the adsorber and establish the breakthrough limit.

(ii) Monitor the HAP or total organic compound (TOC) concentration daily through a sample port at the outlet of the first adsorber bed in series. You must measure the concentration of HAP or TOC using either a portable analyzer, in accordance with Method 21 of 40 CFR part 60, appendix A–7 or Method 25A at 40 CFR part 60, appendix A–7 using propane as the calibration gas.

(iii) Comply with paragraph (e)(7)(iii)(A) of this section, and you may reduce your monitoring frequency according to paragraph (e)(7)(iii)(B) of this section.

(A) The first adsorber in series must be replaced immediately when breakthrough, as defined in § 63.2550(i), is detected between the first and second adsorber. The original second adsorber (or a fresh canister) will become the new first adsorber and a fresh adsorber will become the second adsorber. For purposes of this paragraph, ''immediately'' means within 8 hours of the detection of a breakthrough for adsorbers of 55 gallons or less, and within 24 hours of the detection of a breakthrough for adsorbers greater than 55 gallons.

(B) In lieu of the daily monitoring, you may reduce your monitoring frequency by establishing the average adsorber bed life. To establish the average adsorber bed life, you must conduct daily monitoring of the HAP or TOC concentration of the first adsorber bed in series until breakthrough, as defined in § 63.2550(i), occurs for the first three adsorber bed change-outs. You must reestablish an average adsorber bed life if you change the adsorbent brand or type, or if any process changes are made that would lead to a lower bed lifetime. Once the average life of the bed is determined, you may conduct ongoing monitoring, as specified in paragraphs (e)(7)(iii)(B)(*1*) and (*2*) of this section.

(*1*) You may conduct monthly monitoring if the adsorbent has more than 2 months of life remaining, based on the average adsorber bed life, as established in paragraph (e)(7)(iii)(B) of this section, and the date the adsorbent was last replaced.

(*2*) You may conduct weekly monitoring if the adsorbent has more than 2 weeks of life remaining, based on the average adsorber bed life, established in paragraph (e)(7)(iii)(B) of this section, and the date the adsorbent was last replaced.

(f) *Requirements for flare compliance assessments.* Except as specified in paragraph (e)(5) of this section, you must comply with paragraphs (f)(1) and (2) of this section.

* * * * *

(g) *Requirements for performance tests.* The requirements specified in paragraphs (g)(1) through (7) of this section apply instead of or in addition to the requirements specified in subpart SS of this part 63.

* * * * *

(3) * * *

(ii) If you elect to comply with the outlet TOC concentration emission limits in tables 1 through 7 to this subpart, and the uncontrolled or inlet gas stream to the control device contains greater than 10 percent (volume concentration) carbon disulfide, you must use Method 18 or Method 15 to separately determine the carbon disulfide concentration. Calculate the total HAP or TOC emissions by totaling the carbon disulfide emissions measured using Method 18 or 15 and the other HAP emissions measured using Method 18 or 25A.

* * * * *

(5) Section 63.997(c)(1) does not apply. For the purposes of this subpart, results of all initial compliance demonstrations must be included in the notification of compliance status report, which is due 150 days after the compliance date, as specified in § 63.2520(d)(1). If the initial compliance demonstration includes a performance test and the results are submitted electronically via CEDRI in accordance with § 63.2520(f), the process unit(s) tested, the pollutant(s) tested, and the date that such performance test was conducted may be submitted in the notification of compliance status report in lieu of the performance test results. The performance test results must be submitted to CEDRI by the date the notification of compliance status report is submitted.

(6) Beginning no later than the compliance dates specified in § 63.2445(g), in lieu of the requirements specified in § 63.7(e)(1) you must conduct performance tests under such conditions as the Administrator specifies based on representative performance of the affected source for the period being tested. Representative conditions exclude periods of startup and shutdown. You may not conduct performance tests during periods of malfunction. You must record the process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. Upon request, you must make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

(7) Comply with the requirements in § 63.2450(e)(4), as applicable.

* * * * *

(i) *Outlet concentration correction for combustion devices.* Except as specified in paragraph (i)(3) of this section, when § 63.997(e)(2)(iii)(C) requires you to correct the measured concentration at the outlet of a combustion device to 3 percent oxygen if you add supplemental combustion air, the requirements in either paragraph (i)(1) or (2) of this section apply for the purposes of this subpart.

* * * * *

(2) You must correct the measured concentration for supplemental gases

using Equation 3 in § 63.2460; you may use process knowledge and representative operating data to determine the fraction of the total flow due to supplemental gas.

(3) Beginning no later than the compliance dates specified in § 63.2445(g), paragraphs (i)(1) and (2) no longer apply. Instead, when § 63.997(e)(2)(iii)(C) requires you to correct the measured concentration at the outlet of a combustion device to 3 percent oxygen if you add supplemental combustion air, you must follow the procedures in § 63.997(e)(2)(iii)(C) to perform the concentration correction, except you may also use Method 3A of 40 CFR part 60, appendix A–2 to determine the oxygen concentration.

(j) *Continuous emissions monitoring systems.* Each continuous emissions monitoring system (CEMS) must be installed, operated, and maintained according to the requirements in § 63.8 and paragraphs (j)(1) through (6) of this section.

(1) Each CEMS must be installed, operated, and maintained according to the applicable Performance Specification of 40 CFR part 60, appendix B, and the applicable Quality Assurance Procedures of 40 CFR part 60, appendix F, and according to paragraph (j)(2) of this section, except as specified in paragraph (j)(1)(i) of this section. For any CEMS meeting Performance Specification 8, you must also comply with appendix F, procedure 1 of 40 CFR part 60. Locate the sampling probe or other interface at a measurement location such that you obtain representative measurements of emissions from the regulated source. For CEMS installed after [date of publication of final rule in the **Federal Register**], conduct a performance evaluation of each CEMS within 180 days of installation of the monitoring system.

(i) If you wish to use a CEMS other than a Fourier Transform Infrared Spectroscopy (FTIR) meeting the requirements of Performance Specification 15 to measure hydrogen halide, other than hydrogen chloride, and halogen HAP or CEMS meeting the requirements of Performance Specification 18 to measure hydrogen chloride before we promulgate a Performance Specification for such CEMS, you must prepare a monitoring plan and submit it for approval in accordance with the procedures specified in § 63.8.

* * * * *

(2) * * *

(iii) For CEMS meeting Performance Specification 8 used to monitor performance of a noncombustion device, determine the predominant organic HAP using either process knowledge or the screening procedures of Method 18 on the control device inlet stream, calibrate the monitor on the predominant organic HAP, and report the results as C1. Use Method 18 of appendix A–6 of 40 CFR part 60, Method 320 of appendix A to 40 CFR part 63, ASTM D6420–18 (incorporated by reference, see § 63.14), or any approved alternative as the reference method for the relative accuracy tests, and report the results as C1.

(3) You must conduct a performance evaluation of each CEMS according to the requirements in§ 63.8 and according to the applicable Performance Specification of 40 CFR part 60, appendix B, except that the schedule in § 63.8(e)(4) does not apply, and before [date 60 days after date of publication of final rule in the **Federal Register**], the results of the performance evaluation must be included in the notification of compliance status report. Beginning on and after [date 60 days after date of publication of final rule in the **Federal Register**], the results of the performance evaluation must be submitted in accordance with § 63.2520(g).

(4) The CEMS data must be reduced to operating day or operating block averages computed using valid data consistent with the data availability requirements specified in § 63.999(c)(6)(i)(B) through (D), except monitoring data also are sufficient to constitute a valid hour of data if measured values are available for at least two of the 15-minute periods during an hour when calibration, quality assurance, or maintenance activities are being performed. An operating block is a period of time from the beginning to end of batch operations within a process. Operating block averages may be used only for batch process vent data. In computing operating day or operating block averages to determine compliance with this subpart, you must exclude monitoring data recorded during CEMS breakdowns, out-of-control periods, repairs, maintenance periods, calibration checks, or other quality assurance activities. Out-of-control periods are as specified in § 63.8(c)(7).

(5) If you add supplemental gases, you must comply with paragraphs (j)(5)(i) and (ii) of this section.

(i) Except as specified in paragraph (j)(5)(ii) of this section, correct the measured concentrations in accordance with paragraph (i) of this section and § 63.2460(c)(6).

(ii) Beginning no later than the compliance dates specified in § 63.2445(g), you must use Performance Specification 3 of 40 CFR part 60, appendix B, to certify your oxygen CEMS, and you must comply with procedure 1 of 40 CFR part 60, appendix F. Use Method 3A of 40 CFR part 60, appendix A–2 as the reference method when conducting a relative accuracy test audit.

(6) Beginning no later than the compliance dates specified in § 63.2445(g), in lieu of the requirements specified in § 63.8(d)(3) you must keep the written procedures required by § 63.8(d)(2) on record for the life of the affected source or until the affected source is no longer subject to the provisions of this part, to be made available for inspection, upon request, by the Administrator. If the performance evaluation plan is revised, you must keep previous (*i.e.,* superseded) versions of the performance evaluation plan on record to be made available for inspection, upon request, by the Administrator, for a period of 5 years after each revision to the plan. The program of corrective action should be included in the plan required under § 63.8(d)(2). In addition to the information required in § 63.8(d)(2), your written procedures for CEMS must include the information in paragraphs (j)(6)(i) through (vi) of this section:

(i) Description of CEMS installation location.

(ii) Description of the monitoring equipment, including the manufacturer and model number for all monitoring equipment components and the span of the analyzer.

(iii) Routine quality control and assurance procedures.

(iv) Conditions that would trigger a CEMS performance evaluation, which must include, at a minimum, a newly installed CEMS; a process change that is expected to affect the performance of the CEMS; and the Administrator's request for a performance evaluation under section 114 of the Clean Air Act.

(v) Ongoing operation and maintenance procedures in accordance with the general requirements of § 63.8(c)(1), (c)(3), (c)(4)(ii), (c)(7), and (c)(8);

(vi) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 63.10(c) and (e)(1).

(k) *Continuous parameter monitoring.* The provisions in paragraphs (k)(1) through (68) of this section apply in addition to the requirements for continuous parameter monitoring system (CPMS) in subpart SS of this part 63.

(1) You must comply with paragraphs (k)(1)(i) and (ii) of this section.

(i) Except as specified in paragraph (k)(1)(ii) of this section, record the results of each calibration check and all maintenance performed on the CPMS as specified in § 63.998(c)(1)(ii)(A).

(ii) Beginning no later than the compliance dates specified in § 63.2445(g), paragraph (k)(1)(i) of this section no longer applies. Instead, you must record the results of each calibration check and all maintenance performed on the CPMS as specified in § 63.998(c)(1)(ii)(A), except you must record all maintenance, not just preventative maintenance.

* * * * *

(4) * * *

(iv) Recording the downstream temperature and temperature difference across the catalyst bed as specified in § 63.998(a)(2)(ii)(B)(2) and (c)(2)(ii) is not required.

* * * * *

(7) Beginning no later than the compliance dates specified in § 63.2445(g), the manufacturer's specifications or your written procedures must include a schedule for calibrations, preventative maintenance procedures, a schedule for preventative maintenance, and corrective actions to be taken if a calibration fails. If a CPMS calibration fails, the CPMS is considered to be inoperative until you take corrective action and the system passes calibration. You must record the nature and cause of instances when the CPMS is inoperative and the corrective action taken.

(8) You must comply with the requirements in § 63.2450(e)(4), as applicable.

* * * * *

(l) *Startup, shutdown, and malfunction.* Sections § 63.152(f)(7)(ii) through (iv) and § 63.998(b)(2)(iii) and (b)(6)(i)(A), which apply to the exclusion of monitoring data collected during periods of SSM from daily averages, do not apply for the purposes of this subpart.

* * * * *

(o) You may not use a flare to control halogenated vent streams or hydrogen halide and halogen HAP emissions.

(p) Except as specified in paragraph (t) of this section, opening a safety device, as defined in § 63.2550, is allowed at any time conditions require it to avoid unsafe conditions.

* * * * *

(t) Beginning no later than the compliance dates specified in § 63.2445(g), paragraph (p) of this section no longer applies. Instead, you must comply with the requirements specified in § 63.2480(e).

(u) *General Duty.* Beginning no later than the compliance dates specified in § 63.2445(g), at all times, you must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. The general duty to minimize emissions does not require you to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved. Determination of whether a source is operating in compliance with operation and maintenance requirements will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

■ 6. Section 63.2455 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 63.2455 What requirements must I meet for continuous process vents?

(a) You must meet each emission limit in Table 1 to this subpart that applies to your continuous process vents, and you must meet each applicable requirement specified in paragraphs (b) through (d) of this section, § 63.2492, and § 63.2493(a) through (c).

* * * * *

(d) *Maintenance vents.* Beginning no later than the compliance dates specified in § 63.2445(g), you may designate a process vent as a maintenance vent if the vent is only used as a result of startup, shutdown, maintenance, or inspection of equipment where equipment is emptied, depressurized, degassed, or placed into service. You must comply with the applicable requirements in paragraphs (d)(1) through (3) of this section for each maintenance vent.

(1) Prior to venting to the atmosphere, remove process liquids from the equipment as much as practical and depressurize the equipment to either: A flare meeting the requirements of § 63.2450(e)(2) or (5), as applicable, or a non-flare control device meeting the requirements in § 63.2450(e)(4) and the requirements specified in § 63.982(c)(2) of subpart SS until one of the following conditions, as applicable, is met.

(i) The vapor in the equipment served by the maintenance vent has a lower explosive limit (LEL) of less than 10 percent.

(ii) If there is no ability to measure the LEL of the vapor in the equipment based on the design of the equipment, the pressure in the equipment served by the maintenance vent is reduced to 5 pounds per square inch gauge (psig) or less. Upon opening the maintenance vent, active purging of the equipment cannot be used until the LEL of the vapors in the maintenance vent (or inside the equipment if the maintenance is a hatch or similar type of opening) is less than 10 percent.

(iii) The equipment served by the maintenance vent contains less than 50 pounds of total volatile organic compounds (VOC).

(iv) If, after applying best practices to isolate and purge equipment served by a maintenance vent, none of the applicable criterion in paragraphs (d)(1)(i) through (iii) of this section can be met prior to installing or removing a blind flange or similar equipment blind, then the pressure in the equipment served by the maintenance vent must be reduced to 2 psig or less before installing or removing the equipment blind. During installation or removal of the equipment blind, active purging of the equipment may be used provided the equipment pressure at the location where purge gas is introduced remains at 2 psig or less.

(2) Except for maintenance vents complying with the alternative in paragraph (d)(1)(iii) of this section, you must determine the LEL or, if applicable, equipment pressure using process instrumentation or portable measurement devices and follow procedures for calibration and maintenance according to manufacturer's specifications.

(3) For maintenance vents complying with the alternative in paragraph (d)(1)(iii) of this section, you must determine mass of VOC in the equipment served by the maintenance vent based on the equipment size and contents after considering any contents drained or purged from the equipment. Equipment size may be determined from equipment design specifications. Equipment contents may be determined using process knowledge.

■ 7. Section 63.2460 is amended by:

■ a. Revising paragraph (a), paragraph (b)(5) introductory text, paragraph (b)(5)(iii), paragraph (b)(6) introductory text, paragraphs (c)(2)(i) and (ii), (c)(2)(v), and paragraph (c)(6) introductory text;

■ b. Redesignating Equation 1 to paragraph (c)(6) as Equation 3;

■ c. Revising paragraphs (c)(9) introductory text, (c)(9)(ii) introductory text, paragraphs (c)(9)(ii)(D), and (c)(9)(iii) and (iv).

The revisions read as follows:

§ 63.2460 What requirements must I meet for batch process vents?

(a) You must meet each emission limit in Table 2 to this subpart that applies to you, and you must meet each applicable requirement specified in paragraphs (b) and (c) of this section, § 63.2492, and § 63.2493(a) through (c).

(b) * * *

(5) You may elect to designate the batch process vents within a process as Group 1 and not calculate uncontrolled emissions if you comply with one of the situations in paragraph (b)(5)(i), (ii), or (iii) of this section.

* * * * *

(iii) If you comply with an emission limit using a flare that meets the requirements specified in §§ 63.987 or 63.2450(e)(5), as applicable.

(6) You may change from Group 2 to Group 1 in accordance with either paragraph (b)(6)(i) or (ii) of this section. Before [date 60 days after date of publication of final rule in the **Federal Register**], you must comply with the requirements of this section and submit the test report. Beginning on and after [date 60 days after date of publication of final rule in the **Federal Register**], you must comply with the requirements of this section and submit the performance test report for the demonstration required in § 63.1257(b)(8) in accordance with § 63.2520(f).

* * * * *

(c) * * *

(2) * * *

(i) To demonstrate initial compliance with a percent reduction emission limit in Table 2 to this subpart FFFF, you must compare the sums of the controlled and uncontrolled emissions for the applicable Group 1 batch process vents within the process, and show that the specified reduction is met. This requirement does not apply if you comply with the emission limits of Table 2 to this subpart FFFF by using a flare that meets the requirements of § 63.987 or 63.2450(e)(5), as applicable.

(ii) When you conduct a performance test or design evaluation for a non-flare control device used to control emissions from batch process vents, you must establish emission profiles and conduct the test under worst-case conditions according to § 63.1257(b)(8) instead of under normal operating conditions as specified in § 63.7(e)(1) or the conditions as specified in § 63.2450(g)(6). The requirements in § 63.997(e)(1)(i) and (iii) also do not apply for performance tests conducted to determine compliance with the emission limits for batch process vents. For purposes of this subpart FFFF, references in § 63.997(b)(1) to ‘‘methods specified in § 63.997(e)’’ include the methods specified in § 63.1257(b)(8).

* * * * *

(v) If a process condenser is used for boiling operations in which HAP (not as an impurity) is heated to the boiling point, you must demonstrate that it is properly operated according to the procedures specified in § 63.1257(d)(2)(i)(C)(4)(ii) and (d)(3)(iii)(B), and the demonstration must occur only during the boiling operation. The reference in § 63.1257(d)(3)(iii)(B) to the alternative standard in § 63.1254(c) means § 63.2505 for the purposes of this subpart. As an alternative to measuring the exhaust gas temperature, as required by § 63.1257(d)(3)(iii)(B), you may elect to measure the liquid temperature in the receiver.

* * * * *

(6) *Outlet concentration correction for supplemental gases.* If you use a control device other than a combustion device to comply with a TOC, organic HAP, or hydrogen halide and halogen HAP outlet concentration emission limit for batch process vents, you must correct the actual concentration for supplemental gases using Equation 3 of this subpart; you may use process knowledge and representative operating data to determine the fraction of the total flow due to supplemental gas.

* * * * *

(9) *Requirements for a biofilter.* If you use a biofilter to meet either the 95 percent reduction requirement or outlet concentration requirement specified in Table 2 to this subpart, you must meet the requirements specified in paragraphs (c)(9)(i) through (vi) of this section.

* * * * *

(ii) *Performance tests.* To demonstrate initial compliance, you must conduct a performance test according to the procedures in § 63.2450(g), § 63.997, and paragraphs (c)(9)(ii)(A) through (D) of this section. The design evaluation option for small control devices is not applicable if you use a biofilter.

* * * * *

(D) Before [date 60 days after date of publication of final rule in the **Federal Register**], submit a performance test report as specified in § 63.999(a)(2)(i) and (ii) and include the records from paragraph (c)(9)(ii)(B) of this section. Beginning on and after [date 60 days after date of publication of final rule in the **Federal Register**], you must submit a performance test report as specified in § 63.2520(f).

(iii) *Monitoring requirements.* Use either a biofilter bed temperature monitoring device (or multiple devices) capable of providing a continuous record or an organic monitoring device capable of providing a continuous record. Comply with the requirements in § 63.2450(e)(4), the general requirements for monitoring in § 63.996, and keep records of temperature or other parameter monitoring results as specified in § 63.998(b) and (c), as applicable. If you monitor temperature, the operating temperature range must be based on only the temperatures measured during the performance test; these data may not be supplemented by engineering assessments or manufacturer's recommendations as otherwise allowed in § 63.999(b)(3)(ii)(A). If you establish the operating range (minimum and maximum temperatures) using data from previous performance tests in accordance with § 63.996(c)(6), replacement of the biofilter media with the same type of media is not considered a process change under § 63.997(b)(1). You may expand your biofilter bed temperature operating range by conducting a repeat performance test that demonstrates compliance with the 95 percent reduction requirement or outlet concentration limit, as applicable.

(iv) *Repeat performance tests.* You must conduct a repeat performance test using the applicable methods specified in § 63.2450(g) and § 63.997 within 2 years following the previous performance test and within 150 days after each replacement of any portion of the biofilter bed media with a different type of media or each replacement of more than 50 percent (by volume) of the biofilter bed media with the same type of media.

■ 8. Section 63.2465 is amended by revising paragraphs (c) introductory text and (d)(2) to read as follows:

§ 63.2465 What requirements must I meet for process vents that emit hydrogen halide and halogen HAP or HAP metals?

* * * * *

(c) If collective uncontrolled hydrogen halide and halogen HAP emissions from the process vents within a process are greater than or equal to 1,000 pounds per year (lb/yr), you must comply with the requirements in § 63.2450(e)(4) and the requirements of § 63.994 and the requirements referenced therein, except as specified in paragraphs (c)(1) through (3) of this section.

* * * * *

(d) * * *

(2) Conduct an initial performance test of each control device that is used to comply with the emission limit for HAP metals specified in Table 3 to this subpart. Conduct the performance test

according to the procedures in § 63.2450(g) and § 63.997. Use Method 29 of appendix A of 40 CFR part 60 to determine the HAP metals at the inlet and outlet of each control device, or use Method 5 of appendix A of 40 CFR part 60 to determine the total particulate matter (PM) at the inlet and outlet of each control device. You may use ASTM D6784–02 (Reapproved 2008) (incorporated by reference, see § 63.14) as an alternative to Method 29 (portion for mercury only) as a method for measuring mercury concentrations of 0.5 to 100 micrograms per standard cubic meter. You have demonstrated initial compliance if the overall reduction of either HAP metals or total PM from the process is greater than or equal to 97 percent by weight.

* * * * *

■ 9. Section 63.2470 is amended by revising paragraphs (a), (b), (c), and (e)(3) to read as follows:

§ 63.2470 What requirements must I meet for storage tanks?

(a) You must meet each emission limit in Table 4 to this subpart that applies to your storage tanks, and except as specified in paragraph (b), you must also meet each applicable requirement specified in paragraphs (c) through (e) of this section, § 63.2492, and § 63.2493(a) through (c).

(b) On and after the compliance dates specified in § 63.2445(i), paragraphs (d) and (e) of this section do not apply to storage tanks in ethylene oxide service as defined in § 63.2550.

(c) *Exceptions to subparts SS and WW of this part 63.* (1) If you conduct a performance test or design evaluation for a control device used to control emissions only from storage tanks, you must establish operating limits, conduct monitoring, and keep records using the same procedures as required in subpart SS of this part 63 for control devices used to reduce emissions from process vents instead of the procedures specified in §§ 63.985(c), 63.998(d)(2)(i), and 63.999(b)(2). You must also comply with the requirements in § 63.2450(e)(4), as applicable.

(2) Except as specified in paragraph (c)(4) of this section, when the term ''storage vessel'' is used in subparts SS and WW of this part 63, the term ''storage tank,'' as defined in § 63.2550 applies for the purposes of this subpart.

(3) For adsorbers that cannot be regenerated or regenerative adsorbers that are regenerated offsite, you must comply with the monitoring requirements in § 63.2450(e)(7) in lieu of § 63.995(c).

(4) Beginning no later than the compliance dates specified in § 63.2445(i), the exemptions for ''vessels storing organic liquids that contain HAP only as impurities'' and ''pressure vessels designed to operate in excess of 204.9 kilopascals and without emissions to the atmosphere'' listed in the definition of ''storage tank'' in § 63.2550 do not apply for storage tanks in ethylene oxide service.

* * * * *

(e) * * *

(3) You may elect to set a pressure relief device to a value less than the 2.5 psig required in § 63.1253(f)(5) if you provide rationale in your notification of compliance status report explaining why the alternative value is sufficient to prevent breathing losses at all times.

* * * * *

■ 10. Section 63.2475 is amended by revising paragraph (a) to read as follows:

§ 63.2475 What requirements must I meet for transfer racks?

(a) You must comply with each emission limit and work practice standard in table 5 to this subpart that applies to your transfer racks, and you must meet each applicable requirement in paragraph (b) of this section.

* * * * *

■ 11. Section 63.2480 is amended by:

■ a. Revising paragraph (a), paragraph (b) introductory text, paragraphs (b)(1) and (2), and (b)(5);

■ b. Adding paragraphs (b)(6) and (7);

■ c. Revising paragraph (c) introductory text and paragraph (c)(5);

■ d. Adding paragraphs (c)(10) and (11), (e), and (f).

The revisions and additions read as follows:

§ 63.2480 What requirements must I meet for equipment leaks?

(a) You must meet each requirement in table 6 to this subpart that applies to your equipment leaks, except as specified in paragraphs (b) through (f) of this section. For each light liquid pump, valve, and connector in ethylene oxide service as defined in § 63.2550(i), you must also meet the applicable requirements specified in § 63.2492 and § 63.2493(d) and (e).

(b) Except as specified in paragraphs (b)(6) and (7) of this section, if you comply with either subpart H or subpart UU of this part 63, you may elect to comply with the provisions in paragraphs (b)(1) through (5) of this section as an alternative to the referenced provisions in subpart H or subpart UU of this part.

(1) The requirements for pressure testing in § 63.178(b) or § 63.1036(b) may be applied to all processes, not just batch processes.

(2) For the purposes of this subpart, pressure testing for leaks in accordance with § 63.178(b) or § 63.1036(b) is not required after reconfiguration of an equipment train if flexible hose connections are the only disturbed equipment.

* * * * *

(5) Except as specified in paragraph (b)(6) of this section, for pumps in light liquid service in an MCPU that has no continuous process vents and is part of an existing source, you may elect to consider the leak definition that defines a leak to be 10,000 parts per million (ppm) or greater as an alternative to the values specified in § 63.1026(b)(2)(i) through (iii) or § 63.163(b)(2).

(6) Beginning no later than the compliance dates specified in § 63.2445(h), paragraph (b)(5) of this section no longer applies to pumps in light liquid service. Instead, for all pumps in light liquid service in an MCPU, the instrument reading that defines a leak and requires repair is 1,000 ppmv or greater.

(7) For each piece of equipment that is added to an affected source after December 17, 2019, and for each piece of equipment that replaces equipment at an affected source after December 17, 2019, you must initially monitor for leaks within 30 days after initial startup of the equipment.

(c) Except as specified in paragraphs (c)(10) and (11) of this section, if you comply with 40 CFR part 65, subpart F, you may elect to comply with the provisions in paragraphs (c)(1) through (9) of this section as an alternative to the referenced provisions in 40 CFR part 65, subpart F.

* * * * *

(5) Except as specified in paragraph (c)(10) of this section, for pumps in light liquid service in an MCPU that has no continuous process vents and is part of an existing source, you may elect to consider the leak definition that defines a leak to be 10,000 ppm or greater as an alternative to the values specified in § 65.107(b)(2)(i) through (iii).

* * * * *

(10) Beginning no later than the compliance dates specified in § 63.2445(h), paragraph (c)(5) of this section no longer applies to pumps in light liquid service. Instead, for all pumps in light liquid service in an MCPU, the instrument reading that defines a leak and requires repair is 1,000 ppmv or greater.

(11) For each piece of equipment that is added to an affected source after December 17, 2019, and for each piece of equipment that replaces equipment at an affected source after December 17,

2019, you must initially monitor for leaks within 30 days after initial startup of the equipment.

* * * * *

(e) Beginning no later than the compliance dates specified in § 63.2445(g), except as specified in paragraph (e)(4) of this section, you must comply with the requirements specified in paragraphs (e)(1) and (2) of this section for pressure relief devices, such as relief valves or rupture disks, in organic HAP gas or vapor service instead of the pressure relief device requirements of § 63.1030 of subpart UU, § 63.165 of subpart H, or § 65.111 of subpart F. Except as specified in paragraphs (e)(4) and (5) of this section, you must also comply with the requirements specified in paragraphs (e)(3), (6), (7), and (8) of this section for all pressure relief devices.

(1) *Operating requirements.* Except during a pressure release, operate each pressure relief device in organic HAP gas or vapor service with an instrument reading of less than 500 ppm above background as measured by the method in § 63.1023(b) of subpart UU, § 63.180(c) of subpart H, or § 65.104(b) of subpart F.

(2) *Pressure release requirements.* For pressure relief devices in organic HAP gas or vapor service, you must comply with the applicable requirements paragraphs (e)(2)(i) through (iii) of this section following a pressure release.

(i) If the pressure relief device does not consist of or include a rupture disk, conduct instrument monitoring, as specified in § 63.1023(b) of subpart UU, § 63.180(c) of subpart H, or § 65.104(b) of subpart F, no later than 5 calendar days after the pressure relief device returns to organic HAP gas or vapor service following a pressure release to verify that the pressure relief device is operating with an instrument reading of less than 500 ppm.

(ii) If the pressure relief device includes a rupture disk, either comply with the requirements in paragraph (e)(2)(i) of this section (and do not replace the rupture disk) or install a replacement disk as soon as practicable after a pressure release, but no later than 5 calendar days after the pressure release. You must conduct instrument monitoring, as specified in § 63.1023(b) of subpart UU, § 63.180(c) of subpart H, or § 65.104(b) of subpart F, no later than 5 calendar days after the pressure relief device returns to organic HAP gas or vapor service following a pressure release to verify that the pressure relief device is operating with an instrument reading of less than 500 ppm.

(iii) If the pressure relief device consists only of a rupture disk, install a replacement disk as soon as practicable after a pressure release, but no later than 5 calendar days after the pressure release. You must not initiate startup of the equipment served by the rupture disk until the rupture disc is replaced. You must conduct instrument monitoring, as specified in § 63.1023(b) of subpart UU, § 63.180(c) of subpart H, or § 65.104(b) of subpart F, no later than 5 calendar days after the pressure relief device returns to organic HAP gas or vapor service following a pressure release to verify that the pressure relief device is operating with an instrument reading of less than 500 ppm.

(3) *Pressure release management.* Except as specified in paragraphs (e)(4) and (5) of this section, you must comply with the requirements specified in paragraphs (e)(3)(i) through (v) of this section for all pressure relief devices in organic HAP service.

(i) You must equip each affected pressure relief device with a device(s) or use a monitoring system that is capable of:

(A) Identifying the pressure release;

(B) Recording the time and duration of each pressure release; and

(C) Notifying operators immediately that a pressure release is occurring. The device or monitoring system must be either specific to the pressure relief device itself or must be associated with the process system or piping, sufficient to indicate a pressure release to the atmosphere. Examples of these types of devices and systems include, but are not limited to, a rupture disk indicator, magnetic sensor, motion detector on the pressure relief valve stem, flow monitor, or pressure monitor.

(ii) You must apply at least three redundant prevention measures to each affected pressure relief device and document these measures. Examples of prevention measures include:

(A) Flow, temperature, liquid level and pressure indicators with deadman switches, monitors, or automatic actuators. Independent, non-duplicative systems within this category count as separate redundant prevention measures.

(B) Documented routine inspection and maintenance programs and/or operator training (maintenance programs and operator training may count as only one redundant prevention measure).

(C) Inherently safer designs or safety instrumentation systems.

(D) Deluge systems.

(E) Staged relief system where the initial pressure relief device (with lower set release pressure) discharges to a flare or other closed vent system and control device.

(iii) If any affected pressure relief device releases to atmosphere as a result of a pressure release event, you must perform root cause analysis and corrective action analysis according to the requirement in paragraph (e)(6) of this section and implement corrective actions according to the requirements in paragraph (e)(7) of this section. You must also calculate the quantity of organic HAP released during each pressure release event and report this quantity as required in § 63.2520(e)(15). Calculations may be based on data from the pressure relief device monitoring alone or in combination with process parameter monitoring data and process knowledge.

(iv) You must determine the total number of release events that occurred during the calendar year for each affected pressure relief device separately. You must also determine the total number of release events for each pressure relief device for which the root cause analysis concluded that the root cause was a force majeure event, as defined in § 63.2550.

(v) Except for pressure relief devices described in paragraphs (e)(4) and (5) of this section, the following release events from an affected pressure relief device are a deviation of the pressure release management work practice standards.

(A) Any release event for which the root cause of the event was determined to be operator error or poor maintenance.

(B) A second release event not including force majeure events from a single pressure relief device in a 3 calendar year period for the same root cause for the same equipment.

(C) A third release event not including force majeure events from a single pressure relief device in a 3 calendar year period for any reason.

(4) *Pressure relief devices routed to a control device, process, fuel gas system, or drain system.* (i) If all releases and potential leaks from a pressure relief device are routed through a closed vent system to a control device, back into the process, to the fuel gas system, or to a drain system, then you are not required to comply with paragraph (e)(1), (2), or (3) of this section.

(ii) Before the compliance dates specified in § 63.2445(g), both the closed vent system and control device (if applicable) referenced in paragraph (e)(4)(i) of this section must meet the applicable requirements specified in § 63.982(b) and (c)(2) of subpart SS. Beginning no later than the compliance dates specified in § 63.2445(g), both the closed vent system and control device (if applicable) referenced in paragraph (e)(4)(i) of this section must meet the applicable requirements specified in § 63.982(c)(2), § 63.983, and § 63.2450(e)(4) through (6).

(iii) The drain system (if applicable) referenced in paragraph (e)(4)(i) must meet the applicable requirements specified in § 63.2485(e).

(5) *Pressure relief devices exempted from pressure release management requirements.* The following types of pressure relief devices are not subject to the pressure release management requirements in paragraph (e)(3) of this section.

(i) Pressure relief devices in heavy liquid service, as defined in § 63.1020 of subpart UU or § 65.103(f) of subpart F.

(ii) Thermal expansion relief valves.

(iii) Pressure relief devices designed with a set relief pressure of less than 2.5 psig.

(iv) Pilot-operated pressure relief devices where the primary release valve is routed through a closed vent system to a control device or back into the process, to the fuel gas system, or to a drain system.

(v) Balanced bellows pressure relief devices where the primary release valve is routed through a closed vent system to a control device or back into the process, to the fuel gas system, or to a drain system.

(6) *Root cause analysis and corrective action analysis.* A root cause analysis and corrective action analysis must be completed as soon as possible, but no later than 45 days after a release event. Special circumstances affecting the number of root cause analyses and/or corrective action analyses are provided in paragraphs (e)(6)(i) through (iii) of this section.

(i) You may conduct a single root cause analysis and corrective action analysis for a single emergency event that causes two or more pressure relief devices installed on the same equipment to release.

(ii) You may conduct a single root cause analysis and corrective action analysis for a single emergency event that causes two or more pressure relief devices to release, regardless of the equipment served, if the root cause is reasonably expected to be a force majeure event, as defined in § 63.2550.

(iii) Except as provided in paragraphs (e)(6)(i) and (ii) of this section, if more than one pressure relief device has a release during the same time period, an initial root cause analysis must be conducted separately for each pressure relief device that had a release. If the initial root cause analysis indicates that the release events have the same root cause(s), the initially separate root cause analyses may be recorded as a single root cause analysis and a single corrective action analysis may be conducted.

(7) *Corrective action implementation.* You must conduct a root cause analysis and corrective action analysis as specified in paragraphs (e)(3)(iii) and (e)(6) of this section, and you must implement the corrective action(s) identified in the corrective action analysis in accordance with the applicable requirements in paragraphs (e)(7)(i) through (iii) of this section.

(i) All corrective action(s) must be implemented within 45 days of the event for which the root cause and corrective action analyses were required or as soon thereafter as practicable. If you conclude that no corrective action should be implemented, you must record and explain the basis for that conclusion no later than 45 days following the event.

(ii) For corrective actions that cannot be fully implemented within 45 days following the event for which the root cause and corrective action analyses were required, you must develop an implementation schedule to complete the corrective action(s) as soon as practicable.

(iii) No later than 45 days following the event for which a root cause and corrective action analyses were required, you must record the corrective action(s) completed to date, and, for action(s) not already completed, a schedule for implementation, including proposed commencement and completion dates.

(8) *Flowing pilot-operated pressure relief devices.* For affected sources that commenced construction or reconstruction on or before December 17, 2019, you are prohibited from installing a flowing pilot-operated pressure relief device or replacing any pressure relief device with a flowing pilot-operated pressure relief device after [date 3 years after date of publication of final rule in the **Federal Register**]. For affected sources that commenced construction or reconstruction after December 17, 2019, you are prohibited from installing and operating flowing pilot-operated pressure relief devices. For purpose of compliance with this paragraph, a flowing pilot-operated pressure relief device means the type of pilot-operated pressure relief device where the pilot discharge vent continuously releases emissions to the atmosphere when the pressure relief device is actuated.

(f) Beginning no later than the compliance dates specified in § 63.2445(g), the referenced provisions specified in paragraphs (f)(1) through (15) of this section do not apply when demonstrating compliance with this section.

(1) § 63.163(c)(3) of subpart H.

(2) The second sentence of § 63.181(d)(5)(i) of subpart H.

(3) § 63.1026(b)(3) of subpart UU.

(4) The phrase ''(except periods of startup, shutdown, or malfunction)'' from § 63.1026(e)(1)(ii)(A) of subpart UU.

(5) The phrase ''(except during periods of startup, shutdown, or malfunction)'' from § 63.1028(e)(1)(i)(A) of subpart UU.

(6) The phrase ''(except during periods of startup, shutdown, or malfunction)'' from § 63.1031(b)(1) of subpart UU.

(7) The second sentence of § 65.105(f)(4)(i) of subpart F.

(8) § 65.107(b)(3) of subpart F.

(9) The phrase ''(except periods of start-up, shutdown, or malfunction)'' from § 65.107(e)(1)(ii)(A) of subpart F.

(10) The phrase ''(except during periods of start-up, shutdown, or malfunction)'' from § 65.109(e)(1)(i)(A) of subpart F.

(11) The phrase ''(except during periods of start-up, shutdown, or malfunction)'' from § 65.112(b)(1) of subpart F.

(12) The last sentence of § 65.115(b)(1) of subpart F.

(13) The last sentence of § 65.115(b)(2) of subpart F.

(14) The phrase ''Except for pressure relief devices needed for safety purposes, low leg drains, high point bleeds, analyzer vents, and open-ended valves or lines'' in § 65.143(a)(3) of subpart G.

(15) For flares complying with § 63.2450(e)(5), the following provisions do not apply:

(i) § 63.172(d) of subpart H;

(ii) § 63.180(e) of subpart H;

(iii) § 63.181(g)(1)(iii) of subpart H;

(iv) The phrase ''including periods when a flare pilot light system does not have a flame'' from § 63.181(g)(2)(i) of subpart H;

(v) § 63.1034(b)(2)(iii) of subpart UU; and

(vi) § 65.115(b)(2) of subpart F.

■ 12. Section 63.2485 is amended by:

■ a. Revising paragraphs (a) and (f);

■ b. Adding paragraph (h)(4);

■ c. Revising paragraph (i)(2)(ii);

■ d. Adding paragraph (i)(2)(iii);

■ e. Revising paragraphs (k) introductory text, (n)(2) introductory text, (n)(2)(ii) and (n)(2)(iv)(A);

■ f. Redesignating Equation 1 to paragraph (n)(2) as Equation 4;

■ g. Adding paragraph (n)(2)(vii);

■ h. Revising paragraphs (n)(4) and (o);

■ i. Adding paragraphs (p) and (q).

The revisions and additions read as follows:

§ 63.2485 What requirements must I meet for wastewater streams and liquid streams in open systems within an MCPU?

(a) You must meet each requirement in table 7 to this subpart that applies to your wastewater streams and liquid streams in open systems within an MCPU, except as specified in paragraphs (b) through (q) of this section.

* * * * *

(f) *Closed-vent system requirements.* Except as specified in § 63.2450(e)(6), when § 63.148(k) refers to closed vent systems that are subject to the requirements of § 63.172, the requirements of either § 63.172 or § 63.1034 apply for the purposes of this subpart.

* * * * *

(h) * * *

(4) As an alternative to using EPA Method 624 as specified in § 63.144(b)(5)(i)(C), you may use ASTM D5790–95 (2012) (incorporated by reference, see § 63.14) for the analysis of total organic HAP in wastewater samples. If you choose to use ASTM D5790–95 (2012), then you must also use the sampling procedures of EPA Method 25D or an equivalent method.

(i) * * *

(2) * * *

(ii) The transferee must treat the wastewater stream or residual in a biological treatment unit in accordance with the requirement in paragraph (i)(2)(iii) of this section and the requirements of §§ 63.138 and 63.145 and the requirements referenced therein.

(iii) Beginning no later than the compliance dates specified in § 63.2445(g), the requirement of § 63.145(a)(3) no longer applies. Instead, the transferee must comply with the conditions specified in 63.2450(g)(6).

* * * * *

(k) The requirement to correct outlet concentrations from combustion devices to 3 percent oxygen in §§ 63.139(c)(1)(ii) and 63.145(i)(6) applies only if supplemental gases are combined with a vent stream from a Group 1 wastewater stream. If emissions are controlled with a vapor recovery system as specified in § 63.139(c)(2), you must correct for supplemental gases as specified in § 63.2460(c)(6).

* * * * *

(n) * * *

(2) Calculate the destruction efficiency of the biological treatment unit using Equation 4 of this subpart in accordance with the procedures described in paragraphs (n)(2)(i) through (viii) of this section. You have demonstrated initial compliance if E is greater than or equal to 90 percent.

* * * * *

(ii) Except as specified in paragraph (n)(2)(vii) of this section, conduct the demonstration under representative process unit and treatment unit operating conditions in accordance with § 63.145(a)(3) and (4).

* * * * *

(iv) * * *

(A) If the biological treatment process meets both of the requirements specified in § 63.145(h)(1)(i) and (ii), you may elect to replace the F_{bio} term in Equation 4 of this subpart with the numeral ''1.''

* * * * *

(vii) Beginning no later than the compliance dates specified in § 63.2445(g), the requirement of § 63.145(a)(3) no longer applies. Instead, you must comply with the conditions specified in 63.2450(g)(6).

* * * * *

(4) For any wastewater streams that are Group 1 for both PSHAP and SHAP, you may elect to meet the requirements specified in table 7 to this subpart for the PSHAP and then comply with paragraphs (n)(1) through (3) of this section for the SHAP in the wastewater system. You may determine the SHAP mass removal rate, in kg/hr, in treatment units that are used to meet the requirements for PSHAP and add this amount to both the numerator and denominator in Equation 4 of this subpart.

(o) *Compliance records.* Except as specified in paragraph (p) of this section, for each CPMS used to monitor a nonflare control device for wastewater emissions, you must keep records as specified in § 63.998(c)(1) in addition to the records required in § 63.147(d).

(p) *Compliance records after date of compliance.* Beginning no later than the compliance dates specified in § 63.2445(g), paragraph (o) of this section no longer applies. Instead, for each CPMS used to monitor a nonflare control device for wastewater emissions, you must keep records as specified in § 63.998(c)(1) in addition to the records required in § 63.147(d), except that the provisions of § 63.998(c)(1)(ii)(D), (E), (F), and (G) do not apply.

(q) *Startup, shutdown, and malfunction referenced provisions.* Beginning no later than the compliance dates specified in § 63.2445(g), the referenced provisions specified in paragraphs (q)(1) through (5) of this section do not apply when demonstrating compliance with this section.

(1) § 63.105(d) and (e).

(2) § 63.132(b)(3)(i)(B).

(3) § 63.132(f)(2).

(4) § 63.148(f)(3).

(5) For flares complying with § 63.2450(e)(5), the following provisions do not apply:

(i) § 63.139(c)(3);

(ii) § 63.139(d)(2)(vii)(3);

(iii) § 63.145(j);

(iv) § 63.146(b)(7)(i);

(v) § 63.147(d)(1); and

(vi) § 63.1034(b)(2)(iii).

■ 13. Revise § 63.2490 to read as follows:

§ 63.2490 What requirements must I meet for heat exchange systems?

(a) You must comply with each requirement in Table 10 to this subpart that applies to your heat exchange systems, except as specified in paragraphs (b) through (d) of this section.

(b) Except as specified in paragraph (d) of this section, if you comply with the requirements of § 63.104 as specified in Table 10 to this subpart, then the phrase ''a chemical manufacturing process unit meeting the conditions of § 63.100 (b)(1) through (b)(3) of this section'' in § 63.104(a) means ''an MCPU meeting the conditions of § 63.2435'' for the purposes of this subpart.

(c) Except as specified in paragraph (d) of this section, if you comply with the requirements of § 63.104 as specified in Table 10 to this subpart, then the reference to § 63.100(c) in § 63.104(a) does not apply for the purposes of this subpart.

(d) Beginning no later than the compliance dates specified in § 63.2445(g), the requirements of § 63.104 as specified in Table 10 to this subpart and paragraphs (b) and (c) of this section no longer apply. Instead, you must monitor the cooling water for the presence of total strippable hydrocarbon concentration (as methane) that indicate a leak according to paragraph (d)(1) of this section, and if you detect a leak, then you must repair it according to paragraphs (d)(2) and (3) of this section, unless repair is delayed according to paragraph (d)(4) of this section. At any time before the compliance dates specified in § 63.2445(g), you may choose to comply with the requirements in this paragraph in lieu of the requirements of § 63.104 as specified in Table 10 to this subpart and paragraphs (b) and (c) of this section. The requirements in this paragraph do not apply to heat exchange systems that have a maximum cooling water flow rate of 10 gallons per minute or less.

(1) You must perform monitoring to identify leaks of total strippable

hydrocarbon concentration (as methane) from each heat exchange system subject to the requirements of this subpart according to the procedures in paragraphs (d)(1)(i) through (v) of this section.

(i) *Monitoring locations for closed-loop recirculation heat exchange systems.* For each closed loop recirculating heat exchange system, you must collect and analyze a sample from the location(s) described in either paragraph (d)(1)(i)(A) or (B) of this section.

(A) Each cooling tower return line or any representative riser within the cooling tower prior to exposure to air for each heat exchange system.

(B) Selected heat exchanger exit line(s), so that each heat exchanger or group of heat exchangers within a heat exchange system is covered by the selected monitoring location(s).

(ii) *Monitoring locations for once-through heat exchange systems.* For each once-through heat exchange system, you must collect and analyze a sample from the location(s) described in paragraph (d)(1)(ii)(A) of this section. You may also elect to collect and analyze an additional sample from the location(s) described in paragraph (d)(1)(ii)(B) of this section.

(A) Selected heat exchanger exit line(s), so that each heat exchanger or group of heat exchangers within a heat exchange system is covered by the selected monitoring location(s). The selected monitoring location may be at a point where discharges from multiple heat exchange systems are combined provided that the combined cooling water flow rate at the monitoring location does not exceed 40,000 gallons per minute.

(B) The inlet water feed line for a once-through heat exchange system prior to any heat exchanger. If multiple heat exchange systems use the same water feed (*i.e.,* inlet water from the same primary water source), you may monitor at one representative location and use the monitoring results for that sampling location for all heat exchange systems that use that same water feed.

(iii) *Monitoring method.* You must determine the total strippable hydrocarbon concentration (in parts per million by volume (ppmv) as methane) at each monitoring location using the ''Air Stripping Method (Modified El Paso Method) for Determination of Volatile Organic Compound Emissions from Water Sources'' Revision Number One, dated January 2003, Sampling Procedures Manual, appendix P: Cooling Tower Monitoring, prepared by Texas Commission on Environmental Quality, January 31, 2003 (incorporated by reference—see § 63.14) using a flame ionization detector (FID) analyzer for on-site determination as described in Section 6.1 of the Modified El Paso Method.

(iv) *Monitoring frequency and leak action level.* For each heat exchange system, you must initially monitor monthly for 6-months beginning upon startup and monitor quarterly thereafter using a leak action level defined as a total strippable hydrocarbon concentration (as methane) in the stripping gas of 6.2 ppmv. If a leak is detected as specified in paragraph (d)(1)(v) of this section, then you must monitor monthly until the leak has been repaired according to the requirements in paragraph (d)(2) or (3) of this section. Once the leak has been repaired according to the requirements in paragraph (d)(2) or (3) of this section, quarterly monitoring for the heat exchange system may resume. The monitoring frequencies specified in this paragraph also apply to the inlet water feed line for a once-through heat exchange system, if monitoring of the inlet water feed is elected as provided in paragraph (d)(1)(ii)(B) of this section.

(v) *Leak definition.* A leak is defined as described in paragraph (d)(1)(v)(A) or (B) of this section, as applicable.

(A) For once-through heat exchange systems for which the inlet water feed is monitored as described in paragraph (d)(1)(ii)(B) of this section, a leak is detected if the difference in the measurement value of the sample taken from a location specified in paragraph (d)(1)(ii)(A) of this section and the measurement value of the corresponding sample taken from the location specified in paragraph (d)(1)(ii)(B) of this section equals or exceeds the leak action level.

(B) For all other heat exchange systems, a leak is detected if a measurement value of the sample taken from a location specified in paragraph (d)(1)(i)(A), (B), or (d)(1)(ii)(A) of this section equals or exceeds the leak action level.

(2) If a leak is detected using the methods described in paragraph (d)(1) of this section, you must repair the leak to reduce the measured concentration to below the applicable leak action level as soon as practicable, but no later than 45 days after identifying the leak, except as specified in paragraph (d)(4) of this section. Repair must include re-monitoring at the monitoring location where the leak was identified according to the method specified in paragraph (d)(1)(iii) of this section to verify that the measured total strippable hydrocarbon concentration is below the applicable leak action level. Repair may also include performing the additional monitoring in paragraph (d)(3) of this section to verify that the total strippable hydrocarbon concentration is below the applicable leak action level. Actions that can be taken to achieve repair include but are not limited to:

(i) Physical modifications to the leaking heat exchanger, such as welding the leak or replacing a tube;

(ii) Blocking the leaking tube within the heat exchanger;

(iii) Changing the pressure so that water flows into the process fluid;

(iv) Replacing the heat exchanger or heat exchanger bundle; or

(v) Isolating, bypassing, or otherwise removing the leaking heat exchanger from service until it is otherwise repaired.

(3) If you detect a leak when monitoring a cooling tower return line under paragraph (d)(1)(i)(A) of this section, you may conduct additional monitoring of each heat exchanger or group of heat exchangers associated with the heat exchange system for which the leak was detected, as provided in paragraph (d)(1)(i)(B) of this section. If no leaks are detected when monitoring according to the requirements of paragraph (d)(1)(i)(B) of this section, the heat exchange system is considered to have met the repair requirements through re-monitoring of the heat exchange system, as provided in paragraph (d)(2) of this section.

(4) You may delay repair when one of the conditions in paragraph (d)(4)(i) or (ii) of this section is met and the leak is less than the delay of repair action level specified in paragraph (d)(4)(iii) of this section. You must determine if a delay of repair is necessary as soon as practicable, but no later than 45 days after first identifying the leak.

(i) If the repair is technically infeasible without a shutdown and the total strippable hydrocarbon concentration is initially and remains less than the delay of repair action level for all monitoring periods during the delay of repair, then you may delay repair until the next scheduled shutdown of the heat exchange system. If, during subsequent monitoring, the delay of repair action level is exceeded, then you must repair the leak within 30 days of the monitoring event in which the leak was equal to or exceeded the delay of repair action level.

(ii) If the necessary equipment, parts, or personnel are not available and the total strippable hydrocarbon concentration is initially and remains less than the delay of repair action level for all monitoring periods during the delay of repair, then you may delay the repair for a maximum of 120 calendar days. You must demonstrate that the necessary equipment, parts, or personnel were not available. If, during subsequent monitoring, the delay of repair action level is exceeded, then you must repair the leak within 30 days of the monitoring event in which the leak was equal to or exceeded the delay of repair action level.

(iii) The delay of repair action level is a total strippable hydrocarbon concentration (as methane) in the stripping gas of 62 ppmv. The delay of repair action level is assessed as described in paragraph (d)(4)(iii)(A) or (B) of this section, as applicable.

(A) For once-through heat exchange systems for which the inlet water feed is monitored as described in paragraph (d)(1)(ii)(B) of this section, the delay of repair action level is exceeded if the difference in the measurement value of the sample taken from a location specified in paragraph (d)(1)(ii)(A) of this section and the measurement value of the corresponding sample taken from the location specified in paragraph (d)(1)(ii)(B) of this section equals or exceeds the delay of repair action level.

(B) For all other heat exchange systems, the delay of repair action level is exceeded if a measurement value of the sample taken from a location specified in paragraph (d)(1)(i)(A), (B), or (d)(1)(ii)(A) of this section equals or exceeds the delay of repair action level.

■ 14. Section 63.2492 is added to read as follows:

§ 63.2492 How do I determine whether my process vent, storage tank, or equipment is in ethylene oxide service?

To determine if process vents, storage tanks, and equipment leaks are in ethylene oxide service as defined in § 63.2550(i), you must comply with the requirements in paragraphs (a) through (c) of this section, as applicable.

(a) For each batch process vent or continuous process vent stream, you must measure the flow rate and concentration of ethylene oxide of each process vent as specified in paragraphs (a)(1) through (5) of this section.

(1) Measurements must be made prior to any dilution of the vent streams.

(2) Measurements may be made on the combined vent streams at an MCPU or for each separate vent stream.

(3) Method 1 or 1A of 40 CFR part 60, appendix A–1, as appropriate, must be used for the selection of the sampling sites. For vents smaller than 0.10 meter in diameter, sample at one point at the center of the duct.

(4) The gas volumetric flow rate must be determined using Method 2, 2A, 2C, 2D, 2F, or 2G of 40 CFR part 60, appendix A–1 and A–2, as appropriate.

(5) The concentration of ethylene oxide must be determined using Method 18 of appendix A–6 of 40 CFR part 60 or Method 320 of appendix A to 40 CFR part 63.

(b) For storage tanks, you must measure the concentration of ethylene oxide of the fluid stored in the storage tanks using Method 624.1 of 40 CFR part 136 or preparation by Method 5031 and analysis by Method 8260D in the SW–846 Compendium. In lieu of preparation by SW–846 Method 5031, you may use SW–846 Method 5030B, as long as: You do not use a preservative in the collected sample; you store the sample with minimal headspace as cold as possible and at least below 4 degrees C; and you analyze the sample as soon as possible, but in no case longer than 7 days from the time the sample was collected. If you are collecting a sample from a pressure vessel, you must maintain the sample under pressure both during and following sampling.

(c) For equipment leaks, you must comply with the requirements in paragraphs (c)(1) through (4) of this section.

(1) Each piece of equipment within an MCPU that can reasonably be expected to contain equipment in ethylene oxide service is presumed to be in ethylene oxide service unless an owner or operator demonstrates that the piece of equipment is not in ethylene oxide service. For a piece of equipment to be considered not in ethylene oxide service, it must be determined that the percent ethylene oxide content of the process fluid that is contained in or contacts equipment can be reasonably expected to not exceed 0.1 percent by weight on an annual average basis. For purposes of determining the percent ethylene oxide content of the process fluid, you must use Method 18 of 40 CFR part 60, appendix A–6 for gaseous process fluid, and Method 624.1 of 40 CFR part 136 or preparation by Method 5031 and analysis by Method 8260D in the SW–846 Compendium for liquid process fluid. In lieu of preparation by SW–846 Method 5031, you may use SW–846 Method 5030B, as long as: You do not use a preservative in the collected sample; you store the sample with minimal headspace as cold as possible and at least below 4 degrees C; and you analyze the sample as soon as possible, but in no case longer than 7 days from the time the sample was collected.

(2) Unless specified by the Administrator, you may use good engineering judgment rather than the procedures specified in paragraph (c)(1) of this section to determine that the percent ethylene oxide content of the process fluid that is contained in or contacts equipment does not exceed 0.1 percent by weight.

(3) You may revise your determination for whether a piece of equipment is in ethylene oxide service by following the procedures in paragraph (c)(1) of this section, or by documenting that a change in the process or raw materials no longer causes the equipment to be in ethylene oxide service.

(4) Samples used in determining the ethylene oxide content must be representative of the process fluid that is contained in or contacts the equipment.

■ 15. Section 63.2493 is added to read as follows:

§ 63.2493 What requirements must I meet for process vents, storage tanks, or equipment that are in ethylene oxide service?

This section applies beginning no later than the compliance dates specified in § 63.2445(i). In order to demonstrate compliance with the emission limits and work practice standards specified in Tables 1, 2, and 4 to this subpart for process vents and storage tanks in ethylene oxide service, you must meet the requirements specified in paragraphs (a) through (c) of this section. In order to demonstrate compliance with the requirements specified in Table 6 to this subpart for equipment in ethylene oxide service, you must meet the requirements specified in paragraphs (d) and (e) of this section.

(a) For initial compliance, you must comply with paragraphs (a)(1) through (4) of this section, as applicable.

(1) If you choose to reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a flare as specified in table 1, 2, or 4 to this subpart, then you must comply with § 63.2450(e)(4) and (6) and the requirements in § 63.983, and you must conduct the initial visible emissions demonstration required by § 63.670(h) of subpart CC as specified in § 63.2450(e)(5).

(2) If you choose to reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a non-flare control device that reduces ethylene oxide by greater than or equal to 99.9 percent by weight as specified in table 1, 2, or 4 to this subpart, then you must comply with § 63.2450(e)(4) and (6) and the requirements in § 63.983, and you must comply with paragraphs (a)(2)(i) through (viii) of this section.

(i) Conduct an initial performance test of the control device that is used to comply with the percent reduction requirement at the inlet and outlet of the control device.

(ii) Conduct the performance test according to the procedures in § 63.997 and § 63.2450(g). Use Method 18 of appendix A–6 of 40 CFR part 60 or Method 320 of appendix A to 40 CFR part 63 to determine the ethylene oxide concentration. Use Method 1 or 1A of appendix A–1 of 40 CFR part 60 to select the sampling sites at each sampling location. Determine the gas volumetric flowrate using Method 2, 2A, 2C, or 2D of appendix A–2 of 40 CFR part 60. Use Method 4 of appendix A–3 of 40 CFR part 60 to convert the volumetric flowrate to a dry basis.

(iii) Calculate the mass emission rate of ethylene oxide entering the control device and exiting the control device using Equations 5 and 6 of this subpart.

$$E_{EtO,inlet} = K\, C_{EtO,inlet}\, M_{EtO}\, Q_{inlet} \qquad \text{(Eq. 5)}$$

$$E_{EtO,outlet} = K\, C_{EtO,outlet}\, M_{EtO}\, Q_{outlet} \qquad \text{(Eq. 6)}$$

Where:

$E_{EtO,inlet}$, $E_{EtO,outlet}$ = Mass rate of ethylene oxide at the inlet and outlet of the control device, respectively, kilogram per hour.

$C_{EtO,inlet}$, $C_{EtO,outlet}$ = Concentration of ethylene oxide in the gas stream at the inlet and outlet of the control device, respectively, dry basis, parts per million by volume.

M_{EtO} = Molecular weight of ethylene oxide, 44.05 grams per gram-mole.

Q_{inlet}, Q_{outlet} = Flow rate of the gas stream at the inlet and outlet of the control device, respectively, dry standard cubic meter per minute.

K = Constant, 2.494×10^{-6} (parts per million)$^{-1}$ (gram-mole per standard cubic meter) (kilogram per gram) (minutes per hour), where standard temperature (gram-mole per standard cubic meter) is 20 °C.

(iv) Calculate the percent reduction from the control device using equation 7 of this subpart. You have demonstrated initial compliance if the overall reduction of ethylene oxide is greater than or equal to 99.9 percent by weight.

$$\text{Percent reduction} = (E_{EtO,inlet} - E_{EtO,outlet})/E_{EtO,inlet} * 100 \qquad \text{(Eq.7)}$$

Where:

$E_{EtO,inlet}$, $E_{EtO,outlet}$ = Mass rate of ethylene oxide at the inlet and outlet of the control device, respectively, kilogram per hour, calculated using Equations 5 and 6 of this subpart.

(v) If a new control device is installed, then conduct a performance test of the new device following the procedures in paragraphs (a)(2)(i) through (iv) of this section.

(vi) If you vent emissions through a closed-vent system to a scrubber, then you must establish operating parameter limits by monitoring the operating parameters specified in paragraphs (a)(2)(vi)(A) through (E) of this section during the performance test.

(A) Scrubber liquid-to-gas ratio (L/G), determined from the total scrubber liquid inlet flow rate and the exit gas flow rate. Determine the average L/G during the performance test as the average of the test run averages.

(B) Scrubber liquid pH of the liquid in the reactant tank. The pH may be measured at any point between the discharge from the scrubber column and the inlet to the reactant tank. Determine the average pH during the performance test as the average of the test run averages.

(C) Pressure drop of the scrubber column. Determine the average pressure drop during the performance test as the average of the test run averages.

(D) Temperature of the water entering the scrubber column. The temperature may be measured at any point after the heat exchanger and prior to entering the top of the scrubber column. Determine the average inlet water temperature as the average of the test run averages.

(E) Liquid feed pressure to the wet scrubber column. Determine the average liquid feed pressure as the average of the test run averages.

(vii) If you vent emissions through a closed-vent system to a thermal oxidizer, then you must establish operating parameter limits by monitoring the operating parameters specified in paragraphs (a)(2)(vii)(A) and (B) of this section during the performance test.

(A) Combustion chamber temperature. Determine the average combustion chamber temperature during the performance test as the average of the test run averages.

(B) Flue gas flow rate. Determine the average flue gas flow rate during the performance test as the average of the test run averages.

(viii) If you vent emissions through a closed-vent system to a control device other than a flare, scrubber, or thermal oxidizer, then you must notify the Administrator of the operating parameters that you plan to monitor during the performance test prior to establishing operating parameter limits for the control device.

(3) If you choose to reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a non-flare control device that reduces ethylene oxide to less than 1 ppmv as specified in table 1, 2, or 4 to this subpart, then you must comply with § 63.2450(e)(4) and (6) and the requirements in § 63.983, and you must comply with either paragraph (a)(3)(i) or (ii) of this section.

(i) Install an FTIR CEMS meeting the requirements of Performance Specification 15 to continuously monitor the ethylene oxide concentration at the exit of the control device. Comply with the requirements specified in § 63.2450(j) for your CEMS.

(ii) If you do not install a CEMS under paragraph (a)(3)(i) of this section, you must comply with paragraphs (a)(3)(ii)(A) through (C) of this section.

(A) Conduct an initial performance test of the control device that is used to comply with the concentration requirement at the outlet of the control device.

(B) Conduct the performance test according to the procedures in § 63.997 and § 63.2450(g). Use Method 18 of appendix A–6 of 40 CFR part 60 or Method 320 of appendix A to 40 CFR part 63 to determine the ethylene oxide concentration. You have demonstrated initial compliance if the ethylene oxide concentration is less than 1 ppmv.

(C) Comply with the requirements specified in paragraphs (a)(2)(v) through (viii) of this section, as applicable.

(4) If you choose to reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a non-flare control device that reduces ethylene oxide to less than 5 pounds per year for all combined process vents as specified in table 1 or 2 to this subpart, then you must comply with

§ 63.2450(e)(4) and (6) and the requirements in § 63.983, and you must comply with paragraphs (a)(4)(i) through (iv) of this section.

(i) Conduct an initial performance test of the control device that is used to comply with the mass emission limit requirement at the outlet of the control device.

(ii) Conduct the performance test according to the procedures in § 63.997 and § 63.2450(g). Use Method 18 of appendix A–6 of 40 CFR part 60 or Method 320 of appendix A to 40 CFR part 63 to determine the ethylene oxide concentration. Use Method 1 or 1A of appendix A–1 of 40 CFR part 60 to select the sampling site. Determine the gas volumetric flowrate using Method 2, 2A, 2C, or 2D of appendix A–2 of 40 CFR part 60. Use Method 4 of appendix A–3 of 40 CFR part 60 to convert the volumetric flowrate to a dry basis.

(iii) Calculate the mass emission rate of ethylene oxide exiting the control device using Equation 6 of this subpart. You have demonstrated initial compliance if the ethylene oxide from all process vents (controlled and uncontrolled) is less than 5 pounds per year when combined.

(iv) Comply with the requirements specified in paragraphs (a)(2)(v) through (viii) of this section, as applicable.

(b) For continuous compliance, you must comply with paragraphs (b)(1) through (6) of this section, as applicable.

(1) If you choose to reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a flare as specified in table 1, 2, or 4 to this subpart, then you must comply with the requirements in §§ 63.983 and 63.2450(e)(4) through (6).

(2) Continuously monitor the ethylene oxide concentration at the exit of the control device using an FTIR CEMS meeting the requirements of Performance Specification 15 and § 63.2450(j). If you use an FTIR CEMS, you do not need to conduct the performance testing required in paragraph (b)(3) of this section or the operating parameter monitoring required in paragraphs (b)(4) through (6) of this section.

(3) Conduct a performance test no later than 60 months after the previous performance test and reestablish operating parameter limits following the procedures in paragraph (a)(2) through (4) of this section. The Administrator may request a repeat performance test at any time.

(4) If you vent emissions through a closed-vent system to a scrubber, then you must comply with § 63.2450(e)(4) and (6) and the requirements in § 63.983, and you must meet the operating parameter limits specified in paragraphs (b)(4)(i) through (v) of this section.

(i) Minimum scrubber liquid-to-gas ratio (L/G), equal to the average L/G measured during the most recent performance test. Determine total scrubber liquid inlet flow rate with a flow sensor with a minimum accuracy of at least ±5 percent over the normal range of flow measured, or 1.9 liters per minute (0.5 gallons per minute), whichever is greater. Determine exit gas flow rate with a flow sensor with a minimum accuracy of at least ±5 percent over the normal range of flow measured, or 280 liters per minute (10 cubic feet per minute), whichever is greater. Compliance with the minimum L/G operating limit must be determined continuously on an instantaneous basis.

(ii) Maximum scrubber liquid pH of the liquid in the reactant tank, equal to the average pH measured during the most recent performance test. Compliance with the pH operating limit must be determined continuously on an instantaneous basis. Use a pH sensor with a minimum accuracy of ±0.2 pH units.

(iii) Maximum pressure drop across the scrubber column, equal to the average pressure drop measured during the most recent performance test. Compliance with the pressure drop operating limit must be determined continuously on an instantaneous basis. Use pressure sensors with a minimum accuracy of ±5 percent over the normal operating range or 0.12 kilopascals, whichever is greater.

(iv) Maximum temperature of the water entering the scrubber column, equal to the average temperature measured during the most recent performance test. Compliance with the inlet water temperature operating limit must be determined continuously on an instantaneous basis. Use a temperature sensor with a minimum accuracy of ±1 percent over the normal range of the temperature measured, expressed in degrees Celsius, or 2.8 degrees Celsius, whichever is greater.

(v) Minimum liquid feed pressure to the scrubber column, equal to the average feed pressure measured during the most recent performance test. Compliance with the liquid feed pressure operating limit must be determined continuously on an instantaneous basis. Use a pressure sensor with a minimum accuracy of ±5 percent over the normal operating range or 0.12 kilopascals, whichever is greater.

(5) If you vent emissions through a closed-vent system to a thermal oxidizer, then you must comply with § 63.2450(e)(4) and (6) and the requirements in § 63.983, and you must meet the operating parameter limits specified in paragraphs (b)(5)(i) and (ii) of this section and the requirements in paragraph (b)(5)(iii) of this section.

(i) Minimum combustion chamber temperature, equal to the average combustion chamber temperature measured during the most recent performance test. Determine combustion chamber temperature with a temperature sensor with a minimum accuracy of at least ±1 percent over the normal range of temperature measured, expressed in degrees Celsius, or 2.8 degrees Celsius, whichever is greater. Compliance with the minimum combustion chamber temperature operating limit must be determined continuously on an instantaneous basis.

(ii) Maximum flue gas flow rate, equal to the average flue gas flow rate measured during the most recent performance test. Determine flue gas flow rate with a flow sensor with a minimum accuracy of at least ±5 percent over the normal range of flow measured, or 280 liters per minute (10 cubic feet per minute), whichever is greater. Compliance with the maximum flue gas flow rate operating limit must be determined continuously on an instantaneous basis.

(iii) You must maintain the thermal oxidizer in accordance with good combustion practices that ensure proper combustion. Good combustion practices include, but are not limited to, proper burner maintenance, proper burner alignment, proper fuel to air distribution and mixing, routine inspection, and preventative maintenance.

(6) If you vent emissions through a closed-vent system to a control device other than a flare, scrubber, or thermal oxidizer, then you must comply with § 63.2450(e)(4) and (6) and the requirements in § 63.983, and you must monitor the operating parameters identified in paragraph (a)(2)(viii) of this section and meet the established operating parameter limits to ensure continuous compliance. The frequency of monitoring and averaging time will be determined based upon the information provided to the Administrator.

(c) *Pressure Vessels.* If you have a storage tank in ethylene oxide service that is considered a pressure vessel as defined in as defined in § 63.2550(i), then you must operate and maintain the pressure vessel, as specified in paragraphs (c)(1) through (5) of this section.

(1) The pressure vessel must be designed to operate with no detectable emissions at all times.

(2) Monitor each point on the pressure vessel through which ethylene oxide could potentially be emitted by conducting initial and annual performance tests using Method 21 of 40 CFR part 60, appendix A–7.

(3) Each instrument reading greater than 500 ppmv is a deviation.

(4) Estimate the flow rate and total regulated material emissions from the defect. Assume the pressure vessel has been emitting for half of the time since the last performance test, unless other information supports a different assumption.

(5) Whenever ethylene oxide is in the pressure vessel, you must operate the pressure vessel as a closed system that vents through a closed vent system to a control device as specified in paragraphs (c)(5)(i) through (iii) of this section, as applicable.

(i) For closed vent systems, comply with § 63.2450(e)(4) and (6) and the requirements in § 63.983.

(ii) For a non-flare control device, comply with requirements as specified in paragraph (b) of this section.

(iii) For a flare, comply with the requirements of § 63.2450(e)(5).

Option 1 for Paragraph (d)

(d) *Equipment in ethylene oxide service.* Except as specified in paragraphs (d)(1) through (4) and (e) of this section, for equipment in ethylene oxide service as defined in § 63.2550(i), you must comply with the requirements of subpart UU or subpart H of this part 63, or 40 CFR part 65, subpart F.

(1) For pumps in ethylene oxide service, you must comply with the requirements in paragraphs (d)(1)(i) through (iii) of this section.

(i) The instrument reading that defines a leak for pumps is 1,000 parts per million or greater.

(ii) The monitoring period for pumps is monthly.

(iii) When a leak is detected, it must be repaired as soon as practicable, but not later than 15 calendar days after it is detected.

(2) For connectors in ethylene oxide service, you must comply with the requirements in paragraphs (d)(2)(i) through (iii) of this section.

(i) The instrument reading that defines a leak for connectors is 500 parts per million or greater.

(ii) The monitoring period for connectors is once every 12 months.

(iii) When a leak is detected, it must be repaired as soon as practicable, but not later than 15 calendar days after it is detected.

(3) For each light liquid pump or connector in ethylene oxide service that is added to an affected source, and for each light liquid pump or connector in ethylene oxide service that replaces a light liquid pump or connector in ethylene oxide service, you must initially monitor for leaks within 5 days after initial startup of the equipment.

(4) Pressure relief devices in ethylene oxide service must not vent directly to atmosphere.

Option 2 for Paragraph (d)

(d) *Equipment in ethylene oxide service.* Except as specified in paragraphs (d)(1) through (5) and (e) of this section, for equipment in ethylene oxide service as defined in § 63.2550(i), you must comply with the requirements of subpart UU or subpart H of this part 63, or 40 CFR part 65, subpart F.

(1) Except as specified in paragraph (d)(3) of this section, for pumps in ethylene oxide service, you must comply with the requirements in paragraphs (d)(1)(i) through (iii) of this section.

(i) The instrument reading that defines a leak for pumps is 1,000 parts per million or greater.

(ii) The monitoring period for pumps is monthly.

(iii) When a leak is detected, it must be repaired as soon as practicable, but not later than 15 calendar days after it is detected.

(2) Except as specified in paragraph (d)(3) of this section, for connectors in ethylene oxide service, you must comply with the requirements in paragraphs (d)(2)(i) through (iii) of this section.

(i) The instrument reading that defines a leak for connectors is 500 parts per million or greater.

(ii) The monitoring period for connectors is once every 12 months.

(iii) When a leak is detected, it must be repaired as soon as practicable, but not later than 15 calendar days after it is detected.

(3) If you operate an MCPU at the facility commonly called Huntsman Performance at 5451 Jefferson Chemical Road in Conroe, Texas or Lanxess Corporation at 2151 King Street Extension in Charleston, SC, then you must comply with the requirements in paragraphs (d)(3)(i) and (ii) of this section in lieu of the requirements specified in paragraphs (d)(1) and (2) of this section.

(i) For pumps and valves in ethylene oxide service, you must comply with the requirements in paragraphs (d)(3)(i)(A) through (E) of this section.

(A) You must install and operate leakless pumps as defined in § 63.2550(i), and monitor the pumps annually.

(B) You must comply with either paragraph (d)(3)(i)(B)(*1*) or (*2*) for valves.

(*1*) Install and operate a leakless valve as defined in § 63.2550(i) and monitor the valve annually or

(*2*) Operate any valve that is not considered a leakless valve as defined in § 63.2550(i) and monitor the valve quarterly.

(C) Valves and pumps must be monitored using the methods specified in § 63.180(b) and (c), § 63.1023(b) and (c), or § 65.104(b) and (c).

(D) For valves and pumps, the instrument reading that defines a leak is any value above the measured background concentration.

(E) When a leak is detected, it must be repaired as soon as practicable, but not later than 15 calendar days after the leak is detected. A first attempt at repair must be made no later than 5 calendar days after the leak is detected. Following repair, the valve or pump must be returned to operation as required in paragraphs (d)(3)(i)(A) through (D) of this section.

(ii) For connectors in ethylene oxide service, you must comply with the requirements in paragraphs (d)(3)(ii)(A) through (C) of this section.

(A) The instrument reading that defines a leak for connectors is 100 parts per million or greater.

(B) The monitoring period for connectors is once every month.

(C) When a leak is detected, it must be repaired as soon as practicable, but not later than 15 calendar days after the leak is detected. A first attempt at repair must be made no later than 5 calendar days after the leak is detected. Following repair, the connector must be returned to operation as required in paragraphs (d)(3)(ii)(A) and (B) of this section.

(4) For each light liquid pump, valve, or connector in ethylene oxide service that is added to an affected source, and for each light liquid pump, valve, or connector in ethylene oxide service that replaces a light liquid pump, valve, or connector in ethylene oxide service, you must initially monitor for leaks within 5 days after initial startup of the equipment.

(5) Pressure relief devices in ethylene oxide service must not vent directly to atmosphere.

(e) The referenced provisions specified in paragraphs (e)(1) through (15) of this section do not apply when demonstrating compliance with this section.

(1) § 63.163(c)(3) of subpart H.

(2) § 63.163(e) of subpart H.

(3) The second sentence of § 63.181(d)(5)(i) of subpart H.

(4) § 63.1026(b)(3) of subpart UU.

(5) § 63.1026(e) of subpart UU.

(6) The phrase (except during periods of startup, shutdown, or malfunction)'' from § 63.1028(e)(1)(i)(A) of subpart UU.

(7) The phrase (except during periods of startup, shutdown, or malfunction)'' from § 63.1031(b)(1) of subpart UU.

(8) The second sentence of § 65.105(f)(4)(i) of subpart F.

(9) § 65.107(b)(3) of subpart F.

(10) § 65.107(e) of subpart F.

(11) The phrase (except during periods of start-up, shutdown, or malfunction)'' from § 65.109(e)(1)(i)(A) of subpart F.

(12) The phrase (except during periods of start-up, shutdown, or malfunction)'' from § 65.112(b)(1) of subpart F.

(13) The last sentence of § 65.115(b)(1) of subpart F.

(14) The last sentence of § 65.115(b)(2) of subpart F.

(15) For flares complying with § 63.2450(e)(5), the following provisions do not apply:

(i) § 63.172(d);

(ii) § 63.180(e);

(iii) § 63.181(g)(1)(iii);

(iv) The phrase ''including periods when a flare pilot light system does not have a flame'' from § 63.181(g)(2)(i);

(v) § 63.1034(b)(2)(iii); and

(vi) § 65.115(b)(2).

(16) Requirements for maintenance vents in § 63.2455(d).

■ 16. Section 63.2495 is amended by revising paragraph (b)(1) to read as follows:

§ 63.2495 How do I comply with the pollution prevention standard?

* * * * *

(b) * * *

(1) You must comply with the emission limitations and work practice standards contained in tables 1 through 7 of this subpart for all HAP that are generated in the MCPU and that are not included in consumption, as defined in § 63.2550. If any vent stream routed to the combustion control is a halogenated vent stream, as defined in § 63.2550, then hydrogen halides that are generated as a result of combustion control must be controlled according to the requirements in § 63.2450(e)(4) and the requirements of § 63.994 and the requirements referenced therein.

* * * * *

■ 17. Section 63.2500 is amended by revising paragraph (a) and adding paragraph (g) to read as follows:

§ 63.2500 How do I comply with emissions averaging?

(a) For an existing source, you may elect to comply with the percent reduction emission limitations in Tables 1, 2, 4, 5, and 7 to this subpart by complying with the emissions averaging provisions specified in § 63.150, except as specified in paragraphs (b) through (g) of this section.

* * * * *

(g) Beginning no later than the compliance dates specified in § 63.2445(g), § 63.150(f)(2) does not apply when demonstrating compliance with this section.

■ 18. Section 63.2505 is amended by revising paragraphs (b)(1) and (b)(6)(i) and (ii) to read as follows:

§ 63.2505 How do I comply with the alternative standard?

* * * * *

(b) * * *

(1) You must comply with the requirements in § 63.2450(e)(4) and the requirements in § 63.983 and the requirements referenced therein for closed-vent systems.

* * * * *

(6) * * *

(i) Demonstrate initial compliance with the 95 percent reduction by conducting a performance test and setting a site-specific operating limit(s) for the scrubber in accordance with the requirements in § 63.2450(e)(4) and the requirements of § 63.994 and the requirements referenced therein. You must submit the results of the initial compliance demonstration in the notification of compliance status report. If the performance test report is submitted electronically through the EPA's CEDRI in accordance with § 63.2520(f), the process unit(s) tested, the pollutant(s) tested, and the date that such performance test was conducted may be submitted in the notification of compliance status report in lieu of the performance test results. The performance test results must be submitted to CEDRI by the date the notification of compliance status report is submitted.

(ii) Install, operate, and maintain CPMS for the scrubber as specified in §§ 63.994(c) and 63.2450(k), instead of as specified in § 63.1258(b)(5)(i)(C). You must also comply with the requirements in § 63.2450(e)(4), as applicable.

* * * * *

■ 19. Section 63.2515 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 63.2515 What notifications must I submit and when?

(a) Except as specified in paragraph (d) of this section, you must submit all of the notifications in §§ 63.6(h)(4) and (5), 63.7(b) and (c), 63.8(e), (f)(4) and (6), and 63.9(b) through (h) that apply to you by the dates specified.

* * * * *

(d) *Supplement to Notification of Compliance Status.* You must also submit supplements to the Notification of Compliance Status as specified in § 63.2520(d)(3) through (5) of this section.

■ 20. Section 63.2520 is amended by:

■ a. Revising paragraph (c) introductory text and paragraph (c)(2);

■ b. Adding paragraph (c)(8);

■ c. Revising paragraphs (d) introductory text and paragraph (d)(2)(ii);

■ d. Adding paragraphs (d)(3) through (5);

■ e. Revising paragraph (e) introductory text, paragraphs (e)(2) through (4), paragraph (e)(5)(ii) introductory text, and paragraph (e)(5)(ii)(A) and (B);

■ f. Adding paragraph (e)(5)(ii)(D);

■ g. Revising paragraph (e)(5)(iii) introductory text, paragraph (e)(5)(iii)(A) through(F), and (e)(5)(iii)(I);

■ h. Adding paragraphs (e)(5)(iii)(M) and (N);

■ i. Revising paragraphs (e)(7) and (8);

■ j. Adding paragraphs (e)(11) through (17), and (f) through (i).

The revisions and additions read as follows:

§ 63.2520 What reports must I submit and when?

* * * * *

(c) *Precompliance report.* You must submit a precompliance report to request approval for any of the items in paragraphs (c)(1) through (8) of this section. We will either approve or disapprove the report within 90 days after we receive it. If we disapprove the report, you must still be in compliance with the emission limitations and work practice standards in this subpart by the compliance date. To change any of the information submitted in the report, you must notify us 60 days before the planned change is to be implemented.

* * * * *

(2) Descriptions of daily or per batch demonstrations to verify that control devices subject to § 63.2450(k)(6) are operating as designed.

* * * * *

(8) For halogen reduction device other than a scrubber, procedures for establishing monitoring parameters.

(d) *Notification of compliance status report.* You must submit a notification of compliance status report according to the schedule in paragraph (d)(1) of this section, and the notification of compliance status report must contain the information specified in paragraphs (d)(2) through (5) of this section.

* * * * *

(2) * * *

(ii) The results of emissions profiles, performance tests, engineering analyses, design evaluations, flare compliance assessments, inspections and repairs, and calculations used to demonstrate initial compliance according to §§ 63.2455 through 63.2485. For performance tests, results must include descriptions of sampling and analysis procedures and quality assurance procedures. If the performance test report is submitted electronically through the EPA's CEDRI in accordance with paragraph (f) of this section, the process unit(s) tested, the pollutant(s) tested, and the date that such performance test was conducted may be submitted in the notification of compliance status report in lieu of the performance test results. The performance test results must be submitted to CEDRI by the date the notification of compliance status report is submitted.

* * * * *

(3) For flares subject to the requirements of § 63.2450(e)(5), you must also submit the information in this paragraph in a supplement to the Notification of Compliance Status within 150 days after the first applicable compliance date for flare monitoring. In lieu of the information required in § 63.987(b) of subpart SS, the supplement to the Notification of Compliance Status must include flare design (*e.g.,* steam-assisted, air-assisted, non-assisted, or pressure-assisted multi-point); all visible emission readings, heat content determinations, flow rate measurements, and exit velocity determinations made during the initial visible emissions demonstration required by § 63.670(h) of subpart CC, as applicable; and all periods during the compliance determination when the pilot flame is absent.

(4) For pressure relief devices subject to the pressure release management work practice standards in § 63.2480(e)(3), you must also submit the information listed in paragraphs (d)(4)(i) and (ii) of this section in a supplement to the Notification of Compliance Status within 150 days after the first applicable compliance date for pressure relief device monitoring.

(i) A description of the monitoring system to be implemented, including the relief devices and process parameters to be monitored, and a description of the alarms or other methods by which operators will be notified of a pressure release.

(ii) A description of the prevention measures to be implemented for each affected pressure relief device.

(5) For process vents, storage tanks, and equipment leaks subject to the requirements of § 63.2493, you must also submit the information in this paragraph in a supplement to the Notification of Compliance Status within 150 days after the first applicable compliance date. The supplement to the Notification of Compliance Status must identify all process vents, storage tanks, and equipment that are in ethylene oxide service as defined in § 63.2550, the method(s) used to control ethylene oxide emissions from each process vent and storage tank (*i.e.,* use of a flare, scrubber, or other control device), the method(s) used to control ethylene oxide emissions from equipment (*i.e.,* subpart UU or subpart H of this part 63, or 40 CFR part 65, subpart F), and the information specified in paragraphs (d)(5)(A) through (C) of this section.

(A) For process vents, include all uncontrolled, undiluted ethylene oxide concentration measurements, and the calculations you used to determine the total uncontrolled, undiluted ethylene oxide mass emission rate for the sum of all vent gas streams.

(B) For storage tanks, include the concentration of ethylene oxide of the fluid stored in each storage tank.

(C) For equipment, include the percent ethylene oxide content of the process fluid and the method used to determine it, and identify the location of each leakless pump and valve in operation.

(e) *Compliance report.* The compliance report must contain the information specified in paragraphs (e)(1) through (17) of this section. On and after [date three years after date of publication of final rule in the **Federal Register**], you must submit all subsequent reports to the EPA via the CEDRI, which can be accessed through the EPA's CDX (*https://cdx.epa.gov/*). You must use the appropriate electronic report template on the CEDRI website (*https://www.epa.gov/electronic-reporting-air-emissions/compliance-and-emissions-data-reporting-interface-cedri*) for this subpart. The report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted. If you claim some of the information required to be submitted via CEDRI is CBI, submit a complete report, including information claimed to be CBI, to the EPA. The report must be generated using the appropriate form on the CEDRI website. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, CORE CBI Office, U.S. EPA Mailroom (C404–02), Attention: Miscellaneous Organic Chemical Manufacturing Sector Lead, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph.

* * * * *

(2) Statement by a responsible official with that official's name, title, and signature, certifying the accuracy of the content of the report. If your report is submitted via CEDRI, the certifier's electronic signature during the submission process replaces this requirement.

(3) Date of report and beginning and ending dates of the reporting period. You are no longer required to provide the date of report when the report is submitted via CEDRI.

(4) For each SSM during which excess emissions occur, the compliance report must include records that the procedures specified in your startup, shutdown, and malfunction plan (SSMP) were followed or documentation of actions taken that are not consistent with the SSMP, and include a brief description of each malfunction. On and after [date 3 years after date of publication of final rule in the **Federal Register**], this paragraph no longer applies; however, for historical compliance purposes, a copy of the plan must be retained and available on-site for five years after [date 3 years after date of publication of final rule in the **Federal Register**].

(5) * * *

(ii) For each deviation from an emission limit, operating limit, and work practice standard that occurs at an affected source where you are not using a continuous monitoring system (CMS) to comply with the emission limit or work practice standard in this subpart, you must include the information in paragraphs (e)(5)(ii)(A) through (D) of this section. This includes periods of SSM.

(A) The total operating time in hours of the affected source during the reporting period.

(B) Except as specified in paragraph (e)(5)(ii)(D) of this section, information on the number, duration, and cause of deviations (including unknown cause, if applicable), as applicable, and the corrective action taken.

* * * * *

(D) Beginning no later than the compliance dates specified in § 63.2445(g), paragraph (e)(5)(ii)(B) of this section no longer applies. Instead, report information for each deviation to meet an applicable standard. For each instance, report the start date, start time and duration in hours of each deviation. For each deviation, the report must include a list of the affected sources or equipment, an estimate of the quantity in pounds of each regulated pollutant emitted over any emission limit, a description of the method used to estimate the emissions, the cause of the deviation (including unknown cause, if applicable), as applicable, and the corrective action taken.

(iii) For each deviation from an emission limit or operating limit occurring at an affected source where you are using a CMS to comply with an emission limit in this subpart, you must include the information in paragraphs (e)(5)(iii)(A) through (N) of this section. This includes periods of SSM.

(A) The start date, start time, and duration in hours that each CMS was inoperative, except for zero (low-level) and high-level checks.

(B) The start date, start time, and duration in hours that each CEMS was out-of-control and a description of the corrective actions taken.

(C) Except as specified in paragraph (e)(5)(iii)(M) of this section, the date and time that each deviation started and stopped, and whether each deviation occurred during a period of startup, shutdown, or malfunction or during another period.

(D) The total duration in hours of all deviations for each CMS during the reporting period, the total operating time in hours of the affected source during the reporting period, and the total duration as a percent of the total operating time of the affected source during that reporting period.

(E) Except as specified in paragraph (e)(5)(iii)(N) of this section, a breakdown of the total duration of the deviations during the reporting period into those that are due to startup, shutdown, control equipment problems, process problems, other known causes, and other unknown causes.

(F) The total duration in hours of CMS downtime for each CMS during the reporting period, and the total duration of CMS downtime as a percent of the total operating time of the affected source during that reporting period.

* * * * *

(I) The monitoring equipment manufacturer(s) and model number(s) and the pollutant or parameter monitored.

* * * * *

(M) Beginning no later than the compliance dates specified in § 63.2445(g), paragraph (e)(5)(iii)(C) of this section no longer applies. Instead, report the number of deviation to meet an applicable standard. For each instance, report the start date, start time and duration in hours of each deviation. For each deviation, the report must include a list of the affected sources or equipment, an estimate of the quantity in pounds of each regulated pollutant emitted over any emission limit, a description of the method used to estimate the emissions, and the cause of the deviation (including unknown cause, if applicable), as applicable, and the corrective action taken.

(N) Beginning no later than the compliance dates specified in § 63.2445(g), paragraph (e)(5)(iii)(E) of this section no longer applies. Instead, report a breakdown of the total duration in hours of the deviations during the reporting period into those that are due control equipment problems, process problems, other known causes, and other unknown causes.

* * * * *

(7) Include each new operating scenario which has been operated since the time period covered by the last compliance report and has not been submitted in the notification of compliance status report or a previous compliance report. For each new operating scenario, you must report the information specified in § 63.2525(b) and provide verification that the operating conditions for any associated control or treatment device have not been exceeded and that any required calculations and engineering analyses have been performed. For the purposes of this paragraph, a revised operating scenario for an existing process is considered to be a new operating scenario.

(8) For process units added to a PUG, you must report the description and rationale specified in § 63.2525(i)(4). You must report your primary product redeterminations specified in § 63.2525(i)(5).

* * * * *

(11) For each flare subject to the requirements in § 63.2450(e)(5), the compliance report must include the items specified in paragraphs (e)(11)(i) through (vi) of this section in lieu of the information required in § 63.999(c)(3) of subpart SS.

(i) Records as specified in § 63.2525(m)(1) of this section for each 15-minute block during which there was at least one minute when regulated material is routed to a flare and no pilot flame is present. Include the start and stop time and date of each 15-minute block.

(ii) Visible emission records as specified in § 63.2525(m)(2)(iv) for each period of 2 consecutive hours during which visible emissions exceeded a total of 5 minutes.

(iii) The periods specified in § 63.2525(m)(6). Indicate the date and start and end times for each period, and the net heating value operating parameter(s) determined following the methods in § 63.670(k) through (n) of subpart CC as applicable.

(iv) For flaring events meeting the criteria in § 63.670(o)(3) of subpart CC:

(A) The start and stop time and date of the flaring event.

(B) The length of time in minutes for which emissions were visible from the flare during the event.

(C) For steam-assisted, air-assisted, and non-assisted flares, the start date, start time, and duration for periods of time that the flare tip velocity exceeds the maximum flare tip velocity determined using the methods in § 63.670(d)(2) of subpart CC and the maximum 15-minute block average flare tip velocity in ft/sec recorded during the event.

(D) Results of the root cause and corrective actions analysis completed during the reporting period, including the corrective actions implemented during the reporting period and, if applicable, the implementation schedule for planned corrective actions to be implemented subsequent to the reporting period.

(v) For pressure-assisted multi-point flares, the periods of time when the pressure monitor(s) on the main flare header show the burners operating outside the range of the manufacturer's specifications. Indicate the date and start and end times for each period.

(vi) For pressure-assisted multi-point flares, the periods of time when the staging valve position indicator monitoring system indicates a stage should not be in operation and is or when a stage should be in operation and is not. Indicate the date and start and end times for each period.

(12) For bypass lines subject to the requirements § 63.2450(e)(6), the compliance report must include the start date, start time, duration in hours, estimate of the volume of gas in standard cubic feet, the concentration of organic HAP in the gas in parts per million by volume and the resulting mass emissions of organic HAP in pounds that bypass a control device. For periods when the flow indicator is not operating, report the start date, start time, and duration in hours.

(13) For each nonregenerative adsorber and regenerative adsorber that is regenerated offsite subject to the

requirements in § 63.2450(e)(7), you must report each instance when breakthrough, as defined in § 63.2550(i), is detected between the first and second adsorber and the adsorber is not replaced according to § 63.2450(e)(7)(iii)(A).

(14) For any maintenance vent release exceeding the applicable limits in § 63.2455(d)(1), the compliance report must include the information specified in paragraphs (e)(14)(i) through (iv) of this section. For the purposes of this reporting requirement, if you comply with § 63.2455(d)(1)(iv) then you must report each venting event conducted under those provisions and include an explanation for each event as to why utilization of this alternative was required.

(i) Identification of the maintenance vent and the equipment served by the maintenance vent.

(ii) The date and time the maintenance vent was opened to the atmosphere.

(iii) The lower explosive limit in percent, vessel pressure in psig, or mass in pounds of VOC in the equipment, as applicable, at the start of atmospheric venting. If the 5 psig vessel pressure option in § 63.2455(d)(1)(ii) was used and active purging was initiated while the lower explosive limit was 10 percent or greater, also include the lower explosive limit of the vapors at the time active purging was initiated.

(iv) An estimate of the mass in pounds of organic HAP released during the entire atmospheric venting event.

(15) Compliance reports for pressure relief devices subject to the requirements § 63.2480(e) must include the information specified in paragraphs (e)(15)(i) through (iii) of this section.

(i) For pressure relief devices in organic HAP gas or vapor service, pursuant to § 63.2480(e)(2)(i), report the dates for all instrument readings of 500 ppmv or greater.

(ii) For pressure relief devices in organic HAP gas or vapor service subject to § 63.2480(e)(2)(ii), report the dates of instrument monitoring conducted.

(iii) For pressure relief devices in organic HAP service subject to § 63.2480(e)(2)(iii), report each pressure release to the atmosphere, including the start date, start time, and duration of the pressure release and estimate of the mass quantity in pounds of each organic HAP released; the results of any root cause analysis and corrective action analysis completed during the reporting period, including the corrective actions implemented during the reporting period; and, if applicable, the implementation schedule for planned corrective actions to be implemented subsequent to the reporting period.

(16) For each heat exchange system, beginning no later than the compliance dates specified in 63.2445(g), the reporting requirements of § 63.104(f)(2) no longer apply; instead, the compliance report must include the information specified in paragraphs (e)(16)(i) through (v) of this section.

(i) The number of heat exchange systems at the plant site subject to the monitoring requirements in § 63.2490(d).

(ii) The number of heat exchange systems at the plant site found to be leaking.

(iii) For each monitoring location where the total strippable hydrocarbon concentration was determined to be equal to or greater than the applicable leak definitions specified in § 63.2490(d)(1)(v), identification of the monitoring location (*e.g.,* unique monitoring location or heat exchange system ID number), the measured total strippable hydrocarbon concentration in ppmv as methane, the date the leak was first identified, and, if applicable, the date the source of the leak was identified;

(iv) For leaks that were repaired during the reporting period (including delayed repairs), identification of the monitoring location associated with the repaired leak, the total strippable hydrocarbon concentration in ppmv as methane measured during re-monitoring to verify repair, and the re-monitoring date (*i.e.,* the effective date of repair); and

(v) For each delayed repair, identification of the monitoring location associated with the leak for which repair is delayed, the date when the delay of repair began, the date the repair is expected to be completed (if the leak is not repaired during the reporting period), the total strippable hydrocarbon concentration in ppmv as methane and date of each monitoring event conducted on the delayed repair during the reporting period, and an estimate in pounds of the potential strippable hydrocarbon emissions over the reporting period associated with the delayed repair.

(17) For process vents and storage tanks in ethylene oxide service subject to the requirements of § 63.2493, the compliance report must include:

(i) The periods specified in § 63.2525(s)(4). Indicate the date and start and end times for each period.

(ii) If you obtain an instrument reading greater than 500 ppmv of a leak when monitoring a pressure vessel in accordance with § 63.2493(c)(2), submit a copy of the records specified in § 63.2525(s)(5)(ii).

(iii) Reports for equipment subject to the requirements of § 63.2493 as specified in paragraph (e)(9) of this section.

(f) *Performance test reports.* Beginning no later than [date 60 days after date of publication of final rule in the **Federal Register**], you must submit performance test reports in accordance with this paragraph. Within 60 days after the date of completing each performance test required by this subpart, you must submit the results of the performance test following the procedures specified in paragraphs (f)(1) through (3) of this section.

(1) *Data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert) at the time of the test.* Submit the results of the performance test to the EPA via CEDRI, which can be accessed through the EPA's CDX (*https://cdx.epa.gov/*). The data must be submitted in a file format generated through the use of the EPA's ERT. Alternatively, you may submit an electronic file consistent with the extensible markup language (XML) schema listed on the EPA's ERT website.

(2) *Data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test.* The results of the performance test must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3) *Confidential business information (CBI).* If you claim some of the information submitted under paragraphs (f)(1) and (2) of this section is CBI, you must submit a complete file, including information claimed to be CBI, to the EPA. The file must be generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, CORE CBI Office, U.S. EPA Mailroom (C404–02), Attention: Group Leader, Measurement Policy Group, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must

be submitted to the EPA via the EPA's CDX as described in paragraph (f)(1) and (2) of this section.

(g) *Performance evaluation reports.* Beginning no later than [date 60 days after date of publication of final rule in the **Federal Register**], you must start submitting performance evaluation reports in accordance with this paragraph. Within 60 days after the date of completing each continuous monitoring system performance evaluation (as defined in § 63.2), you must submit the results of the performance evaluation following the procedures specified in paragraphs (g)(1) through (3) of this section.

(1) *Performance evaluations of CMS measuring relative accuracy test audit (RATA) pollutants that are supported by the EPA's ERT as listed on the EPA's ERT website at the time of the evaluation.* Submit the results of the performance evaluation to the EPA via CEDRI, which can be accessed through the EPA's CDX. The data must be submitted in a file format generated through the use of the EPA's ERT. Alternatively, you may submit an electronic file consistent with the XML schema listed on the EPA's ERT website.

(2) *Performance evaluations of CMS measuring RATA pollutants that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the evaluation.* The results of the performance evaluation must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3) *Confidential business information (CBI).* If you claim some of the information submitted under paragraphs (g)(1) and (2) of this section is CBI, you must submit a complete file, including information claimed to be CBI, to the EPA. The file must be generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, CORE CBI Office, U.S. EPA Mailroom (C404–02), Attention: Group Leader, Measurement Policy Group, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described in paragraphs (g)(1) and (2) of this section.

(h) *Claims of EPA system outage.* If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with the reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (h)(1) through (7) of this section.

(1) You must have been or will be precluded from accessing CEDRI and submitting a required report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(2) The outage must have occurred within the period of time beginning five business days prior to the date that the submission is due.

(3) The outage may be planned or unplanned.

(4) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(5) You must provide to the Administrator a written description identifying:

(i) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to EPA system outage;

(iii) Measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(6) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(7) In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved.

(i) *Claims of force majeure.* If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of force majeure for failure to timely comply with the reporting requirement. To assert a claim of force majeure, you must meet the requirements outlined in paragraphs (i)(1) through (5) of this section.

(1) You may submit a claim if a force majeure event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this paragraph, a force majeure event is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (*e.g.,* hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (*e.g.,* large scale power outage).

(2) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(3) You must provide to the Administrator:

(i) A written description of the force majeure event;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to the force majeure event;

(iii) Measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(4) The decision to accept the claim of force majeure and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(5) In any circumstance, the reporting must occur as soon as possible after the force majeure event occurs.

■ 21. Section 63.2525 is amended by revising the introductory text and paragraphs (a), (e)(1)(ii), (f), (h), and (j), and adding paragraphs (l) through (u) to read as follows:

§ 63.2525 What records must I keep?

You must keep the records specified in paragraphs (a) through (t) of this section.

(a) Except as specified in § 63.2450(e)(4), § 63.2480(f), § 63.2485(p) and (q), and paragraph (t) of this section, each applicable record required by subpart A of this part 63 and in referenced subparts F, G, SS, UU, WW, and GGG of this part 63 and in referenced subpart F of 40 CFR part 65.

* * * * *

(e) * * *

(1) * * *

(ii) You control the Group 2 batch process vents using a flare that meets the requirements of §§ 63.987 or 63.2450(e)(5), as applicable.

* * * * *

(f) A record of each time a safety device is opened to avoid unsafe conditions in accordance with § 63.2450(p).

* * * * *

(h) Except as specified in paragraph (l) of this section, for each CEMS, you must keep records of the date and time that each deviation started and stopped, and whether the deviation occurred during a period of startup, shutdown, or malfunction or during another period.

* * * * *

(j) In the SSMP required by § 63.6(e)(3), you are not required to include Group 2 emission points, unless those emission points are used in an emissions average. For equipment leaks, the SSMP requirement is limited to control devices and is optional for other equipment. On and after [date 3 years after date of publication of final rule in the **Federal Register**], this paragraph no longer applies.

* * * * *

(l) Beginning no later than the compliance dates specified in § 63.2445(g), paragraph (h) of this section no longer applies. Instead, for each deviation from an emission limit, operating limit, or work practice standard, you must keep a record of the information specified in paragraph (l)(1) through (3) of this section. The records shall be maintained as specified in § 63.10(b)(1).

(1) In the event that an affected unit does not meet an applicable standard, record the number of deviations. For each deviation record the date, time and duration of each deviation.

(2) For each deviation from an applicable standard, record and retain a list of the affected sources or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit and a description of the method used to estimate the emissions.

(3) Record actions taken to minimize emissions in accordance with § 63.2450(u) and any corrective actions taken to return the affected unit to its normal or usual manner of operation.

(m) For each flare subject to the requirements in § 63.2450(e)(5), you must keep records specified in paragraphs (m)(1) through (15) of this section in lieu of the information required in § 63.998(a)(1) of subpart SS.

(1) Retain records of the output of the monitoring device used to detect the presence of a pilot flame as required in § 63.670(b) of subpart CC and § 63.2450(e)(5)(vii)(D) for a minimum of 2 years. Retain records of each 15-minute block during which there was at least one minute that no pilot flame is present when regulated material is routed to a flare for a minimum of 5 years. For a pressure-assisted multi-point flare that uses cross-lighting, retain records of each 15-minute block during which there was at least one minute that no pilot flame is present on each stage when regulated material is routed to a flare for a minimum of 5 years.

(2) Retain records of daily visible emissions observations or video surveillance images required in § 63.670(h) of subpart CC as specified in paragraphs (m)(2)(i) through (iv) of this section, as applicable, for a minimum of 3 years.

(i) To determine when visible emissions observations are required, the record must identify all periods when regulated material is vented to the flare.

(ii) If visible emissions observations are performed using Method 22 at 40 CFR part 60, appendix A–7, then the record must identify whether the visible emissions observation was performed, the results of each observation, total duration of observed visible emissions, and whether it was a 5-minute or 2-hour observation. Record the date and start time of each visible emissions observation.

(iii) If a video surveillance camera is used, then the record must include all video surveillance images recorded, with time and date stamps.

(iv) For each 2 hour period for which visible emissions are observed for more than 5 minutes in 2 consecutive hours, then the record must include the date and start and end time of the 2 hour period and an estimate of the cumulative number of minutes in the 2 hour period for which emissions were visible.

(3) The 15-minute block average cumulative flows for flare vent gas and, if applicable, total steam, perimeter assist air, and premix assist air specified to be monitored under § 63.670(i) of subpart CC, along with the date and time interval for the 15-minute block. If multiple monitoring locations are used to determine cumulative vent gas flow, total steam, perimeter assist air, and premix assist air, then retain records of the 15-minute block average flows for each monitoring location for a minimum of 2 years, and retain the 15-minute block average cumulative flows that are used in subsequent calculations for a minimum of 5 years. If pressure and temperature monitoring is used, then retain records of the 15-minute block average temperature, pressure, and molecular weight of the flare vent gas or assist gas stream for each measurement location used to determine the 15-minute block average cumulative flows for a minimum of 2 years, and retain the 15-minute block average cumulative flows that are used in subsequent calculations for a minimum of 5 years.

(4) The flare vent gas compositions specified to be monitored under § 63.670(j) of subpart CC. Retain records of individual component concentrations from each compositional analysis for a minimum of 2 years. If an NHVvg analyzer is used, retain records of the 15-minute block average values for a minimum of 5 years.

(5) Each 15-minute block average operating parameter calculated following the methods specified in § 63.670(k) through (n) of subpart CC, as applicable.

(6) All periods during which operating values are outside of the applicable operating limits specified in § 63.670(d) through (f) of subpart CC and § 63.2450(e)(5)(vii) when regulated material is being routed to the flare.

(7) All periods during which you do not perform flare monitoring according to the procedures in § 63.670(g) through (j) of subpart CC.

(8) For pressure-assisted multi-point flares, if a stage of burners on the flare uses cross-lighting, then a record of any changes made to the distance between burners.

(9) For pressure-assisted multi-point flares, all periods when the pressure monitor(s) on the main flare header show burners are operating outside the range of the manufacturer's specifications. Indicate the date and time for each period, the pressure measurement, the stage(s) and number of burners affected, and the range of manufacturer's specifications.

(10) For pressure-assisted multi-point flares, all periods when the staging valve position indicator monitoring system indicates a stage of the pressure-assisted multi-point flare should not be in operation and when a stage of the pressure-assisted multi-point flare should be in operation and is not. Indicate the date and time for each period, whether the stage was supposed to be open, but was closed or vice versa, and the stage(s) and number of burners affected.

(11) Records of periods when there is flow of vent gas to the flare, but when there is no flow of regulated material to the flare, including the start and stop time and dates of periods of no regulated material flow.

(12) Records when the flow of vent gas exceeds the smokeless capacity of the flare, including start and stop time and dates of the flaring event.

(13) Records of the root cause analysis and corrective action analysis conducted as required in § 63.670(o)(3) of subpart CC, including an

identification of the affected flare, the date and duration of the event, a statement noting whether the event resulted from the same root cause(s) identified in a previous analysis and either a description of the recommended corrective action(s) or an explanation of why corrective action is not necessary under § 63.670(o)(5)(i) of subpart CC.

(14) For any corrective action analysis for which implementation of corrective actions are required in § 63.670(o)(5) of subpart CC, a description of the corrective action(s) completed within the first 45 days following the discharge and, for action(s) not already completed, a schedule for implementation, including proposed commencement and completion dates.

(15) Records described in § 63.10(b)(2)(vi) and (xi).

(n) For each flow event from a bypass line subject to the requirements in § 63.2450(e)(6), you must maintain records sufficient to determine whether or not the detected flow included flow requiring control. For each flow event from a bypass line requiring control that is released either directly to the atmosphere or to a control device not meeting the requirements specified in Tables 1 through 7 to this subpart, you must include an estimate of the volume of gas, the concentration of organic HAP in the gas and the resulting emissions of organic HAP that bypassed the control device using process knowledge and engineering estimates.

(o) For each nonregenerative adsorber and regenerative adsorber that is regenerated offsite subject to the requirements in § 63.2450(e)(7), you must keep the applicable records specified in (o)(1) through (4) of this section.

(1) Outlet HAP or TOC concentration for each adsorber bed measured during each performance test conducted.

(2) Daily outlet HAP or TOC concentration.

(3) Date and time you last replaced the adsorbent.

(4) If you conduct monitoring less frequently than daily as specified in 63.2450(e)(7)(iii)(B), you must record the average life of the bed.

(p) For each maintenance vent opening subject to the requirements in § 63.2455(d), you must keep the applicable records specified in (p)(1) through (5) of this section.

(1) You must maintain standard site procedures used to deinventory equipment for safety purposes (*e.g.,* hot work or vessel entry procedures) to document the procedures used to meet the requirements in § 63.2455(d). The current copy of the procedures must be retained and available on-site at all times. Previous versions of the standard site procedures, as applicable, must be retained for five years.

(2) If complying with the requirements of § 63.2455(d))(1)(i) and the lower explosive limit at the time of the vessel opening exceeds 10 percent, identification of the maintenance vent, the process units or equipment associated with the maintenance vent, the date of maintenance vent opening, and the lower explosive limit at the time of the vessel opening.

(3) If complying with the requirements of § 63.2455(d)(1)(ii) and either the vessel pressure at the time of the vessel opening exceeds 5 psig or the lower explosive limit at the time of the active purging was initiated exceeds 10 percent, identification of the maintenance vent, the process units or equipment associated with the maintenance vent, the date of maintenance vent opening, the pressure of the vessel or equipment at the time of discharge to the atmosphere and, if applicable, the lower explosive limit of the vapors in the equipment when active purging was initiated.

(4) If complying with the requirements of § 63.2455(d)(1)(iii), records used to estimate the total quantity of VOC in the equipment and the type and size limits of equipment that contain less than 50 pounds of VOC at the time of maintenance vent opening. For each maintenance vent opening for which the deinventory procedures specified in paragraph (p)(1) of this section are not followed or for which the equipment opened exceeds the type and size limits established in the records specified in this paragraph, identification of the maintenance vent, the process units or equipment associated with the maintenance vent, the date of maintenance vent opening, and records used to estimate the total quantity of VOC in the equipment at the time the maintenance vent was opened to the atmosphere.

(5) If complying with the requirements of § 63.2455(d)(1)(iv), identification of the maintenance vent, the process units or equipment associated with the maintenance vent, records documenting actions taken to comply with other applicable alternatives and why utilization of this alternative was required, the date of maintenance vent opening, the equipment pressure and lower explosive limit of the vapors in the equipment at the time of discharge, an indication of whether active purging was performed and the pressure of the equipment during the installation or removal of the blind if active purging was used, the duration the maintenance vent was open during the blind installation or removal process, and records used to estimate the total quantity of VOC in the equipment at the time the maintenance vent was opened to the atmosphere for each applicable maintenance vent opening.

(q) For each pressure relief device subject to the pressure release management work practice standards in § 63.2480(e), you must keep the records specified in paragraphs (q)(1) through (3) of this section.

(1) Records of the prevention measures implemented as required in § 63.2480(e)(3)(ii).

(2) Records of the number of releases during each calendar year and the number of those releases for which the root cause was determined to be a force majeure event. Keep these records for the current calendar year and the past five calendar years.

(3) For each release to the atmosphere, you must keep the records specified in paragraphs (q)(3)(i) through (iv) of this section.

(i) The start and end time and date of each pressure release to the atmosphere.

(ii) Records of any data, assumptions, and calculations used to estimate of the mass quantity of each organic HAP released during the event.

(iii) Records of the root cause analysis and corrective action analysis conducted as required in § 63.2480(e)(3)(iii), including an identification of the affected facility, a statement noting whether the event resulted from the same root cause(s) identified in a previous analysis and either a description of the recommended corrective action(s) or an explanation of why corrective action is not necessary under § 63.2480(e)(7)(i).

(iv) For any corrective action analysis for which implementation of corrective actions are required in § 63.2480(e)(7), a description of the corrective action(s) completed within the first 45 days following the discharge and, for action(s) not already completed, a schedule for implementation, including proposed commencement and completion dates.

(r) For each heat exchange system, beginning no later than the compliance dates specified in 63.2445(g), the recordkeeping requirements of § 63.104(f)(1) no longer apply; instead, you must keep records in paragraphs (r)(1) through (4) of this section.

(1) Monitoring data required by § 63.2490(d) that indicate a leak, the date the leak was detected, or, if applicable, the basis for determining there is no leak.

(2) The dates of efforts to repair leaks.

(3) The method or procedures used to confirm repair of a leak and the date the repair was confirmed.

(4) Documentation of delay of repair as specified in paragraphs (r)(4)(i) through (iv) of this section.

(i) The reason(s) for delaying repair.

(ii) A schedule for completing the repair as soon as practical.

(iii) The date and concentration of the leak as first identified and the results of all subsequent monitoring events during the delay of repair.

(iv) An estimate of the potential strippable hydrocarbon emissions from the leaking heat exchange system or heat exchanger for each required delay of repair monitoring interval following the procedures in paragraphs (r)(4)(iv)(A) through (D) of this section.

(A) Determine the leak concentration as specified in § 63.2490(d) and convert the stripping gas leak concentration (in ppmv as methane) to an equivalent liquid concentration, in parts per million by weight (ppmw), using equation 7–1 from ''Air Stripping Method (Modified El Paso Method) for Determination of Volatile Organic Compound Emissions from Water Sources'' Revision Number One, dated January 2003, Sampling Procedures Manual, appendix P: Cooling Tower Monitoring, prepared by Texas Commission on Environmental Quality, January 31, 2003 (incorporated by reference—see § 63.14) and the molecular weight of 16 grams per mole (g/mol) for methane.

(B) Determine the mass flow rate of the cooling water at the monitoring location where the leak was detected. If the monitoring location is an individual cooling tower riser, determine the total cooling water mass flow rate to the cooling tower. Cooling water mass flow rates may be determined using direct measurement, pump curves, heat balance calculations, or other engineering methods. Volumetric flow measurements may be used and converted to mass flow rates using the density of water at the specific monitoring location temperature or using the default density of water at 25 degrees Celsius, which is 997 kilograms per cubic meter or 8.32 pounds per gallon.

(C) For delay of repair monitoring intervals prior to repair of the leak, calculate the potential strippable hydrocarbon emissions for the leaking heat exchange system or heat exchanger for the monitoring interval by multiplying the leak concentration in the cooling water, ppmw, determined in (r)(4)(iv)(A) of this section, by the mass flow rate of the cooling water determined in (r)(4)(iv)(B) of this section and by the duration of the delay of repair monitoring interval. The duration of the delay of repair monitoring interval is the time period starting at midnight on the day of the previous monitoring event or at midnight on the day the repair would have had to be completed if the repair had not been delayed, whichever is later, and ending at midnight of the day the of the current monitoring event.

(D) For delay of repair monitoring intervals ending with a repaired leak, calculate the potential strippable hydrocarbon emissions for the leaking heat exchange system or heat exchanger for the final delay of repair monitoring interval by multiplying the duration of the final delay of repair monitoring interval by the leak concentration and cooling water flow rates determined for the last monitoring event prior to the re-monitoring event used to verify the leak was repaired. The duration of the final delay of repair monitoring interval is the time period starting at midnight of the day of the last monitoring event prior to re-monitoring to verify the leak was repaired and ending at the time of the re-monitoring event that verified that the leak was repaired.

(s) For process vents and storage tanks in ethylene oxide service subject to the requirements of § 63.2493, you must keep the records specified in paragraphs (s)(1) through (5) of this section in addition to those records specified in paragraph (a) of this section. Records for equipment in ethylene oxide service subject to the requirements of § 63.2493 are specified in paragraph (a) of this section.

(1) For process vents, include all uncontrolled, undiluted ethylene oxide concentration measurements, and the calculations you used to determine the total uncontrolled, undiluted ethylene oxide mass emission rate for the sum of all vent gas streams.

(2) For storage tanks, records of the concentration of ethylene oxide of the fluid stored in each storage tank.

(3) For equipment, records of the percent ethylene oxide content of the process fluid and the method used to determine it, and records identifying the location of each leakless pump and valve in operation.

(4) If you vent emissions through a closed-vent system to a non-flare control device, then you must keep records of all periods during which operating values are outside of the applicable operating limits specified in § 63.2493(b)(4) through (6) when regulated material is being routed to the non-flare control device. The record must specify the operating parameter, the applicable limit, and the highest (for maximum operating limits) or lowest (for minimum operating limits) value recorded during the period.

(5) For pressure vessels subject to § 63.2493(c), records as specified in paragraphs (s)(5)(i) through (iv) of this section.

(i) The date of each performance test conducted according to § 63.2493(c)(2).

(ii) The instrument reading of each performance test conducted according to § 63.2493(c)(2), including the following:

(A) Date each defect was detected.

(B) Date of the next performance test that shows the instrument reading is less than 500 ppmv.

(C) Start and end dates of each period after the date in paragraph (s)(5)(ii)(A) of this section when the pressure vessel was completely empty.

(D) Estimated emissions from each defect.

(t) Any records required to be maintained by this part that are submitted electronically via the EPA's CEDRI may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated air agency or the EPA as part of an on-site compliance evaluation.

(u) Beginning no later than the compliance dates specified in § 63.2445(g), the referenced provisions specified in paragraphs (u)(1) through (8) of this section do not apply when demonstrating compliance with paragraph (a) of this section.

(1) § 63.103(c)(2)(i) of subpart F.

(2) § 63.103(c)(2)(ii) of subpart F.

(3) The phrase ''start-up, shutdown and malfunction and'' from § 63.103(c)(3) of subpart F.

(4) The phrase ''other than startups, shutdowns, or malfunctions (*e.g.,* a temperature reading of −200 °C on a boiler),'' from § 63.152(g)(1)(i) of subpart G.

(5) The phrase ''other than a startup, shutdown, or malfunction'' from § 63.152(g)(1)(ii)(C) of subpart G.

(6) The phrase ''other than startups, shutdowns, or malfunctions'' from § 63.152(g)(1)(iii) of subpart G.

(7) The phrase ''other than a startup, shutdown, or malfunction'' from § 63.152(g)(2)(iii) of subpart G.

(8) § 63.152(g)(2)(iv)(A) of subpart G.

■ 22. Section 63.2535 is amended by revising the introductory text and paragraph (d) and adding paragraph (m) to read as follows:

§ 63.2535 What compliance options do I have if part of my plant is subject to both this subpart and another subpart?

For any equipment, emission stream, or wastewater stream not subject to §§ 63.2445(g), 63.2450(e)(5) or 63.2493 but subject to other provisions of both this subpart and another rule, you may elect to comply only with the provisions as specified in paragraphs (a) through (l) of this section. You also must identify the subject equipment, emission stream, or wastewater stream, and the provisions with which you will comply, in your notification of compliance status report required by § 63.2520(d).

* * * * *

(d) Compliance with subpart I, GGG, or MMM of this part 63. After the compliance dates specified in § 63.2445, if you have an affected source with equipment subject to subpart I, GGG, or MMM of this part 63, you may elect to comply with the provisions of subpart H, GGG, or MMM of this part 63, respectively, for all such equipment, except the affirmative defense requirements in subparts GGG and MMM no longer apply.

* * * * *

(m) Overlap of subpart FFFF with other regulations for flares. Beginning no later than the compliance dates specified in § 63.2445(g), flares that control ethylene oxide emissions or are used to control emissions from processes that produce olefins and polyolefins, subject to the provisions of 40 CFR 60.18 or 63.11, and used as a control device for an emission point subject to the emission limits and work practice standards in tables 1 through 7 to this subpart are required to comply only with the provisions specified in § 63.2450(e)(5). At any time before the compliance dates specified in § 63.2445(g), flares that are subject to the provisions of 40 CFR 60.18 or 63.11 and elect to comply with the requirements in § 63.2450(e)(5) are required to comply only with the provisions specified in this subpart.

■ 23. Section 63.2545 is amended by revising paragraph (b) introductory text and adding paragraph (b)(5) to read as follows:

§ 63.2545 Who implements and enforces this subpart?

* * * * *

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or tribal agency under 40 CFR part 63, subpart E, the authorities contained in paragraphs (b)(1) through (5) of this section are retained by the Administrator of U.S. EPA and are not delegated to the State, local, or tribal agency.

* * * * *

(5) Approval of an alternative to any electronic reporting to the EPA required by this subpart.

■ 24. In § 63.2550 amend paragraph (i) by:

■ a. Revising paragraph (4) in the definition of ''Batch process vent'';

■ b. Adding, in alphabetical order, new definitions for ''Bench-scale process'' and ''Breakthrough'';

■ c. Adding paragraphs (8) and (9) in the definition of ''Continuous process vent'';

■ d. Revising paragraph (3) in the definition of ''Deviation'';

■ e. Adding, in alphabetical order, definitions for ''Force majeure'', ''Heat exchange system'', ''In ethylene oxide service'', ''Leakless pump'', ''Leakless valve'', ''Loading rack'';

■ f. Revising paragraph (6) in the definition of ''Miscellaneous organic chemical manufacturing process''; and

■ g. Adding definitions, in alphabetical order, for ''Pressure release'', ''Pressure relief device'', ''Pressure vessel'', and ''Relief valve''.

The revisions and additions read as follows:

§ 63.2550 What definitions apply to this subpart?

* * * * *

(i) * * *

Batch process vent * * *

(4) Gaseous streams routed to a fuel gas system(s) unless on and after [date 3 years after date of publication of final rule in the **Federal Register**], the fuel gas system(s) supplies a flare of which 50 percent or more of the fuel gas burned in the flare is derived from an MCPU that has processes and/or equipment in ethylene oxide service, or produces olefins or polyolefins;

* * * * *

Bench-scale process means a process (other than a research and development facility) that is operated on a small scale, such as one capable of being located on a laboratory bench top. This bench-scale equipment will typically include reagent feed vessels, a small reactor and associated product separator, recovery and holding equipment. These processes are only capable of producing small quantities of product.

* * * * *

Breakthrough means the time when the level of HAP or TOC detected is at the highest concentration allowed to be discharged from an adsorber system.

* * * * *

Continuous process vent * * *

(8) On and after [date 3 years after date of publication of final rule in the **Federal Register**], § 63.107(h)(3) applies unless the fuel gas system supplies a flare of which 50 percent or more of the fuel gas burned in the flare is derived from an MCPU that has processes and/or equipment in ethylene oxide service, or produces olefins or polyolefins.

(9) On and after [date 3 years after date of publication of final rule in the **Federal Register**], § 63.107(i) no longer applies. Instead, a process vent is the point of discharge to the atmosphere (or the point of entry into a control device, if any) of a gas stream if the gas stream meets the criteria specified in this paragraph. The gas stream would meet the characteristics specified in § 63.107(b) through (g) of this section, but, for purposes of avoiding applicability, has been deliberately interrupted, temporarily liquefied, routed through any item of equipment for no process purpose, or disposed of in a flare that does not meet the criteria in § 63.11(b) or § 63.2450(e)(5) as applicable, or an incinerator that does not reduce emissions of organic HAP by 98 percent or to a concentration of 20 parts per million by volume, whichever is less stringent.

* * * * *

Deviation * * *

(3) Before [date 3 years after date of publication of final rule in the **Federal Register**], fails to meet any emission limit, operating limit, or work practice standard in this subpart during startup, shutdown, or malfunction, regardless of whether or not such failure is permitted by this subpart. On and after [date 3 years after date of publication of final rule in the **Federal Register**], this paragraph no longer applies.

* * * * *

Force majeure event means a release of HAP, either directly to the atmosphere from a pressure relief device or discharged via a flare, that is demonstrated to the satisfaction of the Administrator to result from an event beyond the owner or operator's control, such as natural disasters; acts of war or terrorism; loss of a utility external to the MCPU (*e.g.,* external power curtailment), excluding power curtailment due to an interruptible service agreement; and fire or explosion originating at a near or adjoining facility outside of the miscellaneous organic chemical manufacturing process unit that impacts the miscellaneous organic chemical manufacturing process unit's ability to operate.

* * * * *

Heat exchange system means a device or collection of devices used to transfer heat from process fluids to water without intentional direct contact of the process fluid with the water (*i.e.,* non-contact heat exchanger) and to transport and/or cool the water in a closed-loop recirculation system (cooling tower system) or a once-through system (*e.g.,* river or pond water). For closed-loop recirculation systems, the heat exchange system consists of a cooling tower, all miscellaneous organic chemical manufacturing process unit heat exchangers that are in organic HAP service, as defined in this subpart, serviced by that cooling tower, and all water lines to and from these miscellaneous organic chemical manufacturing process unit heat exchangers. For once-through systems, the heat exchange system consists of all heat exchangers that are in organic HAP service, as defined in this subpart, servicing an individual miscellaneous organic chemical manufacturing process unit and all water lines to and from these heat exchangers. Sample coolers or pump seal coolers are not considered heat exchangers for the purpose of this definition and are not part of the heat exchange system. Intentional direct contact with process fluids results in the formation of a wastewater.

* * * * *

In ethylene oxide service means the following:

(1) For equipment leaks, any equipment that contains or contacts a fluid (liquid or gas) that is at least 0.1 percent by weight of ethylene oxide. If information exists that suggests ethylene oxide could be present in equipment, the equipment is considered to be ''in ethylene oxide service'' unless sampling and analysis is performed as specified in § 63.2492 to demonstrate that the equipment does not meet the definition of being ''in ethylene oxide service''. Examples of information that could suggest ethylene oxide could be present in equipment, include calculations based on safety data sheets, material balances, process stoichiometry, or previous test results provided the results are still relevant to the current operating conditions.

(2) For process vents, each batch and continuous process vent in a process that, when uncontrolled, contains a concentration of greater than or equal to 1 ppmv undiluted ethylene oxide anywhere in the process, and when combined, the sum of all these process vents would emit uncontrolled, undiluted ethylene oxide emissions greater than or equal to 5 lb/yr (2.27 kg/yr). If information exists that suggests ethylene oxide could be present in a batch or continuous process vent, then the batch or continuous process vent is considered to be ''in ethylene oxide service'' unless an analysis is performed as specified in § 63.2492 to demonstrate that the batch or continuous process vent does not meet the definition of being ''in ethylene oxide service''. Examples of information that could suggest ethylene oxide could be present in a batch or continuous process vent, include calculations based on safety data sheets, material balances, process stoichiometry, or previous test results provided the results are still relevant to the current operating conditions.

(3) For storage tanks, storage tanks of any capacity and vapor pressure storing a liquid with a concentration of ethylene oxide greater than or equal to 1 ppmw. If knowledge exists that suggests ethylene oxide could be present in a storage tank, then the storage tank is considered to be ''in ethylene oxide service'' unless sampling and analysis is performed as specified in § 63.2492 to demonstrate that the storage tank does not meet the definition of being ''in ethylene oxide service''. The exemptions for ''vessels storing organic liquids that contain HAP only as impurities'' and ''pressure vessels designed to operate in excess of 204.9 kilopascals and without emissions to the atmosphere'' listed in the definition of ''storage tank'' in this section do not apply for storage tanks that may be in ethylene oxide service. Examples of information that could suggest ethylene oxide could be present in a storage tank, include calculations based on safety data sheets, material balances, process stoichiometry, or previous test results provided the results are still relevant to the current operating conditions.

* * * * *

Leakless pump means a pump that has no externally actuated shaft penetrating the pump housing, and as such, is designed to operate with no instrument readings above the background concentration level, as demonstrated using Method 21 of 40 CFR part 60, appendix A–7. Examples of leakless pumps include diaphragm pumps, magnetically-driven pumps, and canned motor pumps. A pump equipped with a dual mechanical seal system that includes a barrier fluid system with a higher pressure than the process is also considered a leakless pump.

Leakless valve means a valve that has no external actuating mechanism in contact with the process fluid, and as such, is designed to operate with no instrument readings above the background concentration level, as demonstrated using Method 21 of 40 CFR part 60, appendix A–7. Examples of leakless valves include bellows valves which are gate or globe valves that use a cylindrical metal bellows to hermetically seal the valve against stem leakage.

Loading rack means a single system used to fill tank trucks and railcars at a single geographic site. Loading equipment and operations that are physically separate (*i.e.,* do not share common piping, valves, and other equipment) are considered to be separate loading racks.

* * * * *

Miscellaneous organic chemical manufacturing process * * *

(6) The end of a process that produces a solid material is either up to and including the dryer or extruder, or for a polymer production process without a dryer or extruder, it is up to and including the die plate or solid-state reactor, except in two cases. If the dryer, extruder, die plate, or solid-state reactor is followed by an operation that is designed and operated to remove HAP solvent or residual HAP monomer from the solid, then the solvent removal operation is the last step in the process. If the dried solid is diluted or mixed with a HAP-based solvent, then the solvent removal operation is the last step in the process.

* * * * *

Pressure release means the emission of materials resulting from the system pressure being greater than the set pressure of the pressure relief device. This release can be one release or a series of releases over a short time period.

Pressure relief device means a valve, rupture disk, or similar device used only to release an unplanned, nonroutine discharge of gas from process equipment in order to avoid safety hazards or equipment damage. A pressure relief device discharge can result from an operator error, a malfunction such as a power failure or equipment failure, or other unexpected cause. Such devices include conventional, spring-actuated relief valves, balanced bellows relief valves, pilot-operated relief valves, rupture disks, and breaking, buckling, or shearing pin devices.

Pressure vessel means a storage vessel that is used to store liquids or gases and is designed not to vent to the atmosphere as a result of compression of the vapor headspace in the pressure vessel during filling of the pressure vessel to its design capacity.

* * * * *

Relief valve means a type of pressure relief device that is designed to re-close after the pressure relief.

* * * * *

■ 25. Table 1 to subpart FFFF of part 63 is revised to read as follows:

TABLE 1 TO SUBPART FFFF OF PART 63—EMISSION LIMITS AND WORK PRACTICE STANDARDS FOR CONTINUOUS PROCESS VENTS

[As required in § 63.2455, you must meet each emission limit and work practice standard in the following table that applies to your continuous process vents]

For each . . .	For which . . .	Then you must . . .
1. Group 1 continuous process vent	a. Not applicable	i. Reduce emissions of total organic HAP by ≥98 percent by weight or to an outlet process concentration ≤20 ppmv as organic HAP or TOC by venting emissions through a closed-vent system to any combination of control devices (except a flare); or ii. Reduce emissions of total organic HAP by venting emissions through a closed vent system to a flare; or iii. Use a recovery device to maintain the TRE above 1.9 for an existing source or above 5.0 for a new source.
2. Halogenated Group 1 continuous process vent stream.	a. You use a combustion control device to control organic HAP emissions.	i. Use a halogen reduction device after the combustion device to reduce emissions of hydrogen halide and halogen HAP by ≥99 percent by weight, or to ≤0.45 kg/hr, or to ≤20 ppmv; or ii. Use a halogen reduction device before the combustion device to reduce the halogen atom mass emission rate to ≤0.45 kg/hr or to a concentration ≤20 ppmv.
3. Group 2 continuous process vent at an existing source.	You use a recovery device to maintain the TRE level >1.9 but ≤5.0.	Comply with the requirements in § 63.2450(e)(4) and the requirements in § 63.993 and the requirements referenced therein.
4. Group 2 continuous process vent at a new source.	You use a recovery device to maintain the TRE level >5.0 but ≤8.0.	Comply with the requirements in § 63.2450(e)(4) and the requirements in § 63.993 and the requirements referenced therein.
5. Continuous process vent	Beginning no later than the compliance dates specified in § 63.2445(i), the continuous process vent contains ethylene oxide such that it is considered to be in ethylene oxide service as defined in § 63.2550.	Comply with the applicable emission limits specified in items 1 through 4 of this Table, and also: i. Reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a flare; or ii. Reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a control device that reduces ethylene oxide by ≥99.9 percent by weight, or to a concentration <1 ppmv for each process vent or to <5 pounds per year for all combined process vents.

■ 26. Table 2 to subpart FFFF of part 63 is amended by adding a new entry 3 to read as follows:

TABLE 2 TO SUBPART FFFF OF PART 63—EMISSION LIMITS AND WORK PRACTICE STANDARDS FOR BATCH PROCESS VENTS

[As required in § 63.2460, you must meet each emission limit and work practice standard in the following table that applies to your batch process vents]

For each . . .	Then you must . . .	And you must . . .
1. Process with Group 1 batch process vents ...	a. Reduce collective uncontrolled organic HAP emissions from the sum of all batch process vents within the process by ≥98 percent by weight by venting emissions from a sufficient number of the vents through one or more closed-vent systems to any combination of control devices (except a flare); or	Not applicable.
	b. Reduce collective uncontrolled organic HAP emissions from the sum of all batch process vents within the process by ≥95 percent by weight by venting emissions from a sufficient number of the vents through one or more closed-vent systems to any combination of recovery devices or a biofilter, except you may elect to comply with the requirements of subpart WW of this part for any process tank; or	Not applicable.
	c. Reduce uncontrolled organic HAP emissions from one or more batch process vents within the process by venting through a closed-vent system to a flare or by venting through one or more closed-vent systems to any combination of control devices (excluding a flare) that reduce organic HAP to an outlet concentration ≤20 ppmv as TOC or total organic HAP.	For all other batch process vents within the process, reduce collective organic HAP emissions as specified in item 1.a and/or item 1.b of this table.
2. Halogenated Group 1 batch process vent for which you use a combustion device to control organic HAP emissions.	a. Use a halogen reduction device after the combustion control device; or	i. Reduce overall emissions of hydrogen halide and halogen HAP by ≥99 percent; or ii. Reduce overall emissions of hydrogen halide and halogen HAP to ≤0.45 kg/hr; or iii. Reduce overall emissions of hydrogen halide and halogen HAP to a concentration ≤20 ppmv.
	b. Use a halogen reduction device before the combustion control device.	Reduce the halogen atom mass emission rate to ≤0.45 kg/hr or to a concentration ≤20 ppmv.
3. Batch process vent that contains ethylene oxide such that it is considered to be in ethylene oxide service as defined in § 63.2550.	Beginning no later than the compliance dates specified in § 63.2445(i), comply with the applicable emission limits specified in items 1 and 2 of this Table, and also: i. Reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a flare; or ii. Reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a control device that reduces ethylene oxide by ≥99.9 percent by weight, or to a concentration <1 ppmv for each process vent or to <5 pounds per year for all combined process vents.	Not applicable.

■ 27. Table 4 to subpart FFFF of part 63 is revised to read as follows:

TABLE 4 TO SUBPART FFFF OF PART 63—EMISSION LIMITS FOR STORAGE TANKS

[As required in § 63.2470, you must meet each emission limit in the following table that applies to your storage tanks]

For each . . .	For which . . .	Then you must . . .
1. Group 1 storage tank	a. The maximum true vapor pressure of total HAP at the storage temperature is ≥76.6 kilopascals.	i. Reduce total HAP emissions by ≥95 percent by weight or to ≤20 ppmv of TOC or organic HAP and ≤20 ppmv of hydrogen halide and halogen HAP by venting emissions through a closed vent system to any combination of control devices (excluding a flare); or ii. Reduce total organic HAP emissions by venting emissions through a closed vent system to a flare; or iii. Comply with the requirements in § 63.2450(e)(4), as applicable; and reduce total HAP emissions by venting emissions to a fuel gas system or process in accordance with § 63.982(d) and the requirements referenced therein.[a]
	b. The maximum true vapor pressure of total HAP at the storage temperature is <76.6 kilopascals.	i. Comply with the requirements of subpart WW of this part, except as specified in § 63.2470; or ii. Reduce total HAP emissions by ≥95 percent by weight or to ≤20 ppmv of TOC or organic HAP and ≤20 ppmv of hydrogen halide and halogen HAP by venting emissions through a closed vent system to any combination of control devices (excluding a flare); or iii. Reduce total organic HAP emissions by venting emissions through a closed vent system to a flare; or iv. Comply with the requirements in § 63.2450(e)(4), as applicable; and reduce total HAP emissions by venting emissions to a fuel gas system or process in accordance with § 63.982(d) and the requirements referenced therein.[a]
2. Halogenated vent stream from a Group 1 storage tank.	You use a combustion control device to control organic HAP emissions.	Meet one of the emission limit options specified in Item 2.a.i or ii. in Table 1 to this subpart.
3. Storage tank of any capacity and vapor pressure.	Beginning no later than the compliance dates specified in § 63.2445(i), the stored liquid contains ethylene oxide such that the storage tank is considered to be in ethylene oxide service as defined in § 63.2550.	Comply with the applicable emission limits specified in items 1 and 2 of this Table, and also: i. Reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a flare; or ii. Reduce emissions of ethylene oxide by venting emissions through a closed-vent system to a control device that reduces ethylene oxide by ≥99.9 percent by weight, or to a concentration <1 ppmv for each storage tank vent.

[a] Beginning no later than the compliance dates specified in § 63.2445(g), any flare using fuel gas from a fuel gas system, of which 50 percent or more of the fuel gas is derived from an MCPU that has processes and/or equipment in ethylene oxide service or that produces olefins or polyolefins, must be in compliance with § 63.2450(e)(5).

■ 28. Table 5 to subpart FFFF of part 63 is revised to read as follows:

TABLE 5 TO SUBPART FFFF OF PART 63—EMISSION LIMITS AND WORK PRACTICE STANDARDS FOR TRANSFER RACKS

[As required in § 63.2475, you must meet each emission limit and work practice standard in the following table that applies to your transfer racks]

For each . . .	You must . . .
1. Group 1 transfer rack	a. Reduce emissions of total organic HAP by ≥98 percent by weight or to an outlet concentration ≤20 ppmv as organic HAP or TOC by venting emissions through a closed-vent system to any combination of control devices (except a flare); or b. Reduce emissions of total organic HAP by venting emissions through a closed-vent system to a flare; or

TABLE 5 TO SUBPART FFFF OF PART 63—EMISSION LIMITS AND WORK PRACTICE STANDARDS FOR TRANSFER RACKS—Continued

[As required in § 63.2475, you must meet each emission limit and work practice standard in the following table that applies to your transfer racks]

For each . . .	You must . . .
	c. Comply with the requirements in § 63.2450(e)(4), as applicable; and reduce emissions of total organic HAP by venting emissions to a fuel gas system or process in accordance with § 63.982(d) and the requirements referenced therein; [a] or d. Use a vapor balancing system designed and operated to collect organic HAP vapors displaced from tank trucks and railcars during loading and route the collected HAP vapors to the storage tank from which the liquid being loaded originated or to another storage tank connected by a common header.
2. Halogenated Group 1 transfer rack vent stream for which you use a combustion device to control organic HAP emissions.	a. Use a halogen reduction device after the combustion device to reduce emissions of hydrogen halide and halogen HAP by ≥99 percent by weight, to ≤0.45 kg/hr, or to ≤20 ppmv; or b. Use a halogen reduction device before the combustion device to reduce the halogen atom mass emission rate to ≤0.45 kg/hr or to a concentration ≤20 ppmv.

[a] Beginning no later than the compliance dates specified in § 63.2445(g), any flare using fuel gas from a fuel gas system, of which 50 percent or more of the fuel gas is derived from an MCPU that has processes and/or equipment in ethylene oxide service or that produces olefins or polyolefins, must be in compliance with § 63.2450(e)(5).

■ 29. Table 6 to subpart FFFF of part 63 is revised to read as follows:

TABLE 6 TO SUBPART FFFF OF PART 63—REQUIREMENTS FOR EQUIPMENT LEAKS

[As required in § 63.2480, you must meet each requirement in the following table that applies to your equipment leaks]

For all . . .	And that is part of . . .	You must . . .
1. Equipment that is in organic HAP service	a. Any MCPU	i. Comply with the requirements of subpart UU of this part 63 and the requirements referenced therein, except as specified in § 63.2480(b), and (d) through (f); or ii. Comply with the requirements of subpart H of this part 63 and the requirements referenced therein, except as specified in § 63.2480(b), and (d) through (f); or iii. Comply with the requirements of 40 CFR part 65, subpart F and the requirements referenced therein, except as specified in § 63.2480(c), and (d) through (f).
2. Equipment that is in organic HAP service at a new source.	a. Any MCPU	i. Comply with the requirements of subpart UU of this part 63 and the requirements referenced therein, except as specified in § 63.2480(b)(6), (b)(7), (e), and (f); or ii. Comply with the requirements of 40 CFR part 65, subpart F, except as specified in § 63.2480(c)(10), (c)(11), (e), and (f).
3. Equipment that is in ethylene oxide service as defined in § 63.2550.	a. Any MCPU	i. Beginning no later than the compliance dates specified in § 63.2445(i), comply with the requirements of subpart UU of this part 63 and the requirements referenced therein, except as specified in § 63.2493(d) and (e); or ii. Beginning no later than the compliance dates specified in § 63.2445(i), comply with the requirements of subpart H of this part 63 and the requirements referenced therein, except as specified in § 63.2493(d) and (e); iii. Beginning no later than the compliance dates specified in § 63.2445(i), comply with the requirements of 40 CFR part 65, subpart F and the requirements referenced therein, except as specified in § 63.2493(d) and (e).

■ 30. Table 10 to subpart FFFF of part 63 is revised to read as follows:

TABLE 10 TO SUBPART FFFF OF PART 63—WORK PRACTICE STANDARDS FOR HEAT EXCHANGE SYSTEMS

[As required in § 63.2490, you must meet each requirement in the following table that applies to your heat exchange systems]

For each . . .	You must . . .
Heat exchange system, as defined in § 63.101	a. Comply with the requirements of § 63.104 and the requirements referenced therein, except as specified in § 63.2490(b) and (c); or b. Comply with the requirements in § 63.2490(d).

■ 31. Table 12 to subpart FFFF of part 63 is revised to read as follows:

TABLE 12 TO SUBPART FFFF OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART FFFF

[As specified in § 63.2540, the parts of the General Provisions that apply to you are shown in the following table]

Citation	Subject	Explanation
§ 63.1	Applicability	Yes.
§ 63.2	Definitions	Yes.
§ 63.3	Units and Abbreviations	Yes.
§ 63.4	Prohibited Activities	Yes.
§ 63.5	Construction/Reconstruction	Yes.
§ 63.6(a)	Applicability	Yes.
§ 63.6(b)(1)–(4)	Compliance Dates for New and Reconstructed sources.	Yes.
§ 63.6(b)(5)	Notification	Yes.
§ 63.6(b) (6)	[Reserved]	
§ 63.6(b)(7)	Compliance Dates for New and Reconstructed Area Sources That Become Major.	Yes.
§ 63.6(c)(1)–(2)	Compliance Dates for Existing Sources.	Yes.
§ 63.6(c)(3)–(4)	[Reserved]	
§ 63.6(c)(5)	Compliance Dates for Existing Area Sources That Become Major.	Yes.
§ 63.6(d)	[Reserved]	
§ 63.6(e)(1)(i)	Operation & Maintenance	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**]. See § 63.2450(u) for general duty requirement.
§ 63.6(e)(1)(ii)	Operation & Maintenance	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.6(e)(1)(iii)	Operation & Maintenance	Yes.
§ 63.6(e)(2)	[Reserved]	
§ 63.6(e)(3)(i), (ii), and (v) through (viii).	Startup, Shutdown, Malfunction Plan (SSMP).	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**], except information regarding Group 2 emission points and equipment leaks is not required in the SSMP, as specified in § 63.2525(j). No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.6(e)(3)(iii) and (iv)	Recordkeeping and Reporting During SSM.	No, see § 63.2525 for recordkeeping requirements and § 63.2520(e)(4) for reporting requirements.
§ 63.6(e)(3)(ix)	SSMP incorporation into title V permit.	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.6(f)(1)	Compliance Except During SSM	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.6(f)(2)–(3)	Methods for Determining Compliance.	Yes.
§ 63.6(g)(1)–(3)	Alternative Standard	Yes.
§ 63.6(h)(1)	Compliance with Opacity/VE Standards.	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.6(h)(2)–(9)	Opacity/Visible Emission (VE) Standards.	Only for flares for which Method 22 observations are required as part of a flare compliance assessment.
§ 63.6(i)(1)–(14)	Compliance Extension	Yes.
§ 63.6(j)	Presidential Compliance Exemption.	Yes.

TABLE 12 TO SUBPART FFFF OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART FFFF—Continued

[As specified in § 63.2540, the parts of the General Provisions that apply to you are shown in the following table]

Citation	Subject	Explanation
§ 63.7(a)(1)–(2)	Performance Test Dates	Yes, except substitute 150 days for 180 days.
§ 63.7(a)(3)	Section 114 Authority	Yes, and this paragraph also applies to flare compliance assessments as specified under § 63.997(b)(2).
§ 63.7(b)(1)	Notification of Performance Test	Yes.
§ 63.7(b)(2)	Notification of Rescheduling	Yes.
§ 63.7(c)	Quality Assurance/Test Plan	Yes, except the test plan must be submitted with the notification of the performance test if the control device controls batch process vents.
§ 63.7(d)	Testing Facilities	Yes.
§ 63.7(e)(1)	Conditions for Conducting Performance Tests.	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**] except that performance tests for batch process vents must be conducted under worst-case conditions as specified in § 63.2460. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**]. See § 63.2450(g)(6).
§ 63.7(e)(2)	Conditions for Conducting Performance Tests.	Yes.
§ 63.7(e)(3)	Test Run Duration	Yes.
§ 63.7(e)(4)	Administrator's Authority to Require Testing.	Yes.
§ 63.7(f)	Alternative Test Method	Yes.
§ 63.7(g)	Performance Test Data Analysis	Yes, except this subpart specifies how and when the performance test and performance evaluation results are reported.
§ 63.7(h)	Waiver of Tests	Yes.
§ 63.8(a)(1)	Applicability of Monitoring Requirements.	Yes.
§ 63.8(a)(2)	Performance Specifications	Yes.
§ 63.8(a)(3)	[Reserved]	
§ 63.8(a)(4)	Monitoring with Flares	Yes, except for flares subject to § 63.2450(e)(5).
§ 63.8(b)(1)	Monitoring	Yes.
§ 63.8(b)(2)–(3)	Multiple Effluents and Multiple Monitoring Systems.	Yes.
§ 63.8(c)(1)	Monitoring System Operation and Maintenance.	Yes.
§ 63.8(c)(1)(i)	Routine and Predictable SSM	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.8(c)(1)(ii)	SSM not in SSMP	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.8(c)(1)(iii)	Compliance with Operation and Maintenance Requirements.	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.8(c)(2)–(3)	Monitoring System Installation	Yes.
§ 63.8(c)(4)	CMS Requirements	Only for CEMS. Requirements for CPMS are specified in referenced subparts G and SS of part 63. Requirements for COMS do not apply because subpart FFFF does not require continuous opacity monitoring systems (COMS).
§ 63.8(c)(4)(i)	COMS Measurement and Recording Frequency.	No; subpart FFFF does not require COMS.
§ 63.8(c)(4)(ii)	CEMS Measurement and Recording Frequency.	Yes.
§ 63.8(c)(5)	COMS Minimum Procedures	No. Subpart FFFF does not contain opacity or VE limits.
§ 63.8(c)(6)	CMS Requirements	Only for CEMS; requirements for CPMS are specified in referenced subparts G and SS of this part 63. Requirements for COMS do not apply because subpart FFFF does not require COMS.
§ 63.8(c)(7)–(8)	CMS Requirements	Only for CEMS. Requirements for CPMS are specified in referenced subparts G and SS of part 63. Requirements for COMS do not apply because subpart FFFF does not require COMS.
§ 63.8(d)(1)	CMS Quality Control	Only for CEMS.
§ 63.8(d)(2)	CMS Quality Control	Only for CEMS.
§ 63.8(d)(3)	CMS Quality Control	Yes, only for CEMS before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**]. See § 63.2450(j)(6).
§ 63.8(e)	CMS Performance Evaluation	Only for CEMS, except this subpart specifies how and when the performance evaluation results are reported. Section 63.8(e)(5)(ii) does not apply because subpart FFFF does not require COMS.
§ 63.8(f)(1)–(5)	Alternative Monitoring Method	Yes, except you may also request approval using the precompliance report.

TABLE 12 TO SUBPART FFFF OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART FFFF—Continued

[As specified in § 63.2540, the parts of the General Provisions that apply to you are shown in the following table]

Citation	Subject	Explanation
§ 63.8(f)(6)	Alternative to Relative Accuracy Test.	Only applicable when using CEMS to demonstrate compliance, including the alternative standard in § 63.2505.
§ 63.8(g)(1)–(4)	Data Reduction	Only when using CEMS, including for the alternative standard in § 63.2505, except that the requirements for COMS do not apply because subpart FFFF has no opacity or VE limits, and § 63.8(g)(2) does not apply because data reduction requirements for CEMS are specified in § 63.2450(j).
§ 63.8(g)(5)	Data Reduction	No. Requirements for CEMS are specified in § 63.2450(j). Requirements for CPMS are specified in referenced subparts G and SS of this part 63.
§ 63.9(a)	Notification Requirements	Yes.
§ 63.9(b)(1)–(5)	Initial Notifications	Yes.
§ 63.9(c)	Request for Compliance Extension	Yes.
§ 63.9(d)	Notification of Special Compliance Requirements for New Source.	Yes.
§ 63.9(e)	Notification of Performance Test	Yes.
§ 63.9(f)	Notification of VE/Opacity Test	No.
§ 63.9(g)	Additional Notifications When Using CMS.	Only for CEMS. Section 63.9(g)(2) does not apply because subpart FFFF does not require COMS.
§ 63.9(h)(1)–(6)	Notification of Compliance Status	Yes, except 63.9(h)(2)(i)(A) through (G) and (ii) do not apply because 63.2520(d) specifies the required contents and due date of the notification of compliance status report.
§ 63.9(i)	Adjustment of Submittal Deadlines	Yes.
§ 63.9(j)	Change in Previous Information	No, § 63.2520(e) specifies reporting requirements for process changes.
§ 63.10(a)	Recordkeeping/Reporting	Yes.
§ 63.10(b)(1)	Recordkeeping/Reporting	Yes.
§ 63.10(b)(2)(i)	Records related to SS	No, see §§ 63.2450(e) and 63.2525 for recordkeeping requirements.
§ 63.10(b)(2)(ii)	Recordkeeping relevant to SSM periods and CMS.	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**]. See §§ 63.2525(h) and 63.2525(l).
§ 63.10(b)(2)(iii)	Records related to maintenance of air pollution control equipment.	Yes.
§ 63.10(b)(2)(iv)	Recordkeeping relevant to SSM periods and CMS.	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.10(b)(2)(v)	Recordkeeping relevant to SSM periods and CMS.	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.10(b)(2)(vi), (x), and (xi)	CMS Records	Only for CEMS; requirements for CPMS are specified in referenced subparts G and SS of this part 63.
§ 63.10(b)(2) (vii)–(ix)	Records	Yes.
§ 63.10(b)(2)(xii)	Records	Yes.
§ 63.10(b)(2)(xiii)	Records	Only for CEMS.
§ 63.10(b)(2)(xiv)	Records	Yes.
§ 63.10(b)(3)	Records	Yes.
§ 63.10(c)(1)–(6),(9)–(14)	Records	Only for CEMS. Recordkeeping requirements for CPMS are specified in referenced subparts G and SS of this part 63.
§ 63.10(c)(7)–(8)	Records	No. Recordkeeping requirements are specified in § 63.2525.
§ 63.10(c)(15)	Records	Yes, before [date 3 years after date of publication of final rule in the **Federal Register**], but only for CEMS. No, beginning on and after [date 3 years after date of publication of final rule in the **Federal Register**].
§ 63.10(d)(1)	General Reporting Requirements	Yes.
§ 63.10(d)(2)	Report of Performance Test Results.	Yes, before [date 60 days after date of publication of final rule in the **Federal Register**]. No, beginning on and after [date 60 days after date of publication of final rule in the **Federal Register**].
§ 63.10(d)(3)	Reporting Opacity or VE Observations.	No.
§ 63.10(d)(4)	Progress Reports	Yes.
§ 63.10(d)(5)(i)	Periodic Startup, Shutdown, and Malfunction Reports.	No, § 63.2520(e)(4) and (5) specify the SSM reporting requirements.
§ 63.10(d)(5)(ii)	Immediate SSM Reports	No.
§ 63.10(e)(1)	Additional CEMS Reports	Yes.
§ 63.10(e)(2)(i)	Additional CMS Reports	Only for CEMS, except this subpart specifies how and when the performance evaluation results are reported.
§ 63.10(e)(2)(ii)	Additional COMS Reports	No. Subpart FFFF does not require COMS.
§ 63.10(e)(3)	Reports	No. Reporting requirements are specified in § 63.2520.
§ 63.10(e)(3)(i)–(iii)	Reports	No. Reporting requirements are specified in § 63.2520.
§ 63.10(e)(3)(iv)–(v)	Excess Emissions Reports	No. Reporting requirements are specified in § 63.2520.

TABLE 12 TO SUBPART FFFF OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART FFFF—Continued

[As specified in § 63.2540, the parts of the General Provisions that apply to you are shown in the following table]

Citation	Subject	Explanation
§ 63.10(e)(3)(iv)–(v)	Excess Emissions Reports	No. Reporting requirements are specified in § 63.2520.
§ 63.10(e)(3)(vi)–(viii)	Excess Emissions Report and Summary Report.	No. Reporting requirements are specified in § 63.2520.
§ 63.10(e)(4)	Reporting COMS data	No.
§ 63.10(f)	Waiver for Recordkeeping/Reporting.	Yes.
§ 63.11	Control device requirements for flares and work practice requirements for equipment leaks.	Yes, except for flares subject to § 63.2450(e)(5).
§ 63.12	Delegation	Yes.
§ 63.13	Addresses	Yes.
§ 63.14	Incorporation by Reference	Yes.
§ 63.15	Availability of Information	Yes.

[FR Doc. 2019–24573 Filed 12–16–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL REGISTER

Vol. 84 Tuesday,

No. 242 December 17, 2019

Part IV

Department of Agriculture

Commodity Credit Corporation

7 CFR Part 1466

Environmental Quality Incentives Program; Final Rule

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1466

[Docket ID NRCS–2019–0009]

RIN 0578–AA68

Environmental Quality Incentives Program

AGENCY: Natural Resources Conservation Service (NRCS) and the Commodity Credit Corporation (CCC), United States Department of Agriculture.

ACTION: Interim rule.

SUMMARY: The Agriculture Improvement Act of 2018 (the 2018 Farm Bill) made changes to the Environmental Quality Incentives Program (EQIP). This interim rule makes conforming changes to EQIP policies and procedures in the regulations. NRCS has responsibility for administering EQIP using funding, facilities, and authorities of the CCC. EQIP helps agricultural producers conserve and enhance soil, water, air, plants, animals (including wildlife), energy, and related natural resources on their land. Eligible lands include cropland, grassland, rangeland, pasture, wetlands, nonindustrial private forest land, and other agricultural land on which agricultural or forest-related products or livestock are produced and natural resource concerns may be addressed. Participation in the program is voluntary.

DATES:

Effective: December 17, 2019.

Comment date: Submit comments on or before February 17, 2020.

Comment date for Environmental Review: Submit comments on the draft Environmental Analysis (EA) and Finding of No Significant Impact (FONSI) on or before 16, 2020.

ADDRESSES: We invite you to submit comments on this document. In your comments, include the date, volume, and page number of this issue of the **Federal Register**, and the title of this document. You may submit comments by the following method:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and search for Docket ID NRCS–2019–0009. Follow the online instructions for submitting comments.

All written comments received will be publicly available on *www.regulations.gov.*

A copy of the draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) may be obtained from either of the following websites: *www.regulations.gov* or *https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/?cid=nrcseprd1504015.* A hard copy may also be requested in one of the following ways:

- *Via mail: karen.fullen@usda.gov* with ''Request for EA'' in the subject line; or
- *A written request:* Karen Fullen, Environmental Compliance Specialist, Natural Resources Conservation Service, 9173 W Barnes Dr., Suite C, Boise, ID 83709.

FOR FURTHER INFORMATION CONTACT: Donna Hopwood; phone: (202) 720–0675; or email: *donna.hopwood@usda.gov.* Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Background

The Agriculture Improvement Act of 2018 (2018 Farm Bill) has reauthorized and amended EQIP. EQIP is implemented under the general supervision and direction of the Chief of the Natural Resources Conservation Service (NRCS).

The information below demonstrates how NRCS provides technical and financial assistance to producers through EQIP to—

- Change tillage practices to enhance soil resources by sustaining tilth, moisture control, nutrients, and overall soil health;
- Replace or improve the management of irrigation systems to conserve scarce water resources. EQIP is also used to manage nutrient applications to protect water quality;
- Manage grazing to sustain plant biodiversity and protect rare species and to assure adequate forage is available, thus helping to maintain watershed heath and enhance water quality;
- Apply energy efficient practices that reduce energy consumption (*e.g.,* reduced tillage conserves fuel, energy efficient lighting);
- Implement conservation practices that sequester carbon or capture methane emissions and greenhouse gases which contribute to climate change;
- Implement conservation practices specific to producers' resource needs, from over 160 available conservation practices, to sustain and improve the health of natural resources on the land and provide public benefits;
- Implement conservation practices in a manner that promotes agricultural production, forest management, and environmental quality as compatible goals;
- Optimize conservation benefits; and
- Help agricultural producers meet Federal, State, and local environmental requirements.

Conservation benefits are reflected in the differences between effects of treatment in comparison to existing or benchmark conditions. Differences may be expressed by reduced nutrients, improved water quality, and reduced soil erosion based upon scientific, quantitative, visual, or other means. NRCS assesses resource conditions through scientifically developed assessment tools and guides that may use client input, planner observation, procedural and deductive methods, and predictive methods. These assessment tools and guides include, but are not limited to, soil erosion prediction tools, wildlife habitat assessment tools, rangeland health assessments, and soil health assessments.

Estimated or projected impacts are used as a basis for applicants to make informed conservation decisions and to help NRCS determine which projects to approve for EQIP assistance.

EQIP was first authorized in 1996, with an initial allocation of $130 million. Since then, through fiscal year (FY) 2018, NRCS has entered into hundreds of thousands of contracts and provided over $15 billion in financial assistance to help agricultural producers apply conservation practices. The agency has evaluated 22 years of program implementation and has assessed opportunities to improve program administration. The changes in this rule are the results of this evaluation and the statutory changes authorized by the 2018 Farm Bill.

NRCS uses a competitive process to achieve the greatest conservation benefits in coordination with EQIP statutory priorities. NRCS establishes National, State, and local priorities and uses scientifically-based ranking tools to assess and rank applications, against these priorities to determine which applications are to be funded. NRCS in the National Office establishes national priorities, and States must incorporate these national priorities along with State and local priorities into the ranking tool used at the State level. These priorities are established with recommendations by State technical committees, priorities identified in State, regional, or national plans and initiatives, and from reports of at-risk wildlife species and designations of threatened or endangered species. NRCS also utilizes funding pools to target EQIP funding to priority resource concerns, such as for the development of wildlife habitat or for water quality issues associated with animal feeding operations.

Each application submitted for consideration in a given funding pool is ranked using scientifically-based assessment evaluation criteria and tools which provide a relative score that reflects the expected conservation benefit of the proposed project. State Conservationists have the authority to prioritize applications for ranking, which results in only the highest priority applications being ranked and considered for funding. Applications are accepted from producers on a continuous basis; however, NRCS announces funding cutoff deadlines where all ranked applications within a funding pool are considered for funding based upon the ranking scores and availability of funds. Nearly all funding pools are established each fiscal year to ensure environmentally and economically effective distribution of funding through a process of fair and open competition that addresses priority resource concerns.

Each fiscal year, State Conservationists:

- Publish program priorities;
- Allocate available funds to State funding pools;
- Publish associated ranking criteria to State program websites available at: *http://www.nrcs.usda.gov/wps/portal/nrcs/sitenav/national/states/;* and
- Allocate funds to each application pool and adjust funding between pools to address shortages or to redistribute surplus funds, if needed. Statutory allocation levels, such as the requirement to provide at least 50 percent of the funding for livestock and 10 percent of the funding for wildlife, are met as national goals through funding pool opportunities established by State Conservationists.

The statutory changes made by the 2018 Farm Bill include, but are not limited to—

- Expanding the EQIP purpose to include new or expected resource concerns, adapting to, and mitigating against, increasing weather volatility, and addressing drought resiliency measures;
- Changing advance payments from ‘‘not more than’’ to ‘‘at least 50 percent’’ of all costs related to purchasing materials or contracting with a requirement for producers to be notified at the time of enrollment of the advance payment option with respect to each practice that has such costs, and that the producer's decision be documented;
- Adding a new provision for increased payments for high-priority practices, which provides the State Conservationist the option to designate up to 10 practices to be eligible for increased payments, not to exceed 90 percent of the costs associated with planning, design, materials, equipment, installation, labor, management, maintenance, or training;
- Decreasing the livestock funding minimum from 60 percent to 50 percent for FY 2019 through 2023;
- Increasing the wildlife funding minimum from 5 percent to 10 percent for FY 2019 through 2023;
- Providing a maximum term of 10 years for contracts entered into solely for the establishment of wildlife management practices;
- Authorizing certain entities (including a State, irrigation district, groundwater management district, acequia, land-grant mercedes, or similar entity) which are not producers to be eligible to enter into an EQIP contract for implementation of water conservation or irrigation efficiency practices, and, authorizing the Secretary of Agriculture to waive the adjusted gross income (AGI) and EQIP payment limitations for those contracts. If a waiver is authorized, the Secretary may establish a separate payment limitation for the contract to which the waiver applies;
- Introducing new EQIP Incentive Contracts, which can address up to three priority resource concerns for each of the relevant land uses within State-identified watersheds or other areas of high priority;
- Encouraging streamlined and coordinated procedures between EQIP and Conservation Stewardship Program (CSP), including applications, contracting, conservation planning, conservation practices, and related administrative procedures;
- Authorizing funding for EQIP at:
  - $1,750 million for FY 2019
  - $1,750 million for FY 2020
  - $1,800 million for FY 2021
  - $1,850 million for FY 2022
  - $2,025 million for FY 2023

USDA Farm Bill Listening Session

The Farm Production and Conservation (FPAC) Mission Area hosted a listening session on February 26, 2019, to obtain initial input on 2018 Farm Bill implementation. USDA sought public input regarding changes to programs implemented by the Farm Service Agency, the Risk Management Agency (RMA), and NRCS. NRCS considered stakeholder input when making discretionary decisions regarding program implementation. In addition to encouraging oral testimony, FPAC also encouraged submission of written comments and the comments received have been made available on *http://www.regulations.gov.*

NRCS received 35 comments regarding the need to evaluate the impact of water conservation and irrigation efficiency projects on grasslands, fish and wildlife habitat, wetlands, and ground water recharge. Some comments recommended the prioritization of projects that improve agricultural water delivery, limit the expansion of irrigated land, and ensure more water conservation. Others pushed for watershed-wide projects, oversight mechanisms to track fund spending and outcomes, and implementation of an effective project rating system. A few requested additional funding for Western producers who are facing water challenges.

NRCS received 26 comments that underscored the importance of State wildlife funding pools to ensure that EQIP funds are used for species and habitats identified as priorities in State, regional, and national wildlife plans. Some recommended the immediate implementation of the 10-percent-funding increase and using the funds to consider wildlife coexistence practices. Others advocated longer-term contracts, additional wildlife-specific technical assistance, landscape-scale project areas, and fund oversight tools, such as public annual reports.

NRCS received 11 comments on wildlife habitat contracts. The comments pushed for prioritizing longer-term wildlife contracts and ensuring that these contracts only fund practices designed to deliver wildlife habitat benefits. Others recommended working with third parties, such as nongovernmental organizations, to coordinate projects and promote short-term contracts to enhance program outcomes.

NRCS received 16 comments related to administration and program delivery. Many recommended streamlining the program application process, providing additional guidance and information on high priority resource concerns, rankings, and practices, and ensuring fair access for most producers to EQIP funds (*i.e.,* property of producers with heirs, Indian Tribes). Other comments urged stricter enforcement of EQIP statutory requirements, use of EQIP funds for oyster restoration, and prioritization of contracts that implement nutrient management and improve habitat and water resources.

Additionally, support for wildlife habitat projects received the majority of the comments related to the new conservation incentive contracts. NRCS received 11 comments supporting the identification of wildlife habitat as a priority resource concern and prioritizing practices related to grazing management and those that can deliver considerable environmental benefits. Others recommended mechanisms to coordinate resource concerns and to determine incentive practice eligibility and proper payment options.

NRCS received 11 comments that advocated for outreach and education for organic producers regarding the new EQIP payments for organic initiatives. Some recommended the development of a funding allocation similar to CSP and the consideration of existing organic management plans. Other comments emphasized additional payments during the transition period (from traditional to organic), helpful tools and resources showing how EQIP practices support organic agriculture, and strong support for smaller organic projects.

NRCS received nine comments mostly supporting the Soil Health Demonstration Trial for EQIP projects. Others called for better soil health planning standards, utilization of existing resources (*i.e.,* Soil Health Partnership and the Operational Tillage Information System), and evaluation tools to determine project rating, economic outcomes, and public benefits.

NRCS received seven comments focusing on increased payments for high-priority practices. Most comments underlined the inclusion of practices that address the goals of State wildlife action plans and other State and local plans involving watershed rehabilitation and drought management. Others recommended careful implementation of the increased payment provision to ensure adequate funding for other EQIP contracts.

NRCS received three comments that recommend ending funding support for the expansion of large livestock operations, and instead, focusing on grazing systems and practices that can benefit wildlife and water quality.

NRCS received three comments pushing for broader producer outreach and immediate implementation of the EQIP advanced payment option. These comments emphasized that outreach needs to include beginning, veteran, and socially disadvantaged producers.

Finally, NRCS received a comment that recommended using the new EQIP provision on precision conservation and agriculture for practice installment and annual payments.

NRCS evaluated the changes made by the 2018 Farm Bill and the comments received during the listening session and is hereby promulgating this interim rule to incorporate the 2018 Farm Bill changes to EQIP program administration. The interim rule adjusts the program regulations to correspond to new statutory language. It also includes changes to streamline program implementation and make the participant's contract responsibilities clearer and more transparent. NRCS is also removing definitions for terms that are not used in the regulation and making other editorial adjustments to improve readability.

Summary of Key Changes to EQIP Regulations

The regulation has long been organized into three subparts: (1) Subpart A—General Provisions, (2) Subpart B—Contracts, and (3) Subpart C—General Administration. To improve the readability and clarity of the regulations, NRCS has moved the provisions in § 1466.27, the section addressing administration of the Conservation Innovation Grants (CIG), to subpart C, and moved the sections related to General Administration to a new subpart E, with redesignation of sections appropriate to such a change. To incorporate regulations necessary to implement the new Incentive Contracts under EQIP, NRCS has added a new subpart D. Below is a summary of the changes made to each subpart based on the changes made to EQIP by the 2018 Farm Bill.

Changes to Sections in Subpart A—General Provisions

§ 1466.1 Applicability

Section 1466.1 sets forth the purpose, scope, and objectives of EQIP. Pursuant to changes made by § 2302 of the 2018 Farm Bill, the interim rule updates § 1466.1 to reiterate the updated statutory language. The interim rule also changes the effective date of this section to acknowledge that each EQIP contract is subject to the regulations that are in effect at the time the EQIP contract is enrolled. EQIP's fundamental purpose—assisting agricultural producers with implementing conservation practices to provide environmental benefits and to comply with or avoid environmental regulation—has been broadened to add specifically addressing new or expected resource concerns, adapting to and mitigating against increasing weather volatility, and drought resiliency measures.

§ 1466.2 Administration

Section 1466.2 describes the roles of NRCS, State technical committees, and local working groups. The 2018 Farm Bill amends how EQIP interacts with the Regional Conservation Partnership Program (RCPP) authorized by Subtitle I of Title XII of the Food Security Act of 1985 (known as the 1985 Farm Bill). The 2014 Farm Bill identified EQIP as a covered program under RCPP and authorized the Chief to waive nonstatutory, discretionary provisions and operational procedures under EQIP contracts where EQIP was being implemented through RCPP. However, since the 2018 Farm Bill no longer requires that RCPP be implemented through EQIP or the other covered programs, NRCS removed the regulatory language to this section that addressed EQIP implementation under RCPP. NRCS retains the authority for the Chief to waive nonstatutory, discretionary provisions where the application of that provision to a particular limited situation to be inappropriate and inconsistent with the purposes of the program.

§ 1466.3 Definitions

Section 1466.3 sets forth definitions for terms used throughout this regulation. NRCS is amending several definitions to conform to the 2018 Farm Bill amendments and to address other administrative matters. Specifically, this interim rule amends § 1466.3 by adding or modifying the following definitions:

- Animal feeding operation (AFO);
- Eligible land;
- Estimated income foregone;
- Forest management plan;
- High priority area;
- Incentive practice;
- Priority resource concern;
- Semi-public;
- Soil remediation;
- Soil testing; and
- Water management entity.

Given the overlap between the definition for the term ''eligible lands'' and ''agricultural lands,'' NRCS has removed the definition for ''agricultural lands'' to reduce confusion.

§ 1466.4 National Priorities

Section 1466.4 establishes a list of priorities, consistent with the statute, that describes the types of resource concerns that NRCS has determined to be the greatest opportunity for natural resource conservation. In addition, it allows for change and adaptation to this listing as new information comes to light. The 2018 Farm Bill added ''increased weather volatility'' as a specific resource concern, and this rulemaking incorporates that change. NRCS made other minor editorial changes to improve style and clarity.

§ 1466.5 Outreach Activities

Section 1466.5 generally establishes the basis for NRCS to market EQIP's resource conservation benefits and its subcomponents to producers so that they are aware of the program's potential to assist them with resource concerns on their operations. This section contains special outreach authorization for historically underserved producers. In addition to several minor stylistic edits to improve clarity, this rulemaking has added a paragraph specifically including messaging related to advance payments and subsequent election as examples of special outreach.

To help producers understand conservation opportunities, the 2018 Farm Bill requires that NRCS establish and maintain a publicly available conservation practice database that provides a compilation and analysis of effective conservation practices and a list of recommended new and effective conservation practices. The 2018 Farm Bill also requires the Secretary to identify available data sets within the Department of Agriculture regarding the use of conservation practices and the effect of such practices on farm and ranch profitability (including such effects relating to crop yields, soil health, and other risk-related factors). NRCS considers estimated economic impact in its conservation planning process, including in the development of conservation practice standards. Since producers must consider the potential estimated economic impact to their particular operation when choosing whether to voluntarily adopt conservation practices through EQIP, NRCS is taking this opportunity to request public comment on how NRCS can best assist producers to understand the potential estimated economic impact of conservation practice adoption to inform their program decisions.

§ 1466.6 Program Requirements

Section 1466.6 lays out the general scope of what EQIP is and does. It sets forth criteria for applicant eligibility, including that the applicant must have control of the land on which EQIP practices are to be implemented. The 2018 Farm Bill also expanded eligibility regarding with whom NRCS can enter into an EQIP contract. In particular, NRCS may enter into EQIP contracts with a State, irrigation district, groundwater management district, acequia, land grant–merced, or similar entity under a streamlined contracting process to implement water conservation or irrigation practices under a watershed-wide project that will effectively conserve water, provide fish and wildlife habitat, or provide for drought-related environmental mitigation, as determined by the Secretary. NRCS has defined these entities as ''water management entities.''

NRCS added provisions related to entering contracts with water management entities to implement water conservation or irrigation practices in certain circumstances.

NRCS introduced criteria for approving waivers and applying a different payment limitation to ensure the focus of EQIP assistance remains on practices that directly benefit producers with resource concerns on their operations. Additionally, the criteria help specify how this provision will be implemented, especially since water management entities can apply to RCPP as an eligible partner for irrigation-related infrastructure projects and that these types of projects are also eligible for assistance under the Watershed Protection and Flood Prevention Act.

Therefore, NRCS incorporated into this interim rule criteria for approving payment and AGI waivers, including the number of producers benefitted, whether the project is in conjunction with EQIP assistance being provided to identified producers who require the project in order for the overall project to be successful, and the establishment of a new payment limitation that ensures that such contracts address more site-specific concerns rather than systemic upgrade requirements. More particularly, NRCS has decided to limit these projects by authorizing a new payment limitation for contracts entered into by these specific entities at $900,000 between FY 2019 through FY 2023 if the projects qualify for a payment and AGI waiver. This new payment limitation for these entity-irrigation contracts is twice the payment limitation established for payments under contracts to individual producers.

Since the interim rule authorizes a waiver of the aggregate payment limitation for contracts with water management entities under this section, NRCS specifically requests comments on how this waiver should operate and whether the $900,000 payment limitation has been established at an appropriate level. NRCS believes that this new authority to enter into an EQIP contract directly with water management entities should not conflict or compete with other NRCS assistance opportunities. Additionally, related to identifying the situations where NRCS should provide assistance to these projects, NRCS specifically requests public comment about whether additional parameters are needed for identifying ''adjacent lands'' eligible for such projects.

Other changes were made to improve style and clarity.

§ 1466.7 EQIP Plan of Operations

This section describes the requirements of the EQIP plan of operations, which is a component of the EQIP contract. Section 1240E(a)(3) as amended by the 2018 Farm Bill inserted the term ''progressive'' to describe the implementation of a comprehensive nutrient management plan (CNMP). Therefore, NRCS amends the regulatory provisions to remove the requirement that a participant must have implemented a developed CNMP by the end of the contract but requires that any conservation practices in the EQIP plan of operation must be implemented consistent with a CNMP. Language regarding irrigation-related practices and water conservation was also slightly modified for clarity.

§ 1466.8 Conservation Practices

This section describes how NRCS determines eligible conservation practices. NRCS made several minor edits for clarity.

§ 1466.9 Technical Services Provided by Qualified Personnel Not Affiliated With USDA

This section describes the use of technical services providers (TSPs). NRCS incorporates use of the TSP acronym to this section.

Changes to Sections in Subpart B—Contracts

§ 1466.20 Application for Contracts and Selecting Applications

This section addresses how producer applications are submitted and selected for funding. NRCS makes several minor edits for clarity.

§ 1466.21 Contract Requirements

This section identifies elements contained within an EQIP contract and the responsibilities of the participant who is party to the EQIP contract. Also, it addresses EQIP contract funding limitations. To receive payment, an applicant must enter into an EQIP contract. The EQIP contract identifies all financially supported conservation practices to be implemented, their timing and sequence, and the operation and maintenance needed to maintain the conservation practice for its intended lifespan. NRCS amends CNMP language to include ''progressive'' implementation by removing the requirement that the CNMP must be implemented by the end of the contract and clarifies the timeline parameters for EQIP contract implementation and the consequences for not complying with those parameters. NRCS also incorporates language to waive the

$450,000 contract limitation and establish a $900,000 contract limitation for certain projects with joint operations, group projects, or contracts where NRCS has waived the payment limitation for a water management entity. NRCS also included language to specify that NRCS may decline an application for water conservation and irrigation efficiency projects with water management entities if that project would be better suited with another NRCS program.

§ 1466.22 Conservation Practice Operation and Maintenance (O&M)

This section addresses the participant's responsibility for conservation practice O&M. NRCS makes only slight grammatical corrections.

§ 1466.23 Payment Rates

This section addresses payment rates and payment eligibility. Section 1240B as amended by the 2018 Farm Bill authorized increased payment rates for certain high-priority practices. The 2018 Farm Bill also authorized increased payment rates for practices that address source water protection. NRCS incorporates these changes by adding a new paragraph authorizing such increased payments.

The 2018 Farm Bill revised section 1240B(d)(7) of the 1985 Farm Bill to authorize States to designate high priority practices that will be eligible for higher payment rates, subject to approval from the Secretary. NRCS at the State level will provide notice of the high priority practices for which a higher payment rate is available based on the criteria identified in section 1240B(d)(7).

§ 1466.24 EQIP Payments

This section provides direction on payment eligibility and payment limitations. Due to the change to § 1466.1 noted above, the language regarding date of contract was removed. As stated, any changes made to this section only affect future contracts. Removal of that language reduces wordiness and improves clarity. NRCS updated the payment limitations for organic production from annual limits to an aggregate limit from FY 2019 through FY 2023. NRCS modified the regulatory levels allowed for advance payments to account for changes made in Section 1240B(d)(4)(B) of the 1985 Farm Bill. NRCS made other organizational and editorial adjustments that did not affect the substance of the provisions.

§ 1466.25 Contract Modifications and Transfers of Contract Rights

This section sets forth the procedures for when and how an EQIP contract can be modified and sets out the process and consequences of a transfer of land during the term of an EQIP contract. NRCS made several stylistic and organizational changes to improve clarity. NRCS added a paragraph to clarify how NRCS will treat the implementation of conservation practices during any period in which a parcel has been transferred, but contract transfer has not yet been approved. These changes align EQIP transfer provisions more closely with similar CSP provisions.

§ 1466.26 Contract Violations and Terminations

This section sets forth the policies and procedures for contract termination when the participant violates the terms of an EQIP contract. NRCS clarified that certain violations may place a participant into suspension or debarment. NRCS will follow suspension and debarment requirements at 7 CFR part 1407, including providing any such participant due process prior to suspending or debarring the participant from future eligibility.

Changes to Sections in Subpart C—Conservation Innovation

Subpart C is revised by moving its provisions to a new subpart E and incorporating provisions addressing the Conservation Innovation Grants (CIG) administration at § 1466.27 as new sections under subpart C.

In addition to organizing the CIG provisions into several sections, this subpart addresses administration of the On-farm Conservation Innovation Trials (OFCIT), which includes the Soil Health Demonstration (SHD) Trial.

The CIG section (formerly 1466.27) has been reorganized into the following six sections, as set forth below.

§ 1466.30 Definitions

This section, the former § 1466.27(a), sets forth the definitions of terms to be used consistently throughout this subpart. The term ''EQIP eligible'' was removed from the definitions section as the term was not used anywhere else in the regulation.

§ 1466.31 Purpose and Scope

This section, the former § 1466.27(b), sets out the broad policy objectives and criteria for implementing CIG and its related components. NRCS has modified references to the use of online methods to award grants to clarify that there may be multiple competitions each fiscal year. NRCS made various changes to improve the section's structure and style without affecting its substance.

§ 1466.32 Conservation Innovation Grant Funding

This section, the former § 1466.27(c), sets out how CIG is funded and what payment limitations may apply. The set-aside of up to 10 percent of total CIG funds for historically underserved or veteran farmers or ranchers or community-based organizations has been moved here. NRCS incorporated other edits to improve clarity.

§ 1466.33 Conservation Innovation Grant Administration

This section, the former § 1466.27(d) through (f), provides the framework for how NRCS administers CIG, including policies and procedures related to awarding CIG grants. Paragraph (a) of this section now identifies that applications should address national or State program priorities as published by NRCS. Paragraph (b) of this section clarifies that any individual or non-federal entity may be eligible for a CIG payment, provided that the payment either directly or indirectly benefits a producer who is eligible for EQIP participation. NRCS adds a paragraph (c) to identify that NRCS will publish annually detailed guidance on how to apply for the grants competitions to address announced national or State program priorities.

§ 1466.34 Award Determinations

This section, the former § 1466.27(g), explains the criteria that NRCS will consider when determining award grantees and award amounts. NRCS made minor changes to the style and structure of the language to set out each step in the awards determination process.

§ 1466.35 State-Level Conservation Innovation Grant Component

This section, the former § 1466.27(h), details the use of State-level use and distribution of CIG resources. Paragraph (d) clarifies that each State may elect to focus on priority resource concerns for that State.

§ 1466.36 Intellectual Property

This section, formerly § 1466.27(i), establishes guidelines for intellectual property rights for any newly patented technology developed under this subpart. NRCS has made minor edits to improve readability.

§ 1466.37 On-farm Conservation Innovation Trials (OFCIT)

This section implements and develops OFCIT to test new and innovative approaches to conservation.

§ 1466.38 Soil Health Demonstration (SHD) Trial

This section of focus for OFCIT addresses the ability of soil health strategies to capture and retain carbon.

Sections in new Subpart D—Incentive Contracts

Subpart D is a new subpart and addresses the new enrollment option, EQIP incentive contracts, as created by section 2304 of the 2018 Farm Bill. This new subpart has the following sections:

§ 1466.40 High Priority Areas

This section sets out the process and requirements for high priority areas within each State that form the backdrop for the new incentive contracts.

§ 1466.41 Incentive Contract Selection

This section specifies how the incentive contract process will deviate from the standard EQIP contract selection process. In particular, NRCS will identify which practices qualify as incentive practices for each land use within each high priority area based on the priority resource concern(s) identified for that land use. Thus, there is no standard list of practices that will universally apply. It will depend on future determinations by State Conservationist with input from the State Technical Committees as to what the high priority areas are and what the (up to) three priority resource concerns are for each land use within each high priority area. NRCS does maintain a database of practices that apply to resource concerns within each land use, but which of those practices will be high priority will vary based on determinations within each State.

§ 1466.42 Incentive Contract Requirements

This section lists all the terms and conditions that are required components of an incentive contract. Many of these terms and conditions are similar to those terms and conditions included in a standard EQIP contract; the most notable distinctions are differences to the contract period and payment rates, which are covered in separate sections below.

§ 1466.43 Incentive Contract Period

This section highlights the criteria for setting the term for an incentive contract. Incentive contracts will be for a period from 5 to 10 years.

§ 1466.44 Incentive Payment Rates and Restrictions

This section sets the parameters for incentive payments. In addition to the payment for practice implementation, which is similar to the standard EQIP implementation payment, incentive contracts offer annual payments to address operations and maintenance costs as well as income foregone. NRCS also established in this interim rule an aggregate payment limitation of $200,000 for a person or legal entity to conform incentive contract implementation to contracts entered into under the CSP, thus ensuring that the new enrollment option supports a participant's ability to transition to CSP eligibility.

New Subpart E—General Administration

Subpart E of the EQIP regulation was formerly subpart C, and it addresses a participant's responsibility to comply with regulatory measures, to provide NRCS access to lands enrolled in the program for compliance monitoring during the term of the contract, and other general program matters. The 2018 Farm Bill changes do not impact the regulatory provisions at subpart E.

Effective Date, Notice and Comment, and Paperwork Reduction Act

In general, the Administrative Procedure Act (APA, 5 U.S.C. 553) requires that a notice of proposed rulemaking be published in the **Federal Register** and interested persons be given an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation, except when the rule involves a matter relating to public property, loans, grants, benefits, or contracts. This rule involves matters relating to benefits and therefore is exempt from the APA requirements. Further, the 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. ch. 35), and
- To use the authority under 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 effect 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. Due to the nature of the rule, the mandatory requirements of the 2018 Farm Bill, and the need to implement the regulations expeditiously to provide assistance to producers, NRCS and CCC find that notice and public procedure are contrary to the public interest. Therefore, even though this rule is a major rule for purposes of the Congressional Review Act of 1996, NRCS 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 on the date of publication in the **Federal Register**.

NRCS invites interested persons to participate in this rulemaking by submitting written comments or views about the changes made by this interim rule. The most helpful comments reference a specific portion of the regulation, explain the reason for any recommended changes, and include supporting data and references to relevant section of either the 2018 Farm Bill or the 1985 Farm Bill. All comments received on or before the closing date for comments will be considered. NRCS will review and respond to the public comments in the EQIP final rule.

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. 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 rule as economically significant under

Executive Order 13563, ''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 *https://www.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 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 and is not covered by Executive Order 13771.

Cost Benefit Analysis

The 2018 Farm Bill makes several changes to EQIP. The changes include:

• Making a State, irrigation district, groundwater management district, acequia, land grant-mercedes, or similar entity eligible for EQIP payments,

• Requiring targeting of at least 10 percent of EQIP funds to wildlife conservation practices,

• Reducing EQIP funds targeted for livestock to 50 percent, and

• Creating various incentives to address resource concerns in identified watersheds and other high priority areas.

Most of this rule's impacts consist of transfer payments to producers for completed conservation practices under EQIP contracts. The 2018 Farm Bill increases EQIP funding over 2014 Farm Bill funding by 22 percent on an annualized basis to $1.84 billion per year. From FY2014–2018, EQIP was authorized at $8.0 billion, but annual funding restrictions resulted in actual authority being $7.51 billion, for an annualized amount of $1.50 billion. In contrast, the authorized level for EQIP for FY2019–2023 is $9.18 billion [1] (assuming future funding caps are set at authorized amounts). Additionally, EQIP funds remain available until expended, meaning that any unobligated balance at the end of a fiscal year is available for obligation in the subsequent year.

Conservation practices funded through EQIP will continue to:

• Contribute to improvements in soil health and reductions in water and wind erosion on cropland, pasture and rangeland;

• Reduce nutrient losses to streams, rivers, lakes and estuaries;

• Increase wildlife habitat; and

• Provide other environmental benefits.

Further, continued implementation of practices that treat and manage animal waste through EQIP will directly contribute to improvements in water quality and associated improvements in air quality (such as from reduction in methane emissions or reduced risk of algal blooms). NRCS estimates that the cost,[2] from both public and private sources, of implementing EQIP conservation practices will be $13,640.2 million dollars (FY2019–2023), assuming a historical average participant cost of 40 percent and a technical assistance share of 27 percent.

Changes in funding levels for EQIP livestock and wildlife practices will alter to a minor extent the types of conservation practices that are funded. From FY 2014–2018, wildlife practices accounted for 7.6 percent of EQIP funds through wildlife and landscape initiatives and 16 designated wildlife conservation practices. The remaining 2.4 percent increase in funding to wildlife needed to meet the new 10 percent level will likely occur through greater support for existing wildlife initiatives and potentially target additional wildlife habitat development efforts through new initiatives. With respect to livestock, over 60 percent of EQIP funds went to livestock-related practices during FY 2014 through 2018, but the 2018 Farm Bill reduced the target to 50 percent for each of fiscal years 2019 through 2023. With greater EQIP funding overall, the amount of funding being provided for the implementation of livestock conservation practices should not change significantly.

To address increasing demands on the nation's water supply, the 2018 Farm Bill expands EQIP eligibility to water management entities like irrigation districts, ground water management districts, and acequias, along with providing the Secretary with the authority to waive adjusted gross income, contract, and payment limits to encourage continued efforts in agricultural water conservation. In some states, particularly in the West, these water management entities may increase competition for funding and enhance conservation benefits per dollar spent. The impacts, however, on the allocation of EQIP funding will be limited. The 2018 Farm Bill directs NRCS to maintain current funding allocations to states, limiting the impact nationally. Also, NRCS proposes in this rule establishing a payment limit of $900,000 on all contracts with water management entities.

The 2018 Farm Bill establishes incentive contracts to address up to three priority resource concerns for a given watershed, or other region, or area. Contracts will range from a minimum of 5 up to 10 years in length and provide an annual payment and an incentive practice payment. The impact of these new incentive contracts is uncertain, particularly regarding benefits per dollar. Overall, given the current demand for regular enrollment in EQIP, and the currently uncertain impacts that incentive contracts will have, the aggregate benefits from these new incentive contracts may be limited.

Increasing the payment limit for participants in the organic initiative to $140,000 over the period FY 2019 through 2023, will likely have little impact on EQIP program performance. This is because existing organic initiative contracts are usually well below the multi-year payment limit of $80,000 previously set by 2014 Farm Bill. Currently, organic participants who exceed the organic initiative payment limit use other EQIP funding mechanisms. With the increase in the organic initiative limit to $140,000, more organic applicants will be able to make use of the organic initiative and consequently need only compete with other organic operations for funding.

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 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?

[1] Includes the $1.75 billion authorized level in the 2018 Farm Bill for FY 2019 even though the amount was reduced by the sequester and other transfers to $1.61 billion.

[2] Public costs include total technical assistance and financial assistance funds. Private costs are out-of-pocket costs paid voluntarily by participants.

- 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?

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory analysis of any rule whenever an agency is required by APA 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 no law requires that a proposed rule be published for this rulemaking initiative. Despite the Regulatory Flexibility Act not applying to this rule, the action only affects those entities who voluntarily participate in EQIP and in doing so receive its benefits. Compliance with the provisions of EQIP regulations is only required for those entities who choose to participate in this voluntary program.

Environmental Analysis

The environmental impacts of this 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 the NRCS regulations for compliance with NEPA (7 CFR part 650). The 2018 Farm Bill requires minor changes to NRCS conservation programs, and there are no changes to the basic structure of the programs. The analysis has determined there will not be a significant impact to the human environment and as a result, an environmental impact statement (EIS) is not required to be prepared (40 CFR 1508.13). 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. The Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) are available for review and comment for 30 days from the date of publication of this interim rule in the **Federal Register**. NRCS will consider this input and determine whether there is any new information provided that is relevant to environmental concerns and bearing on the proposed action or its impacts that warrant supplementing or revising the current available draft of the EQIP EA and FONSI.

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.

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. Before any judicial actions may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR part 11 are to 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 may have substantial direct Tribal implication that may require Tribal consultation under Executive Order 13175. Tribal consultation for this rule was included in the two 2018 Farm Bill Tribal consultation held on May 1, 2019, at the National Museum of the American Indian, in Washington, DC, and on June 26–28, 2019, in Sparks, NV. For the May 1, Tribal consultation, 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 the Title II session. There were no specific comments from Tribes on the EQIP rule during the Tribal consultation. If a tribe requests additional consultation, NRCS will work with OTR to ensure meaningful consultation is provided where changes, additions, and modifications identified in this rule are not expressly mandated by legislation.

Separate from Tribal consultation, communication, and outreach efforts are in place to assure that all producers, including Tribes (or their members), are provided information about the regulation changes. Specifically, NRCS obtains input through Tribal Conservation Advisory Councils. A Tribal Conservation Advisory Council may be an existing Tribal committee or department and may also constitute an association of member Tribes organized to provide direct consultation to NRCS at the State, regional, and national levels to provide input on NRCS rules, policies, programs, and impacts on Tribes. Tribal Conservation Advisory Councils provide a venue for agency leaders to gather input on Tribal interests. Additionally, NRCS will be holding several sessions with Indian Tribes and Tribal entities across the country in fiscal year 2019 to describe the 2018 Farm Bill changes to NRCS conservation programs, obtain input about how to improve Tribal and Tribal member access to NRCS conservation assistance, and make any appropriate adjustments to the regulations that will foster such improved access.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4), requires federal agencies to assess the effects of their regulatory actions on State, local, and Tribal Governments or the private sector. Agencies generally must prepare a written statement, including cost benefits 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 under Title II of UMRA, for State, local, and Tribal Governments or the private sector. Therefore, this rule is not subject to the requirements of UMRA.

Federal Assistance Programs

The title and number of the Federal Domestic Assistance Programs in the Catalog of Federal Domestic Assistance to which this rule applies:

10.912—Environmental Quality Incentives Program.

E-Government Act Compliance

NRCS 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 1466

Administrative practice and procedure, Animal welfare, Natural resources, Soil conservation, Water resources.

The CCC revises 7 CFR part 1466 to read as follows:

PART 1466—ENVIRONMENTAL QUALITY INCENTIVES PROGRAM

Authority: 15 U.S.C. 714b and 714c; and 16 U.S.C. 3839aa—3839–8.

Subpart A—General Provisions

§ 1466.1 Applicability.

(a) *Purposes.* (1) The purposes of the Environmental Quality Incentives Program (EQIP) are to promote agricultural production, forest management, and environmental quality as compatible goals, and to optimize environmental benefits.

(2) Through EQIP, NRCS provides technical and financial assistance to eligible agricultural producers, including nonindustrial private forest (NIPF) landowners and Indian Tribes, to help implement conservation practices which address soil, water, and air quality; wildlife habitat; nutrient management associated with crops and livestock; pest management; surface and groundwater conservation; irrigation management; drought resiliency measures; adapting to and mitigating against increasing weather volatility; energy conservation; and related resource concerns.

(3) EQIP's financial and technical assistance helps producers comply with environmental regulations and enhance agricultural and forested lands in a cost-effective and environmentally beneficial manner.

(4) The purposes of the program are achieved by planning and implementing conservation practices on eligible land to address identified, new, or expected resource concerns.

(b) *Availability.* EQIP is available in any of the 50 States, District of Columbia, Commonwealth of Puerto Rico, Guam, Virgin Islands of the United States, American Samoa, and Commonwealth of the Northern Mariana Islands.

(c) *Applicability.* Each contract enrolled into EQIP, is subject to the regulations in effect on the date it is enrolled.

§ 1466.2 Administration.

(a) *The Commodity Credit Corporation (CCC) funds, facilities, authorities.* Because the funds, facilities, and authorities of the CCC are available to NRCS for carrying out EQIP, each reference to NRCS in this part also refers to the CCC's funds, facilities, and authorities where applicable.

(b) *Locally-led conservation.* (1) NRCS supports locally-led conservation by soliciting input from the State Technical Committee and the Tribal Conservation Advisory Council at the State level, and local working groups at the county, parish, or Tribal level to advise NRCS on issues relating to EQIP implementation.

(2) Recommendations from the State Technical Committee and the Tribal Conservation Advisory Council may include but are not limited to:

(i) Recommendations for program priorities and criteria;

(ii) Identification of priority resource concerns;

(iii) Recommendations about which conservation practices will be effective to treat identified priority resource concerns; and

(iv) Recommendations of program payment rates for payment schedules.

(c) *Delegations.* No delegation in the administration of this part to lower organizational levels will preclude the Chief from making any determinations under this part, redelegating to other organizational levels, or from reversing or modifying any determination made under this part.

(d) *Waiver.* The Chief may modify or waive a nonstatutory, discretionary provision of this part if the Chief determines the application of that provision to a particular limited situation to be inappropriate and inconsistent with the purposes of the program;

(e) *Scope of agreement authority.* NRCS may enter into agreements with other Federal or State agencies, Indian Tribes, conservation districts, units of local government, public or private organizations, acequias, and individuals to assist NRCS with implementation of the program in this part.

§ 1466.3 Definitions.

The definitions in this section apply to this part and all documents issued in accordance with this part, unless specified elsewhere in this part:

Agricultural operation means a parcel or parcels of land whether contiguous or noncontiguous, which is under the effective control of the producer at the time the producer applies for a contract, and which is operated by the producer with equipment, labor, management, and production, or cultivation practices that are substantially separate from other operations.

Animal feeding operation (AFO) means a lot or facility (other than an aquatic animal production facility) where the conditions in this definition are met:

(1) Animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period; and

(2) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

Animal waste storage or treatment facility means a structural conservation practice, implemented on an AFO consistent with the requirements of a comprehensive nutrient management plan (CNMP) and Field Office Technical Guide (FOTG), which is used for storing, treating, or handling animal waste or by-products, such as animal carcasses.

Applicant means a producer who has requested in writing to participate in EQIP.

At-risk species means any plant or animal species listed as threatened or endangered; proposed or candidate for listing under the Endangered Species Act; a species listed as threatened or endangered under State law or Tribal law on Tribal land; State or Tribal land species of conservation concern; or other plant or animal species or community, as determined by the State Conservationist, with advice from the State Technical Committee or Tribal Conservation Advisory Council, that has undergone, or is likely to undergo, population decline and may become imperiled without direct intervention.

Beginning farmer or rancher means a person, Indian Tribe, Tribal corporation, or legal entity who:

(1) Has not operated a farm or ranch, or NIPF, or who has operated a farm, ranch, or NIPF for not more than 10 consecutive years. This requirement applies to all members of an entity who will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a contract with an individual, individually, or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or State where the farm is located.

(3) In the case of a contract with an entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

Chief means the Chief of NRCS, U.S. Department of Agriculture (USDA), or designee.

Comprehensive nutrient management plan (CNMP) means a conservation plan that is specifically for an AFO. A CNMP identifies conservation practices and management activities which, when implemented as part of a conservation system, will manage sufficient quantities of manure, waste water, or organic by-products associated with a waste management facility. A CNMP incorporates practices to use animal manure and organic by-products as a beneficial resource while protecting all natural resources including water and air quality associated with an AFO. A CNMP is developed to assist an AFO owner/operator in meeting all applicable local, Tribal, State, and Federal water quality goals or regulations. For nutrient-impaired stream segments or water bodies, additional management activities or conservation practices may be required by local, Tribal, State, or Federal water quality goals or regulations.

Conservation benefit means the improved condition of a natural resource concern resulting from the implementation of a conservation practice.

Conservation district means any district or unit of State, Tribal, or local government formed under State, Tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a ''conservation district,'' ''soil conservation district,'' ''soil and water conservation district,'' ''resource conservation district,'' ''land conservation committee,'' ''natural resource district,'' or similar name.

Conservation practice means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management practices, and other improvements that achieve the program purposes, including such items as CNMPs, agricultural energy management plans, dryland transition plans, forest management plans, soil testing, soil remediation, integrated pest management, and other plans or activities determined acceptable by the Chief. Approved conservation practices are listed in the NRCS FOTG.

Contract means a legal document that specifies the rights and obligations of any participant accepted into the program. An EQIP contract is a binding agreement for the transfer of assistance from USDA to the participant to share in the costs of implementing conservation practices.

Cost-effectiveness means the least costly option for achieving a given set of conservation objectives to address a resource concern.

Eligible land means land on which agricultural commodities, livestock, or forest-related products are produced, and specifically includes:

(1) Cropland;

(2) Grassland;

(3) Rangeland;

(4) Pasture land;

(5) Nonindustrial private forest land; and

(6) Other agricultural land (including cropped woodland, marshes, environmentally sensitive areas as identified by NRCS, and agricultural land used for the production of livestock) on which identified or expected resource concerns related to agricultural production that may be addressed by a contract under EQIP as determined by the Chief.

Enrolled land means the land area identified and included in the program contract at the time when funds have been obligated.

EQIP plan of operations means the document that identifies the location, timing, and extent of conservation practices that the participant agrees to implement on eligible land enrolled in the program in order to address the priority resource concerns, optimize environmental benefits, and address program purposes as defined in § 1466.1. The EQIP plan of operations is part of the EQIP contract.

Estimated income foregone means an estimate of the net income loss associated with the adoption of a conservation practice. Along with other estimated incurred costs, income foregone is one of the costs associated with practice implementation as recorded in a payment schedule.

Field Office Technical Guide (FOTG) means the official local NRCS source of resource information and interpretations of guidelines, criteria, and requirements for planning and implementation of conservation practices. It contains detailed information on the quality standards to achieve conservation of soil, water, air, plant, energy, and animal 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.)

Forest management plan means a site-specific plan that is prepared according to NRCS criteria by a professional resource manager, in consultation with the participant, and is approved by NRCS. Forest management plans may include a forest stewardship plan, as specified in section 5 of the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103a); another plan approved by the State forester or Indian Tribe; or another plan determined appropriate by NRCS. The plan is intended to comply with Federal, State, Tribal, and local laws, regulations, and permit requirements.

Habitat development means the application of conservation practices to establish, improve, protect, enhance, or restore the conditions of the land for the specific purpose of improving conditions for fish and wildlife.

High priority area means a watershed (or other appropriate region or area within a State) wherein the Chief, in consultation with the State Technical Committee, has identified one or more priority resource concerns.

Historically underserved producer means a person, joint operation, legal entity, or Indian Tribe who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, limited resource farmer or rancher, or veteran farmer or rancher.

Incentive practice means a practice or set of practices approved by the Chief that, when implemented and maintained on eligible land, address one or more priority resource concerns under a contract entered into under subpart D of this part.

Indian land means:

(1) Land held in trust by the United States for individual Indians or Indian Tribes;

(2) Land, the title to which is held by individual Indians or Indian Tribes subject to Federal restrictions against alienation or encumbrance;

(3) Land which is subject to rights of use, occupancy or benefit of certain Indian Tribes; or

(4) Land held in fee title by an Indian, Indian family, or Indian Tribe.

Indian Tribe means any Indian Tribe, band, nation, pueblo, or other organized group or community, including 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 *et seq.*) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Integrated pest management means a sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks.

Joint operation means, as defined in 7 CFR part 1400, a general partnership, joint venture, or other similar business organization in which the members are jointly and severally liable for the obligations of the organization.

Legal entity means, as defined in 7 CFR part 1400, an entity created under Federal or State law that:

(1) Owns land or an agricultural commodity, product, or livestock; or

(2) Produces an agricultural commodity, product, or livestock.

Lifespan means the period of time during which a conservation practice or activity should be maintained and used for the intended purpose.

Limited resource farmer or rancher means either:

(1) Individual producer:

(i) A person with direct or indirect gross farm sales not more than the current indexed value in each of the previous 2 fiscal years (adjusted for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service), and

(ii) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous 2 years (to be determined annually using Commerce Department Data); or

(2) A legal entity or joint operation if all individual members independently qualify under paragraph (1) of this definition.

Liquidated damages means a sum of money stipulated in the EQIP contract that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the contract. The sum represents an estimate of the technical assistance expenses incurred to service the contract and reflects the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

Livestock means all domesticated animals produced on farms or ranches, as determined by the Chief.

Livestock production means farm or ranch operations involving the production, growing, raising, or reproduction of domesticated livestock or livestock products.

Local working group means the advisory body as defined in 7 CFR part 610.

National Organic Program means the national program established under the Organic Foods Production Act of 1990 (7 U.S.C. 6501 *et seq.*), administered by the Agricultural Marketing Service, which regulates the standards for any farm, wild crop harvesting, or handling operation that wants to sell an agricultural product as organically produced.

National priorities mean resource issues identified by the Chief, with advice from other federal agencies, Indian Tribes, and State Conservationists, which is used to determine the distribution of EQIP funds and guide local EQIP implementation.

Natural Resources Conservation Service (NRCS) is an agency of USDA, which has responsibility for administering EQIP using the funds, facilities, and authorities of the CCC.

Nonindustrial private forest land (NIPF) means rural land, as determined by NRCS, that has existing tree cover or is suitable for growing trees; and is owned by any nonindustrial private individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decision-making authority over the land.

Operation and maintenance (O&M) means work performed by the participant to keep the applied conservation practice functioning for the intended purpose during the conservation practice lifespan. Operation includes the administration, management, and performance of nonmaintenance actions needed to keep the completed practice functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

O&M agreement means the document that, in conjunction with the EQIP plan of operations, specifies the O&M responsibilities of the participant for conservation practices installed with EQIP assistance.

Organic system plan (OSP) means a management plan for organic production or for an organic handling operation that has been agreed to by the producer or handler and the certifying agent. The OSP includes all written plans that govern all aspects of agricultural production or handling as required under the Organic Foods Production Act of 1990 (7 U.S.C. 6501 *et seq.*).

Participant means an applicant that has entered into an EQIP contract who incurs the cost of practice implementation, will receive or has received payment, or is responsible for implementing the terms and conditions of an EQIP contract.

Payment means financial assistance provided to the participant based on the estimated costs incurred in performing or implementing conservation practices, including costs for: Planning, design, materials, equipment, installation, labor, management, maintenance, or training, as well as the estimated income foregone by the participant for designated conservation practices.

Person means, as defined in 7 CFR part 1400, an individual, natural person, and does not include a legal entity.

Priority resource concern means a resource concern, as determined by the Chief, with input from the State Technical Committee, that—

(1) Is identified at the national, State, or local level as a priority for a particular area of a State; and

(2) Represents a significant concern in a State or region.

Producer means a person, legal entity, Indian Tribe, or joint operation who NRCS determines is engaged in agricultural production or forestry management on the agricultural operation.

Resource concern means a specific natural resource issue or problem that represents a significant concern in a State or region and is likely to be addressed through the implementation of conservation practices by producers according to NRCS technical standards.

Semi-public means entities that are private or public companies that serve a public purpose, *i.e.* Public utility companies. They often have condemnation authority but are not considered part of the State or State government.

Socially disadvantaged farmer or rancher means a producer who is a member of a group whose members have been subjected to racial or ethnic prejudices without regard to its members' individual qualities. For an entity, at least 50-percent ownership in the business entity must be held by socially disadvantaged individuals.

Soil remediation means scientifically based practices, as determined by NRCS, that—

(1) Ensure the safety of producers from contaminants in soil;

(2) Limit contaminants in soils from entering agricultural products for human or animal consumption; and

(3) Regenerate and sustain the soil.

Soil testing means the evaluation of soil health, including testing for the—

(1) Optimal level of constituents in the soil, such as organic matter, nutrients, and the potential presence of soil contaminants (including heavy metals, volatile organic compounds, polycyclic aromatic hydrocarbons, or other contaminants), as determined by NRCS; and

(2) Biological and physical characteristics indicative of proper soil functioning.

State conservationist means the NRCS employee authorized to implement EQIP and direct and supervise NRCS activities in a State and the Caribbean and Pacific Island Areas.

State Technical Committee means a committee established by NRCS in a State pursuant to 7 CFR part 610, subpart C.

Structural practice means a conservation practice, including a vegetative practice, that involves establishing, constructing, or installing a site-specific measure to conserve and protect a resource from degradation, or improve soil, water, air, or related natural resources. Examples include, but are not limited to, animal waste management facilities, terraces, grassed waterways, tailwater pits, livestock water developments, contour grass strips, filter strips, critical area plantings, tree plantings, establishment or improvement of wildlife habitat, and capping of abandoned wells.

Technical assistance means technical expertise, information, training, education, and tools necessary for a producer to be able to successfully implement, operate, and maintain conservation practices to ensure the conservation of natural resources on land active in agricultural, forestry, or related uses. These technical services include:

(1) Technical services provided directly to farmers, ranchers, Indian Tribes, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and

(2) Technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, education, data, technology, monitoring, and effects analyses.

Technical service provider (TSP) means an individual, private-sector entity, Indian Tribe, or public agency either:

(1) Certified by NRCS pursuant to 7 CFR part 652 and placed on the approved list to provide technical services to participants; or

(2) Selected by the Department to assist in the implementation of conservation programs covered by this part through a procurement contract, contributions agreement, or cooperative agreement with the Department.

Tribal Conservation Advisory Council means, in lieu of or in addition to forming a Tribal conservation district, an Indian Tribe may elect to designate an advisory council to provide input on NRCS programs and the conservation needs of the Tribe and Tribal producers. The advisory council may be an existing Tribal committee or department and may also constitute an association of member Tribes organized to provide direct consultation to NRCS at the State, regional, and national levels to provide input on NRCS rules, policies, and programs and their impacts on Tribes.

Veteran farmer or rancher means a producer who meets the definition in section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, as amended (7 U.S.C. 2279(a)).

Water management entity means a State, irrigation district, groundwater management district, acequia, land grant-merced, or similar entity that has jurisdiction or responsibilities related to water delivery or management to eligible lands.

Wildlife means nondomesticated birds, fishes, reptiles, amphibians, invertebrates, and mammals.

Wildlife habitat means the aquatic and terrestrial environments required for fish and wildlife to complete their life cycles, providing air, food, cover, water, and spatial requirements.

§ 1466.4 National priorities.

(a) The national priorities in paragraphs (a)(1) through (8) of this section, consistent with statutory resources concerns, include soil quality, water quality and quantity, plants, energy, wildlife habitat, air quality, increased weather volatility, and related natural resource concerns, that may be used in EQIP implementation are:

(1) Reductions of nonpoint source pollution, such as nutrients, sediment, pesticides, or excess salinity in impaired watersheds consistent with

total maximum daily loads (TMDL) where available;

(2) The reduction of surface and ground water contamination;

(3) The reduction of contamination from agricultural sources, such as animal feeding operations;

(4) Conservation of ground and surface water resources, including improvement of irrigation efficiency;

(5) Reduction of emissions, such as particulate matter, nitrogen oxides, volatile organic compounds, and ozone precursors and depleters that contribute to air quality impairment violations of the National Ambient Air Quality Standards;

(6) Reduction in soil erosion and sedimentation from unacceptable levels on eligible land;

(7) Promotion of at-risk species habitat conservation including development and improvement of wildlife habitat; and

(8) Energy conservation to help save fuel, improve efficiency of water use, maintain production, and protect soil and water resources by more efficiently using fertilizers and pesticides.

(b) In consultation with other Federal agencies and Indian Tribes, NRCS may undertake periodic reviews of the national priorities and the effects of program delivery at the State and local levels to adapt the program to address emerging resource issues. NRCS may—

(1) Use the national priorities to guide the allocation of EQIP funds to the NRCS State offices;

(2) Use the national priorities in conjunction with States, Indian Tribes, and local priorities to assist with prioritization and selection of EQIP applications; and

(3) Periodically review and update the national priorities utilizing input from the public, Indian Tribes, other Federal and State agencies, and affected stakeholders to ensure that the program continues to address priority resource concerns.

§ 1466.5 Outreach activities.

(a) NRCS conducts outreach activities at the national, State, Tribal, and local levels to ensure that producers whose land has environmental problems or priority resource concerns are aware and informed that they may be eligible to apply for program assistance.

(b) NRCS will make special outreach to eligible producers with historically low participation rates, including but not restricted to, limited resource, socially disadvantaged, small-scale, beginning farmers or ranchers, veteran farmers or ranchers, Indian Tribes, Alaska Natives, and Pacific Islanders.

(c) NRCS provides outreach to ensure producer participation is not limited based on the size or type of operation or production system, including small-scale, specialty crop, and organic production.

(d) NRCS will notify historically underserved producers, at the time of enrollment in the program, of the option to receive advance payments under § 1466.24 of this part and document the election of each of these producers.

§ 1466.6 Program requirements.

(a) *General.* Program participation is voluntary. An applicant must develop an EQIP plan of operations for the eligible land to be treated which serves as the basis for the EQIP contract. Under EQIP, NRCS provides participants with technical assistance and payments to plan and apply needed conservation practices.

(b) *Applicant eligibility.* To be eligible to participate in EQIP, an applicant must—

(1) Be in compliance with the highly erodible land and wetland conservation provisions at 7 CFR part 12;

(2) Be a producer as determined by NRCS;

(3) Have control of the land for the term of the proposed contract unless an exception is made by the Chief in the case of land administered by the Bureau of Indian Affairs (BIA), Indian lands, or other instances in which the Chief determines sufficient assurance of control;

(i) The Chief may determine that land administered by BIA, Indian land, or other such circumstances provides sufficient assurance of control, and

(ii) If the applicant is a tenant of the land involved in agricultural production or forestry management, the Chief may require the applicant to obtain the written concurrence of the landowner to apply a conservation practice;

(4) Agree to implement the EQIP plan of operations according to the provisions and conditions established in the EQIP contract, including the EQIP contract appendix;

(5) Submit an EQIP plan of operations or plan developed for the purposes of acquiring an air or water quality permit, provided these plans contain elements equivalent to those elements required by an EQIP plan of operations and are acceptable to NRCS as being consistent with the purposes of the program;

(6) Supply information, as required by NRCS, to determine eligibility for the program, including but not limited to, information to verify the applicant's status as a historically underserved producer, and payment eligibility as established by 7 CFR part 1400; and

(7) Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity.

(c) *Consideration for enrollment of eligible land.* Eligible land, as defined in § 1466.3, may be considered for enrollment in EQIP only if NRCS determines that the land is—

(1) Privately owned land;

(2) Publicly owned land where—

(i) The land is a working component of the participant's agricultural or forestry operation,

(ii) The participant has control of the land for the term of the contract, and

(iii) The conservation practices to be implemented on the public land are necessary and will contribute to an improvement in the identified resource concern; or

(3) Indian land.

(d) *Eligibility of a water management entity.* (1) Notwithstanding paragraphs (b) and (c) of this section, NRCS may enter into an EQIP contract with a water management entity provided the criteria in paragraphs (d)(1)(i) and (ii) of this section can be met:

(i) The entity is a public or semi-public agency or organization, and

(ii) Its purpose is to assist private agricultural producers manage water distribution systems.

(2) Water conservation or irrigation practices that are the subject of a contract entered into under paragraph (d)(1) of this section shall be implemented on—

(i) Eligible land of a producer; or

(ii) Land that is—

(A) Under the control of the water management entity, and

(B) Adjacent to eligible land of a producer, provided the Chief determines the adjacent land is necessary to support the installation of a practice or system implemented on eligible land.

(3)(i) The Chief may waive the average adjusted gross income limitation set forth in 7 CFR part 1400 or the aggregate payment limitation set forth in § 1466.24 of this part for a contract under paragraph (d)(1) of this section if the Chief determines that the waiver is necessary to fulfill the objectives of the project.

(ii) In determining whether to grant a waiver under this paragraph, the Chief shall consider—

(A) The number of producers who will benefit from the project;

(B) The conservation benefit of the practices involved in the project;

(C) The amount of non-federal assets leveraged to facilitate the project;

(D) The extent to which the project involves progressive implementation of conservation practices; and

(E) Other criteria as determined by NRCS.

(iii) Notwithstanding any waiver of the aggregate payment limitation, a water management entity or individual member thereof shall not receive, in the aggregate, directly or indirectly, payments under this paragraph, in aggregate, in excess of $900,000 for all contracts entered into under this paragraph by the water management entity during the period of fiscal years 2019 through 2023.

§ 1466.7 EQIP plan of operations.

(a) All conservation practices in the EQIP plan of operations must be approved by NRCS and developed and carried out in accordance with the applicable NRCS planning and FOTG technical requirements.

(b) The participant is responsible for implementing the EQIP plan of operations according to the approved implementation schedule.

(c) The EQIP plan of operations must include—

(1) A description of the participant's specific conservation objectives to be achieved;

(2) To the extent practicable, the quantitative or qualitative goals for achieving the participant's conservation and natural resource objectives;

(3) A description of one or more conservation practices in the conservation management system, including conservation planning, design, or installation activities to be implemented to achieve the conservation objectives;

(4) A schedule for implementing the conservation practices, including timing, sequence, operation, and maintenance; and

(5) Information that enables evaluation of the effectiveness of the plan of operations in achieving the conservation objectives.

(d) If an EQIP plan of operations includes an animal waste storage or treatment facility to be implemented on an AFO, the participant must agree to develop a CNMP by the end of the contract period, and any conservation practices in the EQIP plan of operation must be implemented consistent with a CNMP.

(e) An EQIP plan of operations on forest land must implement conservation practices consistent with an approved forest management plan.

(f) NRCS may provide a participant with assistance to implement an EQIP plan of operations which includes irrigation-related practices to address a water conservation resource concern only if the participant establishes through documented evidence, including irrigation history, that such assistance will facilitate a reduction in ground or surface water use on the agricultural operation, unless the producer is participating in a watershed-wide project, as approved by NRCS, which will effectively conserve water in accordance with § 1466.20 of this part.

§ 1466.8 Conservation practices.

(a) NRCS will determine the conservation practices for which participants may receive program payments and provide a list of eligible practices to the public.

(b) Payment will not be made to a participant for conservation practices that—

(1) Either the applicant or another producer has initiated or implemented prior to application for the program; or

(2) Has been initiated or implemented prior to contract approval, unless a waiver was granted by the Chief prior to the practice implementation.

(c) Unless waived for circumstances as determined by the Chief, a participant is eligible for payments for water conservation and irrigation-related conservation practices only on land that has been irrigated for 2 of the last 5 years prior to application for assistance.

(d) Upon the development of a new technology or management approach that provides a high potential for optimizing conservation benefits, NRCS may approve an interim conservation practice standard that incorporates the new technology or management approach and provide financial assistance for pilot work to evaluate and assess the performance, efficiency, and effectiveness of the new technology or management approach.

(e) NRCS will at least annually consult with State Technical Committees, Tribal Conservation Advisory Councils, local work groups, and other stakeholders to identify conservation practices with appropriate purposes and the criteria for their application to address priorities to establish wildlife habitat including—

(1) Upland wildlife habitat;

(2) Wetland wildlife habitat;

(3) Habitat for threatened and endangered species;

(4) Fish habitat;

(5) Habitat on pivot corners and other irregular areas of a field; and

(6) Other types of wildlife habitat, as determined by NRCS.

§ 1466.9 Technical services provided by qualified personnel not affiliated with USDA.

(a) NRCS may use the services of qualified third-party TSPs in its delivery of EQIP technical assistance in accordance with 7 CFR part 652.

(b) Participants may obtain technical services from certified TSPs in accordance with 7 CFR part 652.

(c) NRCS retains approval authority of work done by non-NRCS personnel for the purpose of approving EQIP payments.

Subpart B—Contracts and Payment

§ 1466.20 Application for contracts and selecting applications.

(a) *General guidelines.* (1) Any producer who has eligible land may submit an application for participation in EQIP.

(2) NRCS, to the greatest extent practicable, will group applications of similar crop, forestry, and livestock operations for evaluation purposes.

(3) Applications may be accepted on a continuous basis throughout the year.

(4) Producers who are members of a joint operation may file a single application for ranking purposes for the joint operation.

(b) *Ranking guidelines.* In evaluating EQIP applications, NRCS—

(1) Will establish ranking pools to address a specific resource concern by geographic area or agricultural operation type with advice from the State Technical Committee, Tribal Conservation Advisory Council, or local working groups;

(2) Will develop an evaluation process using, where applicable, science-based tools to prioritize and rank applications for funding that considers national, State, and local priority resource concerns, taking into account the factors related to conservation benefits to address identified resource concerns through implementation of conservation practices such as:

(i) The degree of cost-effectiveness of the proposed conservation practices;

(ii) The magnitude of the expected conservation benefits resulting from the conservation treatment and the priority of the resource concerns that have been identified at the local, State, and national levels;

(iii) How effectively and comprehensively the project addresses the designated resource concern or resource concerns;

(iv) Use of conservation practices that provide long-term conservation enhancements;

(v) Compliance with Federal, State, Tribal, or local regulatory requirements concerning soil, water, and air quality; wildlife habitat; and ground and surface water conservation;

(vi) Willingness of the applicant to complete all conservation practices in an expedited manner;

(vii) The ability to improve existing conservation practices or systems which are in place at the time the application is accepted, or that complete a conservation system;

(viii) The applicant's meeting O&M requirements for the lifespan of conservation practices previously funded through EQIP; and

(xi) Other locally defined pertinent factors, such as the location of the conservation practice, the extent of natural resource degradation, and the degree of cooperation by local producers to achieve environmental improvements.

(3) May give priority for applications that include water conservation or irrigation-related practices, and consistent with State law in which the applicant's eligible land is located, if the application—

(i) Results in a reduction in water use in the agricultural operation, or

(ii) Includes an agreement by the applicant not to use any associated water savings to bring new land (other than incidental land needed for efficient operations) under irrigation production unless the producer is participating in a watershed-wide project that will effectively conserve water as designated under paragraph (c) of this section;

(4) May not assign a higher priority to the application solely because it would present the least cost to the program if determined that the conservation benefits of two or more applications for payments are comparable;

(5) Will ensure that the ranking score does not give preferential treatment to applications based on size of the operation, income generated from the operation, type of operation, or other factors not related to conservation benefits to address a resource concern unless authorized in this rule;

(6) Will determine through the evaluation process the order in which applications will be selected for funding; and

(7) Will make available to the public all information regarding priority resource concerns, the list of eligible practices, payment rates, and how EQIP is implemented in a State.

(c) *Eligibility of certain water conservation projects.* NRCS may designate as eligible watershed-wide projects that effectively conserve water, using the criteria in paragraphs (c)(1) through (3) of this section:

(1) The project area has a current, comprehensive water resource assessment; and

(2) The project plan incorporates one or more of the practices in paragraphs (c)(2)(i) through (iii) of this section:

(i) Water conservation scheduling, water distribution efficiency, soil moisture monitoring, or an appropriate combination thereof,

(ii) Irrigation-related structural or other measures that conserve surface or ground water, including managed aquifer recovery practices, or

(iii) A transition to water-conserving crops, water-conserving crop rotations, or deficit irrigation; and

(3) The project sponsors have consulted relevant State and local agencies.

(d) *Administrative efficiency.* (1) NRCS may use screening factors as part of its evaluation process that may include sorting applications into high, medium, or low priority.

(2) If screening factors are used to designate a higher priority for ranking, all eligible applications screened with a higher priority are ranked and considered for funding before ranking applications that are a lower priority.

(3) NRCS is the approving authority for all EQIP contracts.

§ 1466.21 Contract requirements.

(a) *Requirement for a contract.* For a participant to receive payments, the participant must enter into a contract agreeing to implement one or more conservation practices. Payment for technical services may be included in the contract pursuant to requirements of this part.

(b) *Contract terms.* An EQIP contract will—

(1) Identify all conservation practices to be implemented, the timing of practice installation, the O&M requirements for the practices, and applicable payments allocated to the practices under the contract;

(2) Have a term for no more than 10 years;

(3) Incorporate all provisions as required by law or statute, including requirements that the participant will—

(i) Not implement any practices on the enrolled land that would defeat the program's purposes,

(ii) Refund any program payments received with interest, and forfeit any future payments under the program, on the violation of a term or condition of the contract, consistent with the provisions of § 1466.26,

(iii) Refund all program payments received on the transfer of the right and interest of the producer in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations, including O&M of the EQIP contract's conservation practices, consistent with the provisions of § 1466.25,

(iv) Develop and implement any conservation practices identified in an EQIP plan of operations consistent with a CNMP when the EQIP contract includes an animal waste management facility on an AFO,

(v) Implement conservation practices consistent with an approved forest management plan when the EQIP plan of operations includes forest-related practices that address resource concerns on NIPF,

(vi) Supply information as required by NRCS to determine compliance with contract and program requirements, and

(vii) Specify the participant's responsibilities for the O&M of the applied conservation practices, consistent with the provisions of § 1466.22; and

(4) Specify any other provision determined necessary or appropriate by NRCS to achieve the technical requirements of a practice or purposes of the program.

(c) *Timeline for implementation.* At least one conservation practice must be scheduled for completion within the first 12 months of the contract; NRCS may extend this timeframe if NRCS determines that the participant is unable to complete the conservation practice for reasons beyond their control.

(d) *Contract limitation.* Each contract will be limited to no more than $450,000, unless the contract is with an Indian Tribe or the Chief grants a waiver. Contracts related to organic operations are also subject to payment limitations pursuant to § 1466.24(b).

(e) *Waiver to contract limitation.* (1) The Chief may waive the contract limitation set forth in paragraph (d) of this section if the Chief determines that—

(i) The waiver is in the best interests of the program; and

(ii) The contract involves either—

(A) A joint operation,

(B) A group project, such as for the development of an anaerobic digestor or the improvement of privately owned and operated irrigation systems that benefits multiple producers or a large area of land; or

(C) A water management entity for which NRCS has approved a payment limitation waiver.

(2) A contract for which the Chief has granted a waiver to the contract limitation set forth in paragraph (d) of this section shall be limited to no more than $900,000.

(f) *Water conservation and irrigation efficiency projects with water management entities.* NRCS may decline to select an EQIP application from a legal entity who is otherwise eligible under § 1466.6(d) if NRCS determines that the project is better suited to be implemented under the Regional Conservation Partnership Program or 7 CFR part 622.

§ 1466.22 Conservation practice operation and maintenance (O&M).

(a) The contract will incorporate the O&M agreement that addresses the O&M of conservation practices applied under the contract.

(b) NRCS expects the participant to operate and maintain each conservation practice installed under the contract for its intended purpose for the conservation practice lifespan as specified in the O&M agreement.

(c) Conservation practices installed before the contract execution but included in the contract to obtain the conservation benefits agreed upon, must be operated and maintained as specified in the contract and O&M agreement.

(d) NRCS may periodically inspect the conservation practice during the contract duration as specified in the O&M agreement to ensure that O&M requirements are being carried out and that the conservation practice is fulfilling its intended objectives.

(e) If NRCS finds during the contract that a participant is not operating and maintaining practices in an appropriate manner, NRCS may terminate the contract and request a refund of payments made for that conservation practice under the contract.

§ 1466.23 Payment rates.

(a) *Conservation practices.* NRCS will develop a list of conservation practices eligible for payment under the program, which considers:

(1) The conservation practice cost-effectiveness, implementation efficiency, and innovation;

(2) The degree and effectiveness in treating priority resource concerns;

(3) The number of resource concerns the practice addresses;

(4) The longevity of the practice's conservation benefit;

(5) The conservation practice's ability to assist producers in meeting regulatory requirements; and

(6) Other pertinent local considerations.

(b) *Payment schedules.* The Chief will determine the process and methodology used for development, review, and approval of payment schedules to support accurate and cost-effective delivery of program benefits, including determination of estimated incurred costs and income foregone associated with implementation of all financially-supported conservation practices or activities.

(1) Payment to a participant for performing a practice may not exceed, as determined by NRCS, the maximum payment percentages in paragraphs (b)(1)(i) through (iii) of this section:

(i) Seventy-five percent of the estimated costs incurred by implementing the conservation practice,

(ii) One hundred percent of the estimated income foregone, or

(iii) Both conditions in paragraphs (b)(1)(i) and (ii) of this section, where a producer incurs costs in implementing a conservation practice and foregoes income related to that practice implementation.

(2) In determining the amount and rate of estimated income foregone, NRCS may assign higher significance to conservation practices which promote—

(i) Soil health;

(ii) Water quality and quantity improvement;

(iii) Nutrient management;

(iv) Pest management;

(v) Air quality improvement;

(vi) Wildlife habitat development, including pollinator habitat;

(vii) Invasive species management; or

(viii) Other natural resource concerns of regional or national significance, as determined by NRCS.

(3) Notwithstanding paragraph (b)(1) of this section, a participant that meets the definition of a historically underserved producer under § 1466.3 may be awarded the applicable payment rate and an additional rate that is not less than 25 percent above the applicable rate, provided this increase does not exceed 90 percent of the estimated costs incurred for implementing the conservation practice.

(4) NRCS shall reduce the payments to a participant through EQIP proportionately below the contracted payment rate established by the Chief, so that the total combined payments for a conservation practice from EQIP and other USDA sources does not exceed 100 percent of the estimated costs incurred for implementing or performing the conservation practice.

(5) When NRCS enters into a formal agreement with partners who provide financial support to help implement program initiatives, the Chief shall adjust NRCS program payment percentages to provide practice payment rates to an amount such that the total financial assistance to the participant from NRCS and the partner does not exceed the amount needed to encourage voluntary adoption of the practice. The formal agreement must be approved by NRCS prior to announcement of the program initiative and adjusted payment rates.

(6) NRCS may provide payments for conservation practices on some or all of the operations of a participant related to organic production and the transition to organic production. Payments may not be provided for any costs associated with organic certification, enterprise costs associated with transition to organic production, or for practices or activities that are eligible for financial assistance under the National Organic Program (7 U.S.C. 6523).

(c) *High priority practices.* (1) NRCS, with input from the State Technical Committee, may designate not more than 10 practices to be eligible for increased payments under paragraph (c)(2) of this section, on the condition that the practice, as determined by NRCS—

(i) Addresses specific causes of impairment relating to excessive nutrients in ground or surface water;

(ii) Addresses the conservation of water, to advance drought mitigation and declining aquifers;

(iii) Meets other environmental priorities and other priority resource concerns identified in habitat or other area restoration plans; or

(iv) Is geographically targeted to address a natural resource concern in a specific watershed.

(2) Notwithstanding paragraph (b) of this section, in the case of a practice designated as high priority under paragraph (c)(1) of this section a participant may receive an increased amount provided the payment does not exceed 90 percent of the incurred costs estimated for the conservation practice.

(d) *Source water protection practices.* Notwithstanding paragraph (b) of this section, in the case of a practice that is a source water protection practice as identified by the Chief, a participant may receive an increased amount provided the payment does not exceed 90 percent of the incurred costs estimated for the practice.

§ 1466.24 EQIP payment restrictions and exceptions.

(a) *EQIP general aggregate payment limitation.* (1) The total amount of financial assistance payments paid to a person or legal entity under this part, during the period of fiscal years 2019 through 2023, may not exceed an aggregate of $450,000, directly or indirectly.

(2) Except as otherwise provided in § 1466.6, the limitation in paragraph (a)(1) of this section cannot be waived.

(b) *Organic production aggregate payment limitation.* Payments for conservation practices related to organic production to a person or legal entity, directly or indirectly, during the period of fiscal years 2019 through 2023, may not exceed an aggregate of $140,000.

(c) *Payment eligibility criteria.* To determine eligibility for payments, NRCS will use the criteria in paragraphs (c)(1) through (9) of this section:

(1) The provisions in 7 CFR part 1400, Payment Limitation and Payment Eligibility;

(2) Except as otherwise set forth in this part, States, political subdivisions, and entities thereof are not considered to be producers eligible for payment;

(3) In accordance with 7 CFR part 1400, an applicant applying as a joint operation or legal entity must provide a list of all members of the legal entity and joint operation and associated embedded entities, along with the members' tax identification numbers and percentage interest in the joint operation or legal entity, which all legal entities or persons applying, either alone or as part of a joint operation, must provide to be eligible to receive an EQIP payment;

(4) Contracts with Indian Tribes are not subject to payment or contract limitations, provided that—

(i) Indian Tribes certify in writing that no one individual, directly or indirectly, will receive more than the payment limitation,

(ii) Certification provided at the time of enrollment covers the entire contract period, and

(iii) The Tribal entity provides, upon request from NRCS, a listing of individuals and payment made, by Social Security number or other unique identification number, during the previous year for calculation of overall payment limitations, with the conditions in paragraphs (c)(4)(iii)(A) through (C) of this section:

(A) Payment limitations apply to individual Tribal member(s) when applying and subsequently being granted a contract as an individual(s);

(B) American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment; and

(C) Any individual Tribal member who is identified utilizing a unique identification number as an alternative to a tax identification number will utilize only that identifier for all contracts to which the individual Tribal member receives a payment directly or indirectly;

(5) Any cooperative association of producers that markets commodities for producers is not eligible for payment;

(6) NRCS will confirm eligibility for payments in accordance with 7 CFR part 1400, subpart F, Average Adjusted Gross Income Limitation, prior to contract approval;

(7) To be eligible for payments for conservation practices related to organic production or the transition to organic production:

(i) Participants who are USDA certified organic producers will implement conservation practices that are consistent with an approved organic system plan (OSP), and

(ii) Participants who are transitioning to organic production (including participants who are exempt from certification as defined by the Organic Foods Production Act of 1990) will develop an OSP and implement conservation practices that are consistent with OSP requirements and purposes of the program;

(8) A participant is not eligible for payments for conservation practices on eligible land if the participant receives payments or other benefits for the same practice to address the same resource concern on the same land under any other conservation program administered by USDA; and

(9) Before NRCS approves and issues any EQIP payment, the participant must certify that the conservation practice has been completed in accordance with contract requirements, and NRCS or an approved TSP must certify that the practice has been carried out in accordance with the applicable NRCS FOTG technical standards.

(d) *Advance payments.* (1) Notwithstanding paragraph (c) of this section, with respect to participants who are historically underserved producers, NRCS may issue advance payments of at least 50 percent and not to exceed 100 percent of the anticipated amount of the costs incurred for the purpose of purchasing materials or services to implement a conservation practice.

(2) Eligibility for advance payment is contingent upon the requirement that the participant obtain an NRCS-approved practice design prior to approval of the advance payment.

(3) The participant must expend advanced funds for practice implementation within 90 days from receipt of funds or return the funds to NRCS within a reasonable time as determined by NRCS.

§ 1466.25 Contract modifications and transfers of contract rights.

(a) NRCS may modify a contract, if—

(1) The participant agrees to the modification; and

(2) NRCS determines the modified contract continues to meet the purposes of the program.

(b) NRCS may approve a transfer of the contract if—

(1) NRCS receives written notice that identifies the new producer who will take control of the acreage, as required in paragraph (e) of this section;

(2) The new producer meets program eligibility requirements within a reasonable time frame, as specified in the EQIP contract;

(3) The new producer agrees to assume the rights and responsibilities for the acreage under the contract; and

(4) NRCS determines that the purposes of the program will continue to be met despite the original participant's losing control of all or a portion of the land under contract.

(c)(1) Until NRCS approves the transfer of contract rights, the transferee is not a participant in the program and may not receive payment for a conservation practice commenced prior to approval of the contract transfer.

(2) For contract payment purposes, NRCS will consider the transferor to be the participant to whom payments will be made for conservation practices implemented during the pendency of the approval of contract transfer.

(d) NRCS may terminate the entire contract if, within the time specified in the contract, a participant does not provide NRCS with written notice regarding any voluntary or involuntary loss of control of any acreage under the EQIP contract, which includes changes in a participant's ownership structure or corporate form.

(e) Unless NRCS receives timely notice of a loss of control and approves a transfer of contract rights, a participant losing control of any acreage will constitute a violation of the EQIP contract and NRCS may terminate the contract and require a participant to refund all or a portion of any financial assistance provided.

(f) NRCS may not approve a contract transfer and may terminate the contract in its entirety if NRCS determines that the loss of control is voluntary, the new producer is not eligible or willing to assume responsibilities under the contract (including payment rate eligibility), or the purposes of the program cannot be met.

(g) In the event a conservation practice fails through no fault of the participant, NRCS may issue payments to reestablish the practice, at the rates established in accordance with § 1466.23, provided such payments do not exceed the payment limitation requirements as set forth in § 1466.24.

(h) In the case of death, incompetency, or disappearance of any participant, NRCS may, as identified in the EQIP contract—

(1) Terminate the contract;

(2) Make any payments due under this part pursuant to guidance under applicable provisions of 7 CFR parts 707 and 1400 (including payment to successor(s)); or

(3) Take any further action that the Chief determines is fair and reasonable in light of all of the circumstances.

§ 1466.26 Contract violations and terminations.

(a) NRCS may terminate a contract—

(1) Without the consent of the participant where NRCS determines that the participant violated the contract; or

(2) With the consent of the participant if NRCS determines that the termination is in the public interest.

(b)(1) NRCS may allow a participant in a contract terminated in accordance with the provisions of paragraph (a) of this section to retain a portion of any payments received appropriate to the effort the participant has made to comply with the contract, or in cases of hardship, when forces beyond the participant's control prevented compliance with the contract.

(2) The condition that is the basis for the participant's inability to comply with the contract must not have existed at the time the contract was executed by the participant.

(3) If a participant believes that such a hardship condition exists, the participant may submit a request with NRCS for relief pursuant to this paragraph and any such request must contain documentation sufficient for NRCS to make a determination that this hardship condition exists.

(c)(1) If NRCS determines that a participant is in violation of the terms of a contract, O&M agreement, or documents incorporated by reference into the contract, NRCS may give the participant a reasonable period of time, as determined by NRCS, to correct the violation and comply with the terms of the contract and attachments thereto.

(2) If a participant continues to be in violation after such reasonable time, NRCS may terminate the EQIP contract in accordance with § 1466.26(f).

(d) Notwithstanding the provisions of paragraph (c) of this section, a contract termination is effective immediately upon a determination by NRCS that the participant—

(1) Submitted false information or filed a false claim;

(2) Engaged in any act, scheme, or device for which a finding of ineligibility for payments is permitted under the provisions of § 1466.35; or

(3) Incurred a violation of the contract provisions that cannot be corrected in a timeframe established by NRCS.

(e) If NRCS terminates a contract due to breach of contract, the participant forfeits all rights to future payments under the contract, pay liquidated damages, and refund all or part of the payments received, plus interest.

(1) NRCS may require a participant to provide only a partial refund of the payments received if a previously installed conservation practice can function independently and is not adversely affected by the violation or the absence of other conservation practices that would have been installed under the contract.

(2) NRCS may reduce or waive the liquidated damages depending upon the circumstances of the case.

(3) When terminating a contract, NRCS may reduce the amount of money owed by the participant by a proportion that reflects the good faith effort of the participant to comply with the contract or the existence of hardships beyond the participant's control that have prevented compliance with the contract.

(4) Any participant whose EQIP contract is terminated under paragraph (d) of this section may be subject to debarment or suspension under 7 CFR part 1407.

(f) NRCS may terminate a contract that provides payments to a participant for conservation practices related to organic production, if NRCS determines that the participant is not implementing practices according to provisions of the contract agreement or does not meet provisions of this part.

Subpart C—Conservation Innovation

§ 1466.30 Definitions.

In addition to the terms defined in § 1466.3, the definitions in this section apply to this subpart:

Eligible entity means, as determined by NRCS:

(1) A third-party private entity the primary business of which is related to agriculture;

(2) A nongovernmental organization with experience working with agricultural producers; or

(3) A governmental organization.

Grant agreement means a document describing a relationship between NRCS and a State or local government, or other recipient whenever the principal purpose of the relationship is the transfer of a thing of value to a recipient in order to accomplish a public purpose of support or stimulation authorized by Federal law and substantial Federal involvement is not anticipated.

Grant Review Board consists of representatives of NRCS staff as determined by the Chief.

On-Farm Conservation Innovation Trial (OFCIT) agreement means an agreement that governs the relationship between NRCS and the participant for the purposes of OFCIT implementation. An OFCIT agreement may be between either NRCS and a producer or NRCS and an eligible entity.

On-farm conservation research means an investigation conducted to answer a specified conservation-related question using a statistically valid design, while employing farm-scale equipment on farm fields.

Project means the activities as defined within the scope of the grant agreement or cooperative agreement.

Project director means the individual responsible for the technical direction and management of the project as designated in the application.

Technical Peer Review Panel means a panel consisting of Federal and non-Federal technical advisors who possess expertise in a discipline or disciplines deemed important to provide a technical evaluation of project proposals submitted under the funding opportunity announcement.

§ 1466.31 Purpose and scope.

(a) The purpose of Conservation Innovation Grants (CIG) is to stimulate the development and adoption of innovative conservation approaches and technologies while leveraging Federal investment in environmental enhancement and protection in conjunction with agricultural production. Notwithstanding any limitation of this part, NRCS administers CIG in accordance with this subpart. Unless otherwise provided for in this subpart, grants under CIG are subject to the provisions of 2 CFR part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

(b) Applications for CIG are accepted from the 50 States, District of Columbia, Commonwealth of Puerto Rico, Guam, Virgin Islands of the United States, American Samoa, and Commonwealth of the Northern Mariana Islands.

(c) NRCS may award grants to applicants either through a national competition or, at the Chief's discretion, separate State-level components, either of which may be offered multiple times each fiscal year.

(d) Applications for CIG should propose innovative projects or activities that—

(1) Demonstrate the use of innovative approaches and technologies to leverage Federal investment in environmental enhancement and protection, in conjunction with agricultural production;

(2) Promote innovative on-the-ground conservation, including pilot projects and field demonstrations of promising approaches or technologies;

(3) Lead to the transfer of conservation technologies, management systems, and innovative approaches (such as market-based systems) into

NRCS technical manuals and guides or to the private sector.

(e) For NRCS to consider a proposal eligible for CIG funding, the applicant must clearly demonstrate the innovative features of the proposed technology or approach.

(f) An applicant may demonstrate the innovative features of the proposed technology or approach through a variety of means, such as by establishing that it—

(1) Uses a technology or approach that was studied sufficiently to indicate a high probability for success;

(2) Demonstrates, evaluates, and verifies the effectiveness, utility, affordability, and usability of natural resource conservation technologies and approaches in the field;

(3) Adapts and transfers conservation technologies, management, practices, systems, approaches, and incentive systems to improve performance and encourage adoption; or

(4) Introduces proven conservation technologies and approaches to a geographic area or agricultural sector where that technology or approach is not currently in use.

(g) Projects or activities under CIG shall comply with all applicable Federal, Tribal, State, and local laws and regulations throughout the duration of the project.

§ 1466.32 Conservation innovation grant funding.

(a) *General guidelines.* The guidelines in paragraphs (a)(1) through (5) of this section apply for national-level CIG awards:

(1) CIG funding is available for single- or multi-year projects.

(2) The Chief will determine the funding level for CIG on an annual basis.

(3) CIG funding is made available from EQIP funds made available for EQIP.

(4) The Chief may establish funding limits for individual grants.

(5) The Chief will publicly announce funding for CIG.

(b) *Project or activity funding.* (1) Selected applicants may receive grants or cooperative agreements of up to 50 percent of the total project cost, not to exceed the federal project cap.

(2) Applicants must provide non-federal funding at least equal to the amount of federal funds requested.

(3) Non-federal funds must be derived from cash or in-kind sources.

(c) *Limitation to funding technical assistance.* CIG provides financial assistance to grantees. Procurement of any technical assistance to agricultural producers required to carry out a project is the responsibility of the grantee. A Federal technical representative designated by NRCS will provide technical oversight for grant projects.

(d) *Set-aside.* NRCS may set aside up to 10 percent of the total funds available for CIG for applications from historically underserved producers, or a community-based organization comprised of, representing, or exclusively working with these producers on a CIG project.

§ 1466.33 Conservation innovation grant administration.

(a) CIG applications must describe the use of innovative approaches or technologies to address announced national or State program priorities.

(b) NRCS may consider as eligible for CIG any individual or non-federal entity; however, all agricultural producers receiving a direct or indirect payment through participation in a CIG project to address announced national or State program priorities must—

(1) Be in compliance with the highly erodible land and wetland conservation provisions of 7 CFR part 12;

(2) Be a producer as determined by NRCS; and

(3) Have control of the land for the term of the proposed contract unless an exception is made by the Chief in the case of land administered by the Bureau of Indian Affairs (BIA), Indian lands, or other instances in which the Chief determines that there is sufficient assurance of control.

(c) NRCS will annually publish detailed guidance on how to apply for the grants competition(s) to address announced national or State program priorities.

§ 1466.34 Award determinations.

(a) A peer review panel evaluates completed applications based on the application evaluation criteria that address announced national or State program priorities.

(b) The peer review panel forwards compiled application evaluations to a Grant Review Board (Board).

(c) The Board reviews the peer review panel evaluations and considers review comments from State Conservationists. The Board then makes recommendations for awards to the Chief, who makes final selections.

(d) The NRCS National Headquarters makes a grant or cooperative agreement award after the Chief selects a grantee and the grantee agrees to the terms and conditions of the NRCS grant or cooperative agreement document.

§ 1466.35 State-level conservation innovation grant component.

(a) NRCS has the option of implementing a State-level CIG component. Except as otherwise indicated of this section, State-level CIG awards follows the requirements of this subpart for national-level CIG awards.

(b) Funding availability, application, and submission information for State competitions are announced through public notices separately from the national program and emphasize projects that cover limited geographic areas including individual farms, multicounty areas, or small watersheds.

(c) The State Conservationist determines the funding level for the State CIG competition and creates a review process for applications that considers various relevant criteria, including any potential conflicts of interest.

(d) NRCS may choose to adhere to the CIG national priorities or select other priority resource concerns.

§ 1466.36 Intellectual property.

(a) This section applies to all CIG awardees under this subpart.

(b) Allocation of rights to patents and inventions shall be in accordance with 2 CFR part 200.

(c) Small businesses may retain the principal worldwide patent rights to any invention developed with the support of USDA.

(d) USDA may—

(1) Receive a royalty-free license for Federal Government use,

(2) Reserve the right to require the patentee to license others in certain circumstances, and

(3) Require that anyone exclusively licensed to sell the invention in the United States must normally manufacture it domestically.

§ 1466.37 On-Farm Conservation Innovation Trials.

(a) *Purpose.* The purpose of the On-Farm Conservation Innovation Trials (OFCIT) under this section is for NRCS to facilitate and incentivize experimentation and testing of new and innovative conservation approaches on farms in a diversity of geographic regions and on multiple scales.

(b) *Eligibility determinations.* When determining eligibility for a private or nongovernmental organization, whether or not that organization is operated for profit, to enroll in OFCIT, NRCS may consider multiple factors including—

(1) The extent to which the organization conducts business that is related to agriculture;

(2) The quantity and quality of experience the organization has working with agricultural producers; or

(3) Other factors related to the organization's likelihood to succeed or the proposed trial's likelihood to fulfill the purpose of OFCIT, as determined by the Chief.

(c) *Agreements with eligible entities.* An OFCIT agreement with an eligible entity shall contain provisions indicating how NRCS or the eligible entity shall provide technical assistance to producers.

(d) *Innovation determinations.* Notwithstanding any limitation in § 1466.31(f) of this subpart, when determining whether to approve of a proposed conservation approach as new or innovative, NRCS may consider multiple factors including—

(1) The extent to which the proposed conservation approach makes use of new or innovative conservation practices, systems, or technology;

(2) The extent to which the proposed conservation approach applies conservation practices, systems, or technology in new or innovative ways, geographic regions, or agricultural sectors; or

(3) The extent to which the proposed conservation approach uses new or innovative processes or financing for implementing conservation practices or activities.

(e) *Requirements for producers.* When considering whether to enroll the land of a producer under an OFCIT agreement, NRCS first determines that—

(1) The participating producer complies with the highly erodible land and wetland conservation provisions of 7 CFR part 12;

(2) The producer controls the land for the term of the proposed OFCIT agreement, unless an exception is made by the Chief in the case of land administered by the BIA, Indian lands, or other instances in which the Chief determines that there is sufficient assurance of control;

(3) The producer is within the income limitations set forth in part 1400, subpart F of this chapter; and

(4) The land subject to the project proposal meets the definition of eligible land under § 1466.3.

(f) *Restriction on administrative cost.* None of the funds made available to carry out this section may be used to pay for the administrative expenses of an eligible entity.

(g) *OFCIT agreement period.* (1) An OFCIT agreement shall be for a period of at least 3 years, unless the Chief determines that a longer period is necessary.

(2) The contract period in excess of 3 years shall be no longer than reasonably and foreseeably necessary to fulfill the purpose of OFCIT, as determined by the Chief.

(3) When determining whether to set a contract period longer than 3 years, NRCS shall consider whether such a period is appropriate including whether the period supports—

(i) Adaptive management over multiple crops years; and

(ii) Adequate data collection and analysis by a producer or eligible entity to report the natural resource and agricultural production benefits of the new or innovative conservation approaches to the Secretary.

(h) *Data collection.* For all OFCIT contracts, NRCS shall ensure that appropriate data is collected and analyzed while respecting relevant privacy safeguards by transforming the data into statistical or aggregated form so as not to include any identifiable or personal information of individual producers.

(i) *OFCIT payments.* Pursuant to an OFCIT agreement, NRCS may provide—

(1) Technical assistance to a participating producer or eligible entity with respect to the design, installation, and management of the new or innovative conservation approaches;

(2) Technical assistance to a participating eligible entity with respect to data analyses of the OFCIT; and

(3) Financial assistance to a participating producer (either directly or through an eligible entity) that may include payments to compensate for income foregone, as appropriate to address the increased economic risk potentially associated with new or innovative conservation approaches:

(j) *Absence of payment limitation.* Neither the contract payment limitation set forth in § 1466.22 nor the aggregate payment limitation set forth in § 1466.24 shall apply to OFCIT agreements.

§ 1466.38 Soil Health Demonstration trial.

(a) The Soil Health Demonstration (SHD) shall make use of the OFCIT process, including eligibility requirements, and funding set forth in § 1466.37 to provide incentives to producers to implement conservation practices that improve soil health, increase carbon levels in the soil, or both.

(b) In carrying out SHD, NRCS shall coordinate with eligible entities to establish protocols for measuring carbon levels in the soil and testing carbon levels on land where conservation practices described in paragraph (a) of this section were applied to evaluate gains in soil health as a result of the practices implemented by the producers in the soil health demonstration trial.

(c) For each SHD contract, NRCS shall ensure that appropriate data is collected and analyzed while respecting relevant privacy safeguards by transforming the data into statistical or aggregated form so as not to include any identifiable or personal information of individual producers.

Subpart D—Incentive Contracts

§ 1466.40 High priority areas.

(a) The Chief shall, in consultation with the State Technical Committee, develop a set of high priority areas for each State.

(b) The set of high priority areas described in paragraph (a) of this section must encompass every region within the State.

(c) A high priority area may encompass an entire State or overlap with other high priority areas such that a given parcel of land may exist in multiple high priority areas.

(d) The Chief, in consultation with the State Technical Committee, shall identify up to three priority resource concerns for each land use within a given high priority area.

(e) An identification under paragraph (d) of this section of a priority resource concern for one land use shall not preclude NRCS from identifying the same priority resource concern for a different land use within the same high priority area.

(f) NRCS shall identify which practices qualify as incentive practices for each land use within each high priority area based on the priority resource concern(s) identified for that land use.

(g) NRCS shall make public all determinations made under this section.

§ 1466.41 Incentive contract selection.

(a) NRCS will give priority to applications that address eligible priority resource concerns identified under § 1466.40.

(b) NRCS will evaluate applications relative to other applications for similar agriculture and forest operations.

(c) NRCS shall not select an application for an incentive contract that does not contain at least one qualifying incentive practice as identified under § 1466.40.

§ 1466.42 Incentive contract requirements.

(a) *Requirement for a contract.* (1) In order for a participant to receive incentive payments, the participant must enter into an incentive contract agreeing to implement one or more incentive practices.

(2) Payment for technical services may be included in the contract pursuant to requirements of this part.

(b) *Incentive contract terms.* An incentive contract will—

(1) Identify all incentive practices to be implemented, the timing of practice installation, responsibilities of the participant, the O&M requirements for the practices, and applicable payments allocated to the practices under the contract;

(2) Have a period as set forth in § 1466.43;

(3) Specify any other provision determined necessary or appropriate by NRCS to achieve the technical requirements of a practice or purposes of the program.

(c) *Termination of the incentive contract.* NRCS may terminate an incentive contract consistent with the provisions of § 1466.26.

§ 1466.43 Incentive contract period.

(a) NRCS shall apply science-based criteria to determine an appropriate contract period to achieve desired conservation benefits.

(b) The period determined as appropriate under paragraph (a) of this section shall not be less than 5 years nor exceed 10 years.

§ 1466.44 Incentive payment rates and restrictions.

(a) *Aggregate payment limitation.* (1) Notwithstanding the payment limitation in § 1466.24, the total amount of payments paid to a person or legal entity under this subpart, during the period of fiscal years 2019 through 2023, may not exceed an aggregate of $200,000, directly or indirectly.

(2) Payments received for technical assistance will be excluded from the limitation in paragraph (a)(1) of this section.

(3) The limitation in paragraph (a)(1) of this section cannot be waived.

(b) *Restrictions and exceptions.* Except as otherwise indicated in paragraph (a) of this section, incentive contracts are subject to the payment restrictions and exceptions as set forth in § 1466.24.

(c) *Implementation payments.* The payment rates for implementation of incentive practices shall be identical to the payment rates for practice implementation as set forth in § 1466.23.

(d) *Annual payments.* In addition to the payment for implementation set forth in paragraph (c) of this section, NRCS may award annual payments through incentive contracts to compensate the participant for up to 100 percent of the costs of—

(1) O&M of the incentive practice; and

(2) Income foregone by the participant, including payments to address, as appropriate—

(i) Increased economic risk,

(ii) Loss in revenue due to anticipated reductions in yield, and

(iii) Economic losses during transition to a resource-conserving cropping system, resource-conserving crop rotation, or resource-conserving land uses.

Subpart E—General Administration

§ 1466.50 Appeals.

A participant may obtain administrative review of an adverse decision under EQIP in accordance with 7 CFR parts 11 and 614. Determination in matters of general applicability, such as payment rates, payment limits, the designation of identified priority resource concerns, and eligible conservation practices are not subject to appeal.

§ 1466.51 Compliance with regulatory measures.

Participants who carry out conservation practices will be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants will be responsible for compliance with all laws and for all effects or actions resulting from the participant's performance under the contract.

§ 1466.52 Access to operating unit.

An authorized NRCS representative will have the right to enter land under an NRCS conservation program contract for the purposes of determining eligibility and for ascertaining the accuracy of any representations related to contract performance. Access will include the right to provide technical assistance, determine eligibility, inspect any work undertaken under the contract, and collect information necessary to evaluate the conservation practice performance specified in the contract. The NRCS representative will make an effort to contact the participant prior to the exercising this provision.

§ 1466.53 Equitable relief.

(a) If a participant relied upon the advice or action of an authorized NRCS representative and did not know, or have reason to know, that the action or advice was improper or erroneous, NRCS may accept the advice or action as meeting program requirements and may grant relief, to the extent it is deemed desirable by NRCS, to provide a fair and equitable treatment because of the good-faith reliance on the part of the participant. The financial or technical liability for any action by a participant that was taken based on the advice of an NRCS certified non-USDA TSP is the responsibility of the certified TSP and will not be assumed by NRCS when NRCS authorizes payment. Where a participant believes that detrimental reliance on the advice or action of an NRCS representative resulted in ineligibility or a program violation, but the participant believes that a good-faith effort to comply was made, the participant may request equitable relief under 7 CFR 635.3.

(b) If, during the term of an EQIP contract, a participant has been found in violation of a provision of the EQIP contract, the O&M agreement, or any document incorporated by reference through failure to fully comply with that provision, the participant may be eligible for equitable relief under 7 CFR 635.4.

(c) NRCS reserves the right to correct all errors in entering data or the results of computations in an EQIP contract. If a participant does not agree to such corrections, NRCS shall terminate the contract.

§ 1466.54 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person, joint venture, legal entity, or Tribe will be made without regard to questions of this title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at part 1403 of this chapter will be applicable to contract payments.

(b) EQIP participants may assign any payments in accordance with part 1404 of this chapter.

§ 1466.55 Misrepresentation and scheme or device.

(a) A person, joint operation, legal entity, or Indian Tribe that is determined to have erroneously represented any fact affecting a program determination made in accordance with this part will not be entitled to contract payments and must refund to NRCS all payments, plus interest, determined in accordance with 7 CFR part 1403.

(b) A producer who is determined to have knowingly—

(1) Adopted any scheme or device that tends to defeat the purpose of the program;

(2) Made any fraudulent representation;

(3) Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which

such person would otherwise be entitled under the program; or

(4) Misrepresented any fact affecting a program determination, will refund to NRCS all payments, plus interest, determined in accordance with 7 CFR part 1403, received by such producer with respect to all contracts. The producer's interest in all contracts will be terminated.

§ 1466.56 Environmental credits for conservation improvements.

(a) A participant in EQIP may achieve environmental benefits that may qualify for environmental credits under an environmental credit-trading program. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that EQIP purposes are met. In addition, any requirements or standards of an environmental market program in which an EQIP participant simultaneously enrolls to receive environmental credits must be compatible with the purposes and requirements of the EQIP contract and with this part.

(b) The participant must meet all O&M requirements for EQIP-funded activities, consistent with §§ 1466.21 and 1466.22. Where activities required under an environmental credit agreement may affect the land and conservation practices under an EQIP contract, NRCS recommends that EQIP participants request assistance with the development of a compatibility assessment prior to entering into any credit agreement. The EQIP contract may be modified in accordance with policies outlined in § 1466.25, provided the modification meets EQIP purposes and is in compliance with this part.

(c) EQIP participants may not use EQIP funds to implement conservation practices and activities that the participant is required to establish as a result of a court order. EQIP funds may not be used to satisfy any mitigation requirement for which the EQIP participant is responsible.

Kevin Norton,

Associate Chief, Natural Resources Conservation Service.

Robert Stephenson,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 2019–26872 Filed 12–16–19; 8:45 am]

BILLING CODE 3410–16–P

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Tuesday, December 17, 2019

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at *http://www.archives.gov/federal-register/laws*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO's Federal Digital System (FDsys) at *http://www.gpo.gov/fdsys*. Some laws may not yet be available.

H.R. 887/P.L. 116–79

To designate the facility of the United States Postal Service located at 877 East 1200 South in Orem, Utah, as the ''Jerry C. Washburn Post Office Building''. (Dec. 12, 2019; 133 Stat. 1177)

H.R. 1252/P.L. 116–80

To designate the facility of the United States Postal Service located at 6531 Van Nuys Boulevard in Van Nuys, California, as the ''Marilyn Monroe Post Office''. (Dec. 12, 2019; 133 Stat. 1178)

H.R. 1253/P.L. 116–81

To designate the facility of the United States Postal Service located at 13507 Van Nuys Boulevard in Pacoima, California, as the ''Ritchie Valens Post Office Building''. (Dec. 12, 2019; 133 Stat. 1179)

H.R. 1526/P.L. 116–82

To designate the facility of the United States Postal Service located at 200 Israel Road Southeast in Tumwater, Washington, as the ''Eva G. Hewitt Post Office''. (Dec. 12, 2019; 133 Stat. 1180)

H.R. 1844/P.L. 116–83

To designate the facility of the United States Postal Service located at 66 Grove Court in Elgin, Illinois, as the ''Corporal Alex Martinez Memorial Post Office Building''. (Dec. 12, 2019; 133 Stat. 1181)

H.R. 1972/P.L. 116–84

To designate the facility of the United States Postal Service located at 1100 West Kent Avenue in Missoula, Montana, as the ''Jeannette Rankin Post Office Building''. (Dec. 13, 2019; 133 Stat. 1182)

H.R. 2151/P.L. 116–85

To designate the facility of the United States Postal Service located at 7722 South Main Street in Pine Plains, New York, as the ''Senior Chief Petty Officer Shannon M. Kent Post Office''. (Dec. 13, 2019; 133 Stat. 1183)

H.R. 2325/P.L. 116–86

To designate the facility of the United States Postal Service located at 100 Calle Alondra in San Juan, Puerto Rico, as the ''65th Infantry Regiment Post Office Building''. (Dec. 13, 2019; 133 Stat. 1184)

H.R. 2334/P.L. 116–87

To designate the Department of Veterans Affairs community-based outpatient clinic in Odessa, Texas, as the ''Wilson and Young Medal of Honor VA Clinic''. (Dec. 13, 2019; 133 Stat. 1185)

H.R. 2451/P.L. 116–88

To designate the facility of the United States Postal Service located at 575 Dexter Street in Central Falls, Rhode Island, as the ''Elizabeth Buffum Chace Post Office''. (Dec. 13, 2019; 133 Stat. 1186)

H.R. 3144/P.L. 116–89

To designate the facility of the United States Postal Service located at 8520 Michigan Avenue in Whittier, California, as the ''Jose Ramos Post Office Building''. (Dec. 13, 2019; 133 Stat. 1187)

H.R. 3314/P.L. 116–90

To designate the facility of the United States Postal Service located at 1750 McCulloch Boulevard North in Lake Havasu City, Arizona, as the ''Lake Havasu City Combat Veterans Memorial Post Office Building''. (Dec. 13, 2019; 133 Stat. 1188)

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