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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR 1416

[Docket No. FSA–2019–0011]

RIN 0560–AI50

Supplemental Agricultural Disaster Assistance Programs

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

ACTION: Final rule.

SUMMARY: The Agriculture Improvement Act of 2018 (2018 Farm Bill) amends the Agricultural Act of 2014 to make changes to the Supplemental Agricultural Disaster Assistance Programs, which include the Livestock Indemnity Program (LIP), the Livestock Forage Disaster Program (LFP), the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP), and the Tree Assistance Program (TAP). The rule includes changes required by the 2018 Farm Bill, as well as discretionary changes intended improve administration of the programs and clarify existing program requirements.

DATES: *Effective:* February 26, 2020.

FOR FURTHER INFORMATION CONTACT: Kimberly Graham; telephone (202) 720–7641, or email *kimberly.graham@usda.gov*. Persons with disabilities or who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Background

The disaster assistance programs, payment limitations, and payment eligibility provisions in this rule are Commodity Credit Corporation (CCC) funded and are administered by the Farm Service Agency (FSA). This final rule implements specific changes to the programs required by the 2018 Farm Bill (Pub. L. 115–334). This rule also makes minor clarifying amendments and corrections to the regulations in 7 CFR part 1416.

Payment Limitation

The 2018 Farm Bill removed ELAP from the combined $125,000 per year payment limitation with LFP, effectively removing the annual payment limitation for ELAP. LIP has no annual payment limitation as well because of changes made by the Bipartisan Budget Act of 2018 (Pub. L. 115–123). Accordingly, LFP is the only supplemental disaster program to have a $125,000 per person and legal entity program year payment limitation. However, the average adjusted gross income (AGI) limitation provisions in part 1400 of this chapter relating to limits on payments for persons or legal entities, excluding joint ventures and general partnerships, continue to apply to each applicant for ELAP, LFP, LIP, and TAP. Specifically, a person or legal entity with an AGI that exceeds $900,000 will not be eligible to receive benefits under 7 CFR part 1416. Further, the direct attribution provisions in 7 CFR part 1400 apply to ELAP, LFP, LIP, and TAP.

As required by the 2018 Farm Bill, effective with the 2019 and subsequent program years, direct or indirect payments to a person or legal entity under the LFP are limited to $125,000 per program year. The limitation does not apply to payments issued under ELAP, LIP, and TAP.

General Provisions

The 2018 Farm Bill amends the definition of ''eligible producer on a farm'' to include an Indian Tribe or Tribal organization. This rule amends the definition in the regulation. Additionally, miscellaneous provisions are being amended to specify that in order to be eligible for benefits, participants must submit an accurate acreage report annually as required by applicable program provisions.

ELAP

ELAP provides financial assistance to eligible producers of livestock, honeybees, and farm-raised fish for losses due to disease, certain adverse weather events, or loss conditions, including blizzards and wildfires, as determined by the Secretary. ELAP assistance is provided for losses that are not covered by LFP and LIP.

For ELAP, this rule makes mandatory changes to conform with the 2018 Farm Bill to:

- Provide that a veteran farmer or rancher's payment will be calculated based on a national payment rate of 90 percent;
- Add assistance for costs related to inspection for cattle tick fever, regardless of findings from the inspection;
- Remove assistance for livestock death losses due to disease transmitted by vectors that cannot be controlled by vaccination or acceptable management practices, as the 2018 Farm Bill authorizes payments for these losses under LIP; and
- Provide that ELAP payments, beginning with the 2019 program year, are not subject to an annual program payment limitation.

In addition, FSA is making discretionary changes to ELAP for clarity and to improve program integrity. The definition of ''eligible winter storm'' is amended to be consistent with how this term is used for LIP. In order to be consistent with the LFP and ELAP provisions in § 1416.104 and § 1416.105, the definition of ''livestock owner'' is amended to specify that an owner must have legal ownership of the livestock for which ELAP benefits are being requested during the 60 calendar days before the eligible adverse weather or eligible loss condition as opposed to only or just on the day of the eligible adverse weather or eligible loss condition. The definition of ''grazing animal'' is amended to clarify that unweaned livestock are not included in the definition. The program year for ELAP has always run as a fiscal year while the other disaster programs LFP, LIP and TAP had program years that were based on the calendar year. This rule amends the 2019 and subsequent program years for ELAP; for 2019 the ELAP program year is from October 1, 2018, through December 31, 2019; for 2020 and subsequent years, the ELAP program year is the same as the calendar year, January 1 through December 31. This is for ease in program administration and for producers to better understand the program year for ELAP consistent with other similar disaster assistance programs. The change should not impact the extent of any producer's payment eligibility.

This rule amends § 1416.103 to include costs for transporting water for eligible adverse weather, as determined by the Deputy Administrator. Previously, only drought was an eligible condition for costs for transporting water. This change is being made to address the actual loss sustained by producers when an eligible disaster (not just drought) causes a loss for transport of water (water transportation costs that absent that disaster would not have been incurred by the eligible producer). As was the case for drought, the cost of water is not eligible. The program will not pay for transporting water to livestock on land enrolled in CRP.

This rule amends § 1416.104 to remove the eligibility requirement for contract growers that their income be dependent on survival of the livestock, which was sometimes being interpreted to require a contract grower to indemnify owners for livestock deaths. Contract growers have beneficial risk interest in livestock when their compensation is based on their inputs, which are subject to loss and performance of the livestock as specified in the contract grower's contract. While some contracts may make the contract grower liable for death of livestock, such a condition is not required in order for a contract grower to be able to show beneficial risk interest in the livestock. The intent is to specify that eligibility of contract growers is for those persons or legal entities who do not own the livestock, but who derive income from weight gain of livestock, production of livestock products, or number of livestock produced. This rule also removes a provision that eligible livestock must not have been in a feedlot on the beginning date of the eligible adverse weather or loss condition to be eligible under ELAP as the location of an owner's livestock on the beginning date of an eligible disaster is not relevant to whether an eligible loss has occurred for an owner's grazing animals.

For program integrity, this rule specifies that a notice of loss for honeybee colony or honeybee hive losses must be accompanied by acceptable documentation to FSA that demonstrates that an eligible loss occurred and was associated with an eligible loss condition.

This rule removes regulatory provisions that applied only to ELAP for prior program years.

Further, consistent with the 15-day notice of loss period that applies to producers of honey under the Noninsured Crop Disaster Assistance Program, for honeybee losses the rule amends the notice of loss deadline for 2020 and subsequent program years to 15 days of when the loss is first apparent to the producer. For losses other than honeybee and honeybee hive losses, the notice of loss deadline remains at 30 days from the date loss is first apparent to the producer. This rule specifies that, in addition to all other existing eligibility requirements, that in the event a participant was paid for a loss of honeybee colony or honeybee hive in either or both of the previous 2 years, the participant must provide, along with any notice of loss and application for payment in the current year, documentation acceptable to FSA substantiating beginning inventory for that current year for which the notice of loss and application for payment is being submitted. The rule specifies that, in addition to all other existing eligibility requirements, for honeybee colony losses due to Colony Collapse Disorder (CCD), the participant must provide a producer certification that the loss was a direct result of at least 3 of the 5 symptoms of CCD. Further, in addition to the notice of loss required by § 1416.107, this rule clarifies that an application for payment is due within 30 calendar days of the end of the applicable program year. This is not a change; however, with the change in program years, the regulation is amended to tie the application deadline to the program year.

LFP

Other than the change made to payment limitations that removed ELAP from the combined $125,000 annual payment limit with LFP therefore making LFP the only supplemental disaster program subject to the $125,000 limit, the 2018 Farm Bill did not make changes to the LFP. However, consistent with other discretionary changes for clarity and program integrity, FSA is making the following changes in this rule.

This rule clarifies § 1416.201 to specify that eligible livestock owners or contract growers of livestock who are eligible producers of grazed forage crop acreage are eligible for LFP payment consideration. Persons or legal entities that are not both an eligible owner or contract grower of livestock and a producer of grazed forage are not eligible. This is not a change to existing policy, rather a clarification. This rule amends the definition of ''contract grower'' to remove the requirement that the contract grower's income be dependent on survival of the livestock, consistent with the intent of the program as well as with the ELAP provision covering contract growers. This rule amends the definition of ''grazing animals'' to make clear that unweaned animals are excluded (consistent with ELAP) from this definition and therefore ineligible for payment. This rule adds a definition for ''unweaned livestock''.

This rule amends § 1416.203 to clarify that as of the date of the qualifying drought or fire for LFP, the owner or contract grower of grazing animals must provide pastureland or grazing land for covered livestock that is physically located in a county affected by a qualifying drought during the normal grazing period for the specific forage crop acreage in the county. This is not a change in policy, but rather a clarification in the regulatory text. Further, consistent with ELAP, this rule clarifies that livestock excluded from being eligible include livestock intended for consumption by the owner or contract grower. This rule also clarifies provisions in § 1416.205 regarding grazing losses on irrigated land, which are not eligible for payment under LFP unless they are due to a lack of surface water as a result of a qualifying eligible drought condition. Finally, consistent with amendments to other subparts of part 1416, this rule removes provisions that were applicable to only prior program years.

LIP

LIP provides benefits to livestock owners and contract growers for livestock deaths in excess of normal mortality or injured livestock sold at a reduced price caused by adverse weather or by attacks by animals reintroduced into the wild by the Federal Government. LIP payments are equal to 75 percent of the average fair market value of the livestock. There is no payment limitation for LIP. The 2018 Farm Bill amends LIP to include coverage for:

1. Death loss resulting from diseases caused by, or transmitted by, a vector that cannot be controlled by vaccination or acceptable management practices; and

2. Death of unweaned livestock due to extreme cold and without regard to management protocols.

FSA is amending the regulations to conform to the mandatory changes under the 2018 Farm Bill changes to:

- Amend eligible livestock losses to include death loss of unweaned livestock due to extreme cold, without regard to management practices, vaccination protocols, or lack of vaccinations by the eligible producer; and
- Amend the definition of ''eligible disease'' to include disease caused or transmitted by a vector and not be

susceptible to control by vaccination or acceptable management practices (this was previously an eligible loss under ELAP; it will now be covered under LIP together with any other eligible death loss of eligible livestock). With these amendments, compensation for eligible livestock deaths will only be under LIP.

In addition, this rule makes minor discretionary changes to LIP to improve program integrity. FSA is amending § 1416.302 to remove references to ''open range'' livestock. The term was previously used where the rule allowed for establishment of beginning inventory of calf and lamb operations based on livestock beginning inventory history (LBIH). The regulation will retain LBIH and its use will be applicable in any livestock operation, not only those that were referred to as ''open range,'' for establishment of beginning inventory of unweaned livestock of calves, kids, or lambs. Accordingly, corresponding amendments are being made throughout the subpart to remove references to open range and to replace the reference to calves and lambs with unweaned livestock. This rule also amends § 1416.304, where applicable, by replacing the words ''adverse weather event or date of the attack by animals reintroduced into the wild by the Federal Government or protected by Federal law, including wolves and avian predators or the transmission by vectors and is not susceptible to control by vaccination or acceptable management practices'' with ''eligible loss condition,'' for ease in reading. This rule amends § 1416.304 to clarify that that eligible livestock includes only those livestock produced and maintained for commercial use for sale of the production of livestock products such as milk or eggs (or livestock). Excluded livestock are the same before including, but not limited to, wild free roaming animals; animals produced or maintained for consumption by the owner or contract grower; livestock used for recreational purposes; and livestock used for pleasure, hunting, roping, pets, or for show.

As is the case for other subparts, this rule amends § 1416.305 to remove provisions that were only applicable to prior program years. However, to relieve the burden some livestock owners may have in qualifying for assistance, § 1416.305 is amended to permit, for losses sustained due to an eligible adverse weather event or eligible disease, as defined in the rule, that the participant must, at a minimum, provide reliable records of inventory and reliable records as proof of death or injury. Finally, consistent with other amendments to 7 CFR part 1416, provisions in § 1416.305 that were applicable only to prior program years (for example, on or after October 1, 2011, and before January 1, 2015) have been removed.

TAP

TAP assists eligible orchardists and nursery tree growers that have incurred tree, bush, or vine mortality losses in excess of 15 percent, adjusted for normal mortality, due to natural disaster. TAP is a cost-reimbursement program, which means that payments are calculated based on estimated actual costs to replace or rehabilitate lost or damaged trees, bushes, or vines. The replacement and rehabilitation activities must take place within 12 months after the application is approved, and payment is not made until the activities are completed.

The rule amends § 1416.402 to add the term ''commercially viable'' for those eligible trees, bushes, or vines, that are damaged but which may rejuvenate and return to a level of expected production through rehabilitation and without planting. The term is added to § 1416.403 to permit eligible trees, bushes, or vines that are determined not commercially viable to be included in order to meet the requisite mortality in § 1416.403(a). This rule also amends the definition of ''natural disaster'' to specify the included natural occurrences must be extreme, abnormal, and damaging, consistent with the intent of the program.

This rule amends § 1416.405 to remove provisions that applied only to prior program years. It amends § 1416.406 to implement a change required by the 2018 Farm Bill to increase the reimbursement amount for a beginning farmer and rancher and a veteran farmer and rancher from 65 percent to 75 percent for the cost of replanting trees, bushes, or vines lost due to a natural disaster, in excess of 15 percent mortality (adjusted for normal mortality) or, at the option of the Secretary, sufficient seedlings to reestablish a stand. The 2018 Farm Bill also increases the reimbursement amount for beginning farmers and ranchers and veteran farmers and ranchers from 50 percent to 75 percent of the cost of pruning, removal, and other costs incurred for salvaging the existing plants, or in the case of plant mortality, to prepare land for replanting, subject to the maximum allowable FSA rate.

Effective Date, Notice and Comment, and Paperwork Reduction Act

The Administrative Procedure Act (5 U.S.C.553) provides that the notice and comment and 30-day delay in the effective date provisions do not apply when the rule involves specified actions, including matters relating to benefits. This rule governs Supplemental Agricultural Disaster Assistance Programs, which include ELAP, LIP, LFP, and TAP for benefit payments and thus falls within that exemption.

Further, as specified in 7 U.S.C. 9091, the regulations to implement the provisions of the Title I of the 2018 Farm Bill are:

- Exempt from the notice and comment provisions of 5 U.S.C. 553, and
- Exempt from the Paperwork Reduction Act (44 U.S.C. chapter 35.
- To use the authority in 5 U.S.C. 808 related to Congressional review and any potential delay in the effective date.

In addition, 7 U.S.C. 9091(c)(3) directs the Secretary to use the authority provided in 5 U.S.C. 808, which 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 mandatory requirements of the 2018 Farm Bill and the need to implement the regulations expeditiously to provide assistance to producers who suffered disaster losses because of adverse weather and other natural disasters, FSA and CCC find that notice and public procedure are contrary to the public interest.

The Office of Management and Budget (OMB) designated this rule as not major under Congressional Review Act, as defined by 5 U.S.C. 804(2). Therefore, FSA is not required to delay the effective date for 60 days from the date of publication to allow for Congressional review.

Accordingly, this rule is effective upon publication in the **Federal Register**.

Executive Orders 12866, 13563, 13771, and 13777

Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review,'' direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health

and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The requirements in Executive Order 12866 and 13563 for the analysis of costs and benefits apply to rule that are determined to be significant. Executive Order 13777, ''Enforcing the Regulatory Reform Agenda,'' established a federal policy to alleviate unnecessary regulatory burdens on the American people.

OMB designated this rule as not significant under Executive Order 12866, ''Regulatory Planning and Review,'' and therefore, OMB has not reviewed this rule and analysis of the costs and benefits is not required under either Executive Order 12866 and 13563.

Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' requires that in order to manage the private costs required to comply with Federal regulations that for every new significant or economically significant regulation issued, the new costs must be offset by the elimination of at least two prior regulations. As this rule is designated not significant, it is not subject to Executive Order 13771. In a general response to the requirements of Executive Order 13777, USDA created a Regulatory Reform Task Force, and USDA agencies were directed to remove barriers, reduce burdens, and provide better customer service both as part of the regulatory reform of existing regulations and as an ongoing approach. FSA reviewed this regulation and made changes to improve any provision that was determined to be outdated, unnecessary, or ineffective.

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, 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 as noted above, this rule is exempt from notice and comment rulemaking requirements of the APA and no other law requires that a proposed rule be published for this rulemaking initiative.

Environmental Review

In general, the environmental impacts of rules are to be considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA regulations for compliance with NEPA (7 CFR part 799). Some of the changes being made by the rule were self-enacting and have already been implemented administratively. The rule implements primarily changes required by the 2018 Farm bills for ELAP, LIP and TAP; and the discretionary aspects are to improve administration of the programs and clarify existing program requirements. FSA is providing the disaster assistances, payment limitations, and payment eligibility provisions under the LIP, LFP, ELAP, and TAP to the eligible producers. The discretionary provision would not alter any environmental impacts resulting from implementing the mandatory changes to those programs. Accordingly, these discretionary aspects are coved by the following Categorical Exclusion, found at 7 CFR part 799.31(b)(6)(vi) safety net programs administrated by FSA and no Extraordinary Circumstances (§ 799.33) exist. Therefore, as this rule presents only discretionary clarifications of mandatory requirements that will not have an impact to the human environments, individually or cumulatively, FSA will not prepare an environmental assessment or environmental impact statement for this rule; this rule serves as documentation of the programmatic environmental compliance decision for this federal action.

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 parts 11 and 780 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.

USDA has assessed the impact of this rule on Indian Tribes and determined that this rule has Trial implications that required Tribal consultation under Executive Order 13175. Tribal consultation for this rule was included in the 2018 Farm Bill consultation held on May 1, 2019, at the National Museum of American Indian, in Washington, DC. The portion of the Tribal Consultation relative to this rule was conducted by Bill Northey, USDA Under Secretary for the Farm Production and Conservation mission area, as part of Title I session. If a Tribe requests additional consultation, FSA will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided.

Unfunded Mandates

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, or Tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates as defined by Title II of UMRA for State, local, or Tribal governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Federal Assistance Programs

The titles and numbers of the Federal assistance programs, listed in the Catalog of Federal Domestic Assistance, to which this rule applies, are:

10.088—Livestock Indemnity Program

10.089—Livestock Forage Disaster Program

10.091—Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program

10.092—Tree Assistance Program

E-Government Act Compliance

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

List of Subjects in 7 CFR Part 1416

Administrative practice and procedure, Agriculture, Disaster assistance, Fruits, Livestock, Nursery stock, Seafood.

For the reasons discussed above, CCC amends 7 CFR part 1416 as follows:

PART 1416—EMERGENCY AGRICULTURAL DISASTER ASSISTANCE PROGRAMS

■ 1. The authority citation for part 1416 continues to read as follows:

Authority: Title I, Pub. L. 113–79, 128 Stat. 649; Title I, Pub. L. 115–123; Title VII, Pub. L. 115–141.

Subpart A—General Provisions for Supplemental Agricultural Disaster Assistance Programs

§ 1416.2 [Amended]

■ 2. Amend § 1416.2, in paragraph (a), by removing the words ''will be'' and adding the word ''is'' in their place, and in paragraph (f), by adding a comma after the word ''year'' the first time it appears in the second sentence.

■ 3. Amend § 1416.3 as follows:

■ a. In paragraph (b)(3), remove the word ''or'';

■ b. In paragraph (b)(4), remove the period and add ''; or'' at the end of the paragraph; and

■ c. Add paragraph (b)(5).

The addition reads as follows:

§ 1416.3 Eligible producer.

* * * * *

(b) * * *

(5) Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).

■ 4. Amend § 1416.6 as follows:

■ a. Revise paragraph (a); and

■ b. In paragraph (c), in the first sentence, remove the words ''For losses incurred beginning on October 1, 2011, and for'' add the word ''For'' in their place, and in the last sentence, remove the words ''average AGI'' and add ''AGI'' in their place.

The revision reads as follows:

§ 1416.6 Payment eligibility and limitation.

(a) For 2019 and each subsequent program year, a person, legal entity, or member of a joint venture or general partnership, as determined in part 1400 of this chapter, cannot receive, directly or indirectly, more than $125,000 per program year under LFP.

* * * * *

§ 1416.7 [Amended]

■ 5. Amend § 1416.7, in paragraph (a), by removing the word ''deliberately''.

■ 6. Amend § 1416.14 by adding paragraph (b) to read as follows.

§ 1416.14 Miscellaneous.

* * * * *

(b) In order to be eligible for benefits, participants in the programs specified in this part must submit an accurate acreage report annually as required by these provisions.

Subpart B—Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program

■ 7. Amend § 1416.102 as follows:

■ a. In the definition of ''Eligible adverse weather'', add the word ''eligible'' before the word ''winter'';

■ b. Revise the definition of ''Eligible winter storm'';

■ c. In the definition of ''Equine animal'', add the word ''weaned'' before the word ''domesticated'';

■ d. In the definition of ''Goat'', add the word ''weaned'' before the word ''domesticated'' and remove the second sentence;

■ e. In the definition of ''Grazing animals'', remove the words ''livestock that'' and add the words ''weaned livestock that'' in their place and add a sentence to the end of the definition;

■ f. In the definition of ''Livestock owner'', remove the words ''on the day of'' and add the words ''during the 60 calendar days before'' in their place.

■ g. Revise the definitions of ''Non-adult beef cattle'', ''Non-adult beefalo'', ''Non-adult buffalo or bison'', and ''Non-adult dairy cattle'';

■ h. In the definition of ''Normal mortality'', remove the words ''livestock,'' and ''livestock and'';

■ i. Remove the definition of ''Poultry'';

■ j. Revise the definition of ''Program year'';

■ k. In the definition of ''Sheep'', add the word ''weaned'' before the word ''domesticated'' and remove the second sentence;

■ l. Remove the definition of ''Swine''; and

■ m. Add in alphabetical order a definition for ''Unweaned livestock''; and

■ n. In the definition of ''Verifiable record'', remove the words ''and is used to substantiate the claimed loss''.

The revisions and additions read as follows:

§ 1416.102 Definitions.

* * * * *

Eligible winter storm means an event that is so severe as to directly cause loss and lasts in duration for at least 3 consecutive days and includes a combination of high winds, freezing rain or sleet, heavy snowfall, and extremely cold temperatures. The wind, precipitation, and extremely cold temperatures must occur during the consecutive 3-day period, with wind and extremely cold temperatures occurring in each of the 3 days.

* * * * *

Grazing animals * * * Unweaned livestock are not grazing animals regardless of whether those unweaned livestock are present on grazing land or pastureland.

* * * * *

Non-adult beef cattle means a weaned beef breed bovine animal that on or

before the beginning date of the eligible adverse weather or eligible loss condition does not meet the definition of adult beef cow or bull.

Non-adult beefalo means a weaned hybrid of beef and bison that on or before the beginning date of the eligible adverse weather or eligible loss condition does not meet the definition of adult beefalo cow or bull.

Non-adult buffalo or bison means a weaned animal of those breeds that on or before the beginning date of the eligible adverse weather or loss condition does not meet the definition of adult buffalo or adult bison cow or bull.

Non-adult dairy cattle means a weaned bovine animal of a breed used for the purpose of providing milk for human consumption that on or before the beginning date of the eligible adverse weather or eligible loss condition does not meet the definition of adult dairy cow or bull.

* * * * *

Program year means for 2019 from October 1, 2018, through December 31, 2019; for 2020 and subsequent years, the program year is the same as the calendar year, January 1 through December 31.

* * * * *

Unweaned livestock means an animal not weaned from mother's milk or milk replacement to other nourishment. For ELAP purposes, unweaned livestock does not include turkeys, ducks, chickens, and geese.

* * * * *

■ 8. Amend § 1416.103 as follows:
■ a. Revise paragraphs (d)(5) introductory text and (d)(5)(i) and (ii);
■ b. In paragraph (d)(5)(iii), remove the words ''grazing land' and add the word ''livestock'' in their place;
■ c. Revise paragraph (f);
■ d. Remove paragraph (g);
■ e. Redesignate paragraphs (h) through (j) as paragraphs (g) through (i), respectively; and
■ f. Revise newly redesignated paragraph (h).

The revisions read as follows:

§ 1416.103 Eligible losses, adverse weather, and other loss conditions.

* * * * *

(d) * * *

(5) A loss resulting from the additional cost of transporting water to eligible livestock as specified in § 1416.104(a) due to eligible adverse weather, eligible loss condition, or eligible drought, as determined by the Deputy Administrator, including, but not limited to, costs associated with water transport equipment rental fees, labor, and contracted water transportation fees. The cost of the water is not eligible for payment. Transporting water to livestock located on land enrolled in CRP is not an eligible loss under ELAP. To be eligible for additional cost of transporting water to eligible livestock, the livestock must be on eligible grazing lands that meet all of the following:

(i) Physically located in the county where the eligible adverse weather, eligible loss condition, or eligible drought, as determined by the Deputy Administrator, occurred;

(ii) That had adequate livestock watering systems or facilities before the eligible adverse weather, eligible loss condition, or eligible drought occurred; and

* * * * *

(f) For a loss resulting from the additional cost associated with gathering livestock to inspect or treat for cattle tick fever, the livestock gathered for inspection or treatment for cattle tick fever must be considered eligible livestock as specified in § 1416.104(d). To be considered an eligible loss, acceptable records, as determined by the Deputy Administrator, must be on file with APHIS, that provide the number of livestock gathered and inspected or treated for cattle tick fever and the number of treatments given during the program year.

* * * * *

(h) For honeybee colony or honeybee hive losses to be considered eligible, the hive producer must have incurred the loss in the county where the eligible adverse weather or eligible loss condition occurred. The honeybee colony or hive losses must be due to an eligible adverse weather or eligible loss condition, as determined by the Deputy Administrator, including, but not limited to, colony collapse disorder, earthquake, eligible winter storm, as specified in § 1416.102, excessive wind, flood, hurricane, lightning, tornado, volcanic eruption, and wildfire. Drought is not an eligible adverse weather event or eligible loss condition for honeybee hive losses. To be considered eligible for honeybee hive loss as of the beginning date of the eligible adverse weather event or eligible loss condition the honeybee hive must be all the following: Maintained for producing honey, pollinating, or breeding honeybees for commercial use in a farming operation; physically located in the county where the eligible adverse weather or eligible loss conditions occurred; and be a part of a honeybee farming operation in which the applicant has a risk in honey production, pollination, or honeybee breeding. To be considered an eligible honeybee colony loss, the colony loss must be in excess of normal mortality, as established by the Deputy Administrator, and the loss could not have been prevented through reasonable and available measures. The notice of loss must be accompanied by acceptable documentation, as determined by the Deputy Administrator, that demonstrates an eligible loss occurred and was associated with an eligible adverse weather or eligible loss condition, and that generally accepted husbandry and production practices had been followed. For colony collapse disorder, acceptable documentation includes, but is not limited to, proof of beginning inventory and good management practices, and a producer certification that the loss of honeybee colonies was a direct result of at least 3 of the following 5 symptoms:

(1) The loss of live queen or drone bee populations inside the hives;

(2) Rapid decline of adult worker bee population outside the hives, leaving brood poorly or completely unattended;

(3) Absence of dead adult bees inside the hive and outside the entrance of the hive;

(4) Absence of robbing collapsed colonies;

(5) At the time of collapse, varroa mite and Nosema populations are not at levels known to cause economic injury or population decline.

* * * * *

§ 1416.104 [Amended]

■ 9. Amend § 1416.104 as follows:
■ a. In paragraph (a)(3), add the word ''and'' at the end of the paragraph;
■ b. In paragraph (a)(4); remove the semicolon and add a period in its place;
■ c. Remove paragraph (a)(5);
■ d. In paragraph (c)(7), add the word ''unweaned'' before the word ''beef'';
■ e. Remove paragraphs (d), (e)(1) and (2), and (f);
■ f. Redesignate paragraphs (e), (g), and (h) as paragraphs (d), (e), and (f), respectively; and
■ g. In newly redesignated paragraph (d), remove the words ''the survival of the livestock and'' and the phrase ''For death losses for contract growers to be eligible, the livestock must meet all of the following conditions:''.

§ 1416.105 [Amended]

■ 10. Amend § 1416.105 by removing paragraph (c) and redesignating paragraphs (d) through (f) as paragraphs (c) through (e), respectively.

§ 1416.106 [Amended]

■ 11. Amend § 1416.106 as follows:
■ a. Revise paragraph (a) introductory text;

■ b. In paragraph (a)(2)(i), remove the words ''feed, grazing, and death'' and add the words ''feed and grazing'' in their place;
■ c. In paragraph (a)(7), remove the words ''resource and beginning'' and add the words ''resource, beginning, or veteran'' in their place;
■ d. In paragraph (b) introductory text, remove the words ''For 2017 and subsequent program years, for'' and add the word ''For'' in its place;
■ e. In paragraph (d), add a new third sentence;
■ f. Remove paragraph (e); and
■ g. Redesignate paragraph (f) as paragraph (e).

The revision and addition read as follows:

§ 1416.106 Notice of loss and application process.

(a) To apply for ELAP, the participant that suffered eligible livestock, honeybee, or farm-raised fish losses must submit, to the FSA county office, the following:

* * * * *

(d) * * * If the participant was paid for a loss of honeybee colony or honeybee hive in either or both of the 2 previous years, the participant must provide documentation that FSA deems acceptable to substantiate how current year honeybee colony and honeybee hive inventory was acquired. * * *

* * * * *

■ 12. Revise § 1416.107 to read as follows:

§ 1416.107 Notice of loss and application period.

(a) In addition to submitting an application for payment by the deadline in paragraph (b) of this section, the participant that suffered eligible livestock, honeybee, or farm-raised fish losses that create or could create a claim for benefits must:

(1) For losses other than honeybees, provide a notice of loss to FSA within 30 calendar days of when the loss of livestock is first apparent;

(2) For honeybee losses, provide a notice of loss together with documentation required by § 1416.103 to FSA within 15 calendar days of when the loss is first apparent;

(3) Submit the notice of loss required in this paragraph to the FSA county office.

(b) In addition to the notices of loss required in paragraph (a) of this section, a participant seeking payment must also submit a completed application for payment by 30 calendar days after the end of the applicable program year.

§ 1416.109 [Amended]

■ 13. Amend § 1416.109 as follows:
■ a. In paragraph (a), remove the word ''socially'' and add the words ''veteran farmer or rancher, socially ''in its place; and
■ b. In paragraph (c), remove the references ''§§ 1416.110(n), 1416.111(b)'' and add the reference ''§§ 1416.111(b)'' in its place.

§ 1416.110 [Amended]

■ 14. Amend § 1416.110 as follows:
■ a. In paragraph (b) introductory text, add the words ''eligible adverse weather, eligible loss condition, or'' before the words ''eligible drought'';
■ b. In paragraph (f) introductory text, add the words ''or inspect'' after the word ''treat'', and add the words ''or inspection'' after the word ''treatment'' both times it appears;
■ c. In paragraph (f)(2), add the words ''or inspected'' after the word ''treated'';
■ d. Remove paragraph (n); and
■ e. Redesignate paragraph (o) as paragraph (n).

Subpart C—Livestock Forage Disaster Program

■ 15. Amend § 1416.201 by revising paragraph (b) to read as follows:

§ 1416.201 Applicability.

* * * * *

(b) Eligible livestock owners or contract growers who are eligible producers of eligible grazed forage crop acreage will be compensated for eligible grazing losses for covered livestock that occur due to a qualifying drought or fire that occurs in the calendar year for which benefits are being requested.

■ 16. Amend § 1416.202 as follows:
■ a. In the definition of ''Contract grower'', remove the words ''the survival of the livestock and'';
■ b. In the definition of ''Equine animal'', add the word ''weaned'' before the word ''domesticated'';
■ c. In the definition of ''Goat'', add the word ''weaned'' before the word ''domesticated'';
■ d. In the definition of ''Grazing animals'', add the word ''weaned'' before the work ''livestock'' in the first sentence, and add a sentence to the end of the definition;
■ e. In the definition of ''Non-adult beef cattle'', add the word ''weaned'' before the word ''beef'' and remove the words ''weighted 500 pounds or more'' and remove the words ''but that'';
■ f. In the definition of ''Non-adult beefalo'':
■ i. Add the word ''weaned'' before the word ''hybrid'';
■ ii. Remove the words ''weighed 500 pounds or more''; and
■ iii. Remove the words ''fire, but'' and add the word ''fire'' in their place;
■ g. In the definition of ''Non-adult buffalo or bison'', remove the word ''an'' and add the words ''a weaned'' in its place and remove the words ''weighed 500 pounds or more'' and '', but'';
■ h. In the definition of ''Non-adult dairy cattle'';
■ i. Add the word ''weaned'' before the word ''bovine'';
■ ii. Remove the words ''weighed 500 pounds or more''; and
■ iii. Remove the words ''fire, but that'' and add the word ''fire'' in their place;
■ i. Remove the definition of ''Poultry'';
■ j. In the definition of ''Sheep'', add the word ''weaned'' before the word ''domesticated'';
■ k. Remove the definition of ''Swine''; and
■ l. Add in alphabetical order a definition for ''Unweaned livestock''.

The additions read as follows:

§ 1416.202 Definitions.

* * * * *

Grazing animals * * * Unweaned livestock are excluded as grazing animals regardless of whether those unweaned livestock are present on grazing land or pastureland.

* * * * *

Unweaned livestock means an animal not weaned from mother's milk or milk replacement to other nourishment.

* * * * *

§ 1416.203 [Amended]

■ 17. Amend § 1416.203 as follows:
■ a. In paragraph (a)(2) introductory text, remove the word ''Provide'' and add the words ''As of the date of the qualifying drought or fire provide'' in its place; and
■ b. In paragraph (a)(2)(i), add the words ''the specific forage crop acreage in'' after the word ''for''.

■ 18. Amend § 1416.204 as follows:
■ a. In paragraph (a)(5), remove the word ''any'' and add the words ''consumption by the owner, lessee, or contract grower, any'' in their place;
■ b. Revise paragraph (c)(7); and
■ c. In paragraph (c)(9), remove the words ''as part of a farming operation'' and add the words ''any of the following or'' before the word ''recreational''.

The revision reads as follows:

§ 1416.204 Covered livestock.

* * * * *

(c) * * *

(7) Unweaned livestock or animals not meeting the definition of a grazing animal;

* * * * *

§ 1416.205 [Amended]

■ 19. Amend § 1416.205 in paragraph (b)(2) by removing the words ''lack of water that is beyond the participant's control'' and adding the words ''the lack of surface water as a result of a qualifying eligible drought condition'' in their place.

■ 20. Amend § 1416.206 as follows:
■ a. Remove paragraph (a);
■ b. Redesignate paragraphs (b) and (c) as (a) and (b), respectively;
■ c. Revise newly redesignated paragraph (a);
■ d. Remove newly redesignated paragraph (b)(2);
■ e. Redesignate newly redesignated paragraphs (b)(3) through (7) as paragraphs (b)(2) through (6), respectively; and
■ e. In newly redesignated paragraph (b)(6), remove the words ''papers; rendering truck receipts; Federal Emergency Management Agency Records; National Guard records; written'' and add the words ''papers; written'' in their place.

The revision reads as follows:

§ 1416.206 Application for payment.

(a) To apply for LFP, the participant that suffered eligible grazing losses for the 2019 and subsequent program years must submit a completed application and required supporting documentation, including some supporting documentation such as an acreage report that may have been required at an earlier date, to the administrative FSA county office no later than 30 calendar days after the end of the calendar year in which the grazing loss occurred.

* * * * *

§ 1416.207 [Amended]

■ 21. Amend § 1416.207 in paragraph (a) by adding the words ''representative to'' after the words ''only as'' in the last sentence.

Subpart D—Livestock Indemnity Program

■ 22. Amend § 1416.301 by revising paragraph (a) to read as follows:

§ 1416.301 Applicability.

(a) This subpart establishes the terms and conditions of the Livestock Indemnity Program (LIP).

* * * * *

■ 23. Amend § 1416.302 as follows:
■ a. Revise the definitions of ''Actual livestock beginning inventory'', ''Adjusted livestock beginning inventory'', and ''Approved livestock beginning inventory'';
■ b. In the definition of ''Base period'', remove the words ''open range calf or lambing operation'' and add the words ''unweaned livestock'' in their place;
■ c. In the definition of ''Continuous livestock beginning inventory reports'', remove the words ''livestock open range operation'' and add the words ''unweaned livestock'' in their place;
■ d. Remove the definition of ''Cow/Ewe Livestock Beginning Inventory History'';
■ e. Add in alphabetical order a definition for ''Cow, Ewe, Nanny LBIH'';
■ f. In the definition of ''Eligible adverse weather'', remove the last three sentences;
■ g. In the definition of ''Eligible disease'', remove the word ''poisoning'', and add the words ''poisoning, or a disease that is caused or transmitted by a vector and cannot be controlled by vaccination or acceptable management practices'' in its place;
■ h. In the definition of ''Livestock beginning inventory history'', remove the words ''calf or lamb open range'';
■ i. In the definition of ''LBIH reporting date'', add a period at the end of the definition;
■ j. Revise the definition of ''Livestock inventory report'';
■ k. Remove the definitions of ''Open range operation'' and ''Transitional livestock beginning inventory history for offspring (calves/lambs)''; and
■ l. Add in alphabetical order definitions for ''Transitional LBIH for unweaned livestock'' and ''Unweaned livestock''.

The revisions and additions read as follows:

§ 1416.302 Definitions.

* * * * *

Actual livestock beginning inventory means the actual livestock beginning inventory per calendar year for unweaned livestock that is calculated from the verifiable or reliable records of death, birthing, docking, inventory, and sales.

Adjusted livestock beginning inventory means the LBIH for unweaned livestock that will be adjusted during the base period for years for which continuous actual LBIH records are not provided.

* * * * *

Approved livestock beginning inventory means the approved livestock beginning inventory for unweaned livestock, calculated by the sum of the yearly actual and transitional LBIH divided by the number of years of LBIH.

* * * * *

Cow, Ewe, Nanny LBIH means, the applicable calendar year cow, ewe, or nanny verifiable livestock beginning inventory records provided to FSA by the unweaned livestock operation to be used in calculating the transitional LBIH.

* * * * *

Livestock inventory report means a written record showing the producer's annual inventory used to determine the LBIH for LIP purposes for the livestock operation. The report contains LBIH by livestock operation by livestock type or kind.

* * * * *

Transitional LBIH for unweaned livestock means an estimated LBIH, generally determined by multiplying the livestock operation's beginning cow, ewe, or nanny LBIH by the national established birthing rate percentage established by FSA for the species of unweaned livestock. The Deputy Administrator has the authority to make adjustments for variations in stocking levels for livestock during the period covered by the history as necessary. It is to be used in the transitional LBIH calculation process when less than 4 consecutive calendar years of actual LBIH is available.

Unweaned livestock means an animal not weaned from mother's milk or milk replacement to other nourishment. For LIP purposes, unweaned livestock does not include turkeys, ducks, chickens, and geese.

* * * * *

■ 24. Amend § 1416.304 as follows:
■ a. Revise paragraphs (c)(1)(ii) and (c)(2);
■ b. In paragraph (c)(3), add the words ''produced or'' before the word ''maintained'', and remove the words ''sale of'';
■ c. Revise paragraph (c)(4);
■ d. Redesignate paragraphs (d)(37) through (39) as paragraphs (d)(40) through (42), respectively and Redesignate paragraphs (d)(14) through (36) as paragraphs (d)(16) through (38), respectively;
■ e. Add new paragraphs (d)(14) and (15);
■ f. In newly redesignated paragraph (d)(36), remove the word ''feeder'' and add the words ''suckling pigs, nursery'' in their place;
■ g. In newly redesignated paragraph (d)(37), remove the words ''sows, boars,'' and add ''lightweight'' in their place;
■ h. In newly redesignated paragraph (d)(38), remove the words ''over 150'' and add the words ''151 to 450'' in their place;
■ i. Add new paragraph (d)(39);
■ j. Revise paragraph (e); and
■ k. In paragraph (f), remove the words ''cause of loss'' and add the words ''loss condition'' in their place.

The additions and revisions read as follows:

§ 1416.304 Eligible livestock.

* * * * *

(c) * * *

(1) * * *

(ii) No later than 30 calendar days for livestock, or 7 calendar days for newborn livestock, from the ending date of the eligible loss condition; or

(2) Been injured and sold at a reduced price as a direct result of an eligible adverse weather event or eligible attack no later than 30 calendar days for livestock, or 7 calendar days for newborn livestock, from the ending date of the eligible adverse weather event or eligible attack.

* * * * *

(4) Not be produced or maintained for reasons other than commercial use for livestock sale or for the production of livestock products such as milk or eggs. Livestock excluded from being eligible include, but are not limited to, wild free roaming animals and animals produced or maintained for consumption by the owner or contract grower, livestock used for recreational purposes, livestock used for pleasure, hunting, roping, pets, or for show.

(d) * * *

(14) Chickens, roasters

(15) Chickens, super roasters or parts

* * * * *

(39) Swine, boars, sows, 450 pounds or more;

* * * * *

(e) The following categories of animals are eligible livestock for contract growers and calculations of eligibility for payments will be calculated separately for each producer with respect to each category:

(1) Chickens, broilers, pullets (regular size);

(2) Chickens, chicks;

(3) Chickens, layers;

(4) Chickens, pullets or Cornish hens (small size);

(5) Chickens, roasters;

(6) Chickens, super roasters or parts;

(7) Ducks;

(8) Ducks, ducklings;

(9) Geese, goose;

(10) Swine, boars, sows;

(11) Swine, suckling nursery pigs;

(12) Swine, lightweight barrows, gilts 50 to 150 pounds;

(13) Swine, sows, boars, barrows, gilts 151 to 450 pounds;

(14) Swine, boars and sows 450 pounds or more;

(15) Turkeys, poults; and

(16) Turkeys, toms, fryers, and roasters.

* * * * *

■ 25. Amend § 1416.305 as follows:

■ a. Revise paragraph (a);

■ b. In paragraph (b)(1), remove the words ''For 2017 and subsequent programs years, provide'' and add the word ''Provide'' in its place and;

■ c. In paragraph (b)(2), remove the words ''paragraph (b)(1) of'';

■ d. Revise paragraph (c);

■ e. In paragraph (d)(4), remove the word ''Inventory'', and add the words ''Documentation acceptable to FSA showing inventory'' in its place;

■ f. Revise paragraphs (f), (g) introductory text, and (h) introductory text;

■ g. In paragraph (h)(1)(i), remove the words ''verifiable or reliable'';

■ h. Revise paragraphs (i) introductory text and (i)(1) introductory text;

■ i. In paragraph (i)(1)(i), remove the words ''open range'' and ''verifiable;

■ j. In paragraphs (i)(1)(ii), (i)(2) introductory text, and (i)(2)(i), remove the words ''open range'' and add the word ''unweaned'' in their place;

■ k. Revise paragraph (i)(2)(ii);

■ l. In paragraph (i)(3), remove the words ''livestock beginning inventory history'' and add the word ''LBIH'' in their places each time they appear; and remove the words ''ewe and cow'' and add the words ''ewe, cow, and nanny'' in their place;

■ m. In paragraph (i)(4) introductory text, remove the words ''open range'' and add the word ''unweaned'' in their place, and remove the words ''livestock beginning inventory history'' and add the word ''LBIH'' in their place;

■ n. Revise paragraphs (i)(4)(i) through (iv); and

■ o. Remove paragraph (k).

The revisions read as follows:

§ 1416.305 Application process.

(a) A notice of loss must be accompanied by documentation acceptable to FSA substantiating that the claimed eligible loss condition occurred and was responsible for eligible losses. For any notice of loss being submitted for disease exacerbated by eligible adverse weather, the notice of loss must be accompanied by a certification referenced in paragraph (g) of this section.

* * * * *

(c) In addition to the notice of loss required in paragraph (b) of this section, a participant must also submit a completed application for payment, by livestock unit for losses apparent in 2019 and subsequent years, by no later than 60 calendar days after the end of the calendar year in which the eligible loss condition occurred.

* * * * *

(f) For losses resulting from an eligible adverse weather event or eligible disease, if adequate verifiable proof of death or injury documentation is not available, the participant may provide reliable records as proof of death or injury. Reliable records may include contemporaneous producer records, dairy herd improvement records, brand inspection records, vaccination records, dated pictures, and other similar reliable documents as determined by FSA.

(g) For livestock death losses due to disease, a licensed veterinarian's certification of livestock deaths may be accepted as proof of death, if reliable beginning inventory data is available, only if the veterinarian provides a written statement containing all of the following:

* * * * *

(h) Certification of livestock deaths or injuries by third parties may be accepted if both of the following conditions are met:

* * * * *

(i) * * *

(2) * * *

(ii) The COC will explain the procedure for the LBIH to unweaned livestock operation. COC will determine the LBIH in accordance with § 1416.305(g).

* * * * *

(4) * * *

(i) If no acceptable livestock beginning inventory records are available for calves, lambs, or kids, calculate the 4 transitional livestock beginning inventory histories by multiplying the approved birthing rate or drop rate percentage for the unweaned livestock operation times the applicable cow, ewe, or nanny LBIH times 65 percent.

(ii) If acceptable livestock beginning inventory records are provided for only one of the most recent 5 calendar years, calculate the 3 transitional livestock beginning inventory histories by multiplying the approved birthing rate or drop rate percentage for the unweaned livestock operation times the applicable cow, ewe, or nanny LBIH times 80 percent.

(iii) If acceptable livestock beginning inventory records are provided for only 2 of the most recent 5 calendar years, calculate the 2 transitional livestock beginning inventory histories by multiplying the approved birthing rate or drop rate percentage for the unweaned livestock operation times the applicable cow, ewe, or nanny LBIH times 90 percent.

(iv) If acceptable livestock beginning inventory records are provided for only

3 of the most recent 5 calendar years, calculate the one transitional livestock beginning inventory histories by multiplying the approved birthing rate or drop rate percentage for the unweaned livestock operation times the applicable cow, ewe, or nanny LBIH times 100 percent.

* * * * *

Subpart E—Tree Assistance Program

§ 1416.400 [Amended]

■ 26. Amend § 1416.400 in paragraph (a) by removing the words ''by the Bipartisan Budget Act of 2018 (Pub. L. 115–123), and the Consolidated Appropriations Act, 2018 (Pub. L. 115–141)''.

■ 27. Amend § 1416.402 by adding in alphabetical order a definition for ''Commercially viable'' and revising the definition of ''Natural disaster'' to read as follows:

§ 1416.402 Definitions.

* * * * *

Commercially viable means an eligible tree, bush, or vine, though damaged, that can rejuvenate and return to an acceptable level of commercial production at some time with rehabilitation and without replanting. A commercially viable tree, bush, or vine, regardless of the extent of damage or years of reduced production, is always excluded and never included as part of mortality under § 1416.403.

* * * * *

Natural disaster means plant disease, insect infestation, drought, fire, freeze, flood, earthquake, lightning, or other natural occurrence. Each of these types of disasters must be extreme, abnormal, and damaging as well as of significant magnitude or severity, as determined by the Deputy Administrator.

* * * * *

■ 28. Amend § 1416.403 in paragraph (g) by adding two sentences to the end to read as follows:

§ 1416.403 Eligible losses.

* * * * *

(g) * * * The qualifying mortality loss will be determined based on the eligible trees, bushes, or vines that reached mortality, which means that the tree, bush, or vine died, above and below ground, as a result of an eligible natural disaster event. If an eligible tree, bush, or vine is damaged to such an extent that it is not commercially viable, now or at any time in the future, the tree, bush, or vine can be considered dead in determining if the requisite qualifying mortality loss threshold in paragraph (a) of this section is reached.

§ 1416.404 [Amended]

■ 29. Amend § 1416.404 in paragraph (a)(2) by removing the words ''occurring on or after October 1, 2011''.

§ 1416.405 [Amended]

■ 30. Amend § 1416.405 as follows:

■ a. Remove paragraph (a);

■ b. Redesignate paragraphs (b) through (e) as paragraphs (a) through (d), respectively; and

■ c. In newly redesignated paragraph (a), remove the words ''that occurred during the 2017 and subsequent calendar years'' and remove the words ''by the later of December 3, 2018''.

§ 1416.406 [Amended]

■ 31. Amend § 1416.406 as follows:

■ a. In paragraphs (a)(1)(i) and (a)(2)(i), add the words ''for eligible producers, or 75 percent of the actual cost of the practice for an eligible producer who is a beginning or veteran farmer or rancher'' after the word ''practice'';

■ b. In paragraph (j), remove the words ''occurred on or after October 1, 2011, can not'' and add the word ''cannot'' in their place.

Richard Fordyce,

Administrator, Farm Service Agency.

Robert Stephenson,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 2020–03841 Filed 2–25–20; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 1, 3, 5, 6, 23, 24, 32, 34, 160, and 192

[Docket ID OCC–2018–0040]

RIN 1557–AE59

FEDERAL RESERVE SYSTEM

12 CFR Parts 206, 208, 211, 215, 217, 223, 225, 238, and 251

[Regulation Q; Docket No. R–1638]

RIN 7100–AF 29

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303, 324, 337, 347, 362, 365, and 390

RIN 3064–AE91

Regulatory Capital Rule: Capital Simplification for Qualifying Community Banking Organizations

Correction

In rule document 2019–23472 beginning on page 61776 in the issue of Wednesday, November 13, 2019, make the following correction:

§ 6.4 [Corrected]

■ 1. On page 61794, in § 6.4, in the second column, beginning on the 21st line, amendatory instruction 13 should read:

■ 13. Section 6.4 is amended by:

■ a. Revising the section heading;

■ b. Revising paragraph (a);

■ c. Removing paragraph (b);

■ d. Redesignating paragraph (c) as paragraph (b);

■ e. Revising newly designated paragraph (b) introductory text and paragraph (b)(1); and

■ f. Redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively.

[FR Doc. C1–2019–23472 Filed 2–25–20; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0525; Product Identifier 2019–NM–076–AD; Amendment 39–19824; AD 2020–01–18]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting an airworthiness directive (AD) that published in the **Federal Register**. That AD applies to all The Boeing Company Model 757 airplanes. As published, the reference for revising the existing maintenance or inspection program specified in the regulatory text is incorrect. This document corrects that error. In all other respects, the original document remains the same.

DATES: This correction is effective March 5, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of March 5, 2020 (85 FR 5304, January 30, 2020).

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of June 30, 2006 (71 FR 30278, May 26, 2006).

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; phone: 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. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0525.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Chandraduth 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: As published, AD 2020–01–18, Amendment 39–19824 (85 FR 5304, January 30, 2020) (''AD 2020–01–18''), requires incorporating a new revision to the Airworthiness Limitations section of the Instructions for Continued Airworthiness to mandate certain repetitive inspections for fatigue cracking of principal structural elements (PSEs), and revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, for all The Boeing Company Model 757 airplanes.

Need for the Correction

As published, the service information reference for revising the existing maintenance or inspection program specified in the regulatory text is incorrect. The incorrectly specified reference was Boeing 757 Maintenance Planning Data (MPD) Document, Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622N001–9, Revision October 2018, which did not include reference to Subsection B. The correct reference is Subsection B., ''Airworthiness Limitations—Structural Inspections,'' of Boeing 757 Maintenance Planning Data (MPD) Document, Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622N001–9, Revision October 2018.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing 757 Maintenance Planning Data (MPD) Document, Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622N001–9, Revision October 2018. This service information describes procedures for airworthiness limitations for structural inspections, fuel tank systems, safe life limits, and certification maintenance requirements.

This AD also requires the following service information, which the Director of the Federal Register approved for incorporation by reference as of June 30, 2006 (71 FR 30278, May 26, 2006).

- Boeing 757 Maintenance Planning Data (MPD) Document, Section 9, ''Airworthiness Limitations and Certification Maintenance Requirements,'' Subsection B. of Boeing Document D622N001–9, Revision ''May 2003.''
- Boeing 757 Maintenance Planning Data (MPD) Document, Section 9, ''Airworthiness Limitations and Certification Maintenance Requirements,'' Subsection B. of Boeing Document D622N001–9, Revision ''June 2005.''

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.

Correction of Publication

This document corrects an error and correctly adds the AD as an amendment to 14 CFR 39.13. Although no other part of the preamble or regulatory information has been corrected, we are publishing the entire rule in the **Federal Register**.

The effective date of this AD remains March 5, 2020.

Since this action only corrects the service information reference for revising the existing maintenance or inspection program specified in the regulatory text, it has no adverse economic impact and imposes no additional burden on any person. Therefore, the FAA has determined that notice and public comment procedures are unnecessary.

List of Subjects in 14 CFR Part 39

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

Adoption of the Correction

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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 [Corrected]

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

2020–01–18 The Boeing Company: Amendment 39–19824; Docket No. FAA–2019–0525; Product Identifier 2019–NM–076–AD.

(a) Effective Date

This AD is effective March 5, 2020.

(b) Affected ADs

This AD replaces AD 2006–11–11, Amendment 39–14615 (71 FR 30278, May 26, 2006) (''AD 2006–11–11'').

(c) Applicability

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

(2) Installation of Supplemental Type Certificate (STC) ST01518SE affects the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST01518SE is installed, a ''change in product'' alternative method of compliance (AMOC) approval request is necessary to comply with the requirements of 14 CFR 39.17.

(d) Subject

Air Transport Association (ATA) of America Code 28, Fuel; 53, Fuselage; 57, Wings.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address fatigue cracking of various principal structural elements (PSEs); such fatigue cracking could adversely affect the structural integrity of these airplanes.

(f) Compliance

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

(g) Retained Revision to the Maintenance or Inspection Program, With No Changes

This paragraph restates the requirements of paragraph (h) of AD 2006–11–11, with no changes. Within 36 months after June 30, 2006 (the effective date of AD 2006–11–11), revise Section 9, ''Airworthiness Limitations and CMRs'' of the Boeing 757 Maintenance Planning Data (MPD) Document to incorporate Subsection B. of Boeing Document D622N001–9, Revision ''May 2003;'' or Revision ''June 2005;'' as applicable.

(h) New Maintenance or Inspection Program Revision

(1) Except for airplanes identified in paragraph (h)(2) of this AD: Within 18 months after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Subsection B., ''Airworthiness Limitations—Structural Inspections,'' of Boeing 757 Maintenance Planning Data (MPD) Document, Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622N001–9, Revision October 2018. The initial compliance time for doing the new or updated tasks is at the time specified in Subsection B., ''Airworthiness Limitations—Structural Inspections,'' of Boeing 757 Maintenance Planning Data (MPD) Document, Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622N001–9, Revision October 2018, or within 18 months after the effective date of this AD, whichever occurs later. The compliance time for doing the unchanged tasks is at the time specified in Subsection B., ''Airworthiness Limitations—Structural Inspections,'' of Boeing 757 Maintenance Planning Data (MPD) Document, Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622N001–9, Revision October 2018.

(2) For airplanes with STC ST01518SE installed: Within 18 months after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate a supplemental program to address the effect of STC ST01518SE, in accordance with the procedures specified in paragraph (l) of this AD.

(i) No Alternative Actions, Intervals, or Critical Design Configuration Control Limitations (CDCCLs) for Paragraph (g) of This AD

Except as required by paragraph (h) of this AD: After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections), intervals, or CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (l) of this AD.

(j) No Alternative Actions, Intervals, or CDCCLs for Paragraph (h) of This AD

After the existing maintenance or inspection program has been revised as required by paragraph (h) of this AD, no alternative actions (*e.g.,* inspections), intervals, or CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (l) of this AD.

(k) Terminating Action for the Requirements of Paragraph (g) of This AD

Accomplishing the revision required by paragraph (h) of this AD terminates the revision required by paragraph (g) of this AD.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (m) 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 2001–20–12, Amendment 39–12460 (66 FR 52492, October 16, 2001), and AD 2006–11–11, are approved as AMOCs for the corresponding provisions of this AD.

(m) Related Information

For more information about this AD, contact Chandraduth 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*.

(n) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on March 5, 2020 (85 FR 5304, January 30, 2020).

(i) Boeing 757 Maintenance Planning Data (MPD) Document, Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622N001–9, Revision October 2018.

(ii) [Reserved]

(4) The following service information was approved for IBR on June 30, 2006 (71 FR 30278, May 26, 2006).

(i) Boeing 757 Maintenance Planning Data Document, Section 9, ''Airworthiness Limitations and Certification Maintenance Requirements,'' Subsection B. of Boeing Document D622N001–9, Revision ''May 2003.''

(ii) Boeing 757 Maintenance Planning Data Document, Section 9, ''Airworthiness Limitations and Certification Maintenance Requirements,'' Subsection B. of Boeing Document D622N001–9, Revision ''June 2005.''

(5) 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; phone: 562–797–1717; internet: *https://www.myboeingfleet.com*.

(6) 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.

(6) You may view this service information that is incorporated by reference at the

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

Issued on February 20, 2020.

Lance T. Gant, Director,

Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03829 Filed 2–25–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0150; Product Identifier 2019–SW–063–AD; Amendment 39–21028; AD 2020–03–13]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.A. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Leonardo S.p.A. Model AW189 helicopters. This AD requires inspecting the hydraulic fluid level on each tail rotor (T/R) damper and depending on the inspection results, removing the T/R damper from service and reporting information or repetitively inspecting the T/R damper. This AD is prompted by reports of major leakage of hydraulic fluid in T/R dampers. This condition could result in degradation of T/R damper performance; multiple leaking T/R dampers could result in T/R damage and subsequent loss control of the helicopter. The actions of this AD are intended to address an unsafe condition on these products.

DATES: This AD becomes effective March 12, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain document listed in this AD as of March 12, 2020.

The FAA must receive comments on this AD by April 27, 2020.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *https://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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–2020–0150; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Aviation Safety Agency (EASA) AD, any service information that is incorporated by reference, the economic evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

For service information identified in this final rule, contact Leonardo S.p.A. Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–225074; fax +39–0331–229046; or at *https://www.leonardocompany.com/en/home.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0150.

FOR FURTHER INFORMATION CONTACT: Kristi Bradley, Aerospace Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *kristin.bradley@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and the FAA did not provide you with notice and an opportunity to provide your comments prior to it becoming effective. However, the FAA invites you to participate in this rulemaking by submitting written comments, data, or views. The FAA also invites comments relating to the economic, environmental, energy, or federalism impacts that resulted from adopting this AD. The most helpful comments reference a specific portion of the AD, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit them only one time. The FAA will file in the docket all comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this rulemaking during the comment period. The FAA will consider all the comments received and may conduct additional rulemaking based on those comments.

Discussion

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2019–0160, dated July 5, 2019, to correct an unsafe condition for Leonardo S.p.A. Model AW189 helicopters, with T/R damper part number (P/N) 4F640V00254 with a serial number (S/N) up to LK1229 inclusive. The EASA AD excludes any T/R damper that is marked with ''R'' on its S/N and any T/R damper that has accumulated 150 flight hours or more since installation on a helicopter and that has been continuously installed for 12 months or more. EASA advises that occurrences were reported of leakage of the T/R damper hydraulic fluid. EASA advises that the T/R damper hydraulic fluid leakage occurred on newly installed T/R dampers and those that had accumulated less than 150 flight hours. Therefore, the EASA AD requires repetitive visual inspections of the hydraulic fluid level of each T/R damper at intervals not to exceed 10 flight hours until the T/R damper accumulates 150 flight hours since first installation and 10 months after the effective date of the EASA AD. The EASA AD also provides a terminating action and requires a ground run following installation of an affected T/R damper. Additionally, depending on the inspection results, the EASA AD requires replacement of the affected part with a serviceable part, returning T/R dampers for re-work and re-identification, and emailing information and pictures to Leonardo Helicopter Division.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all known

relevant information and determining that an unsafe condition is likely to exist or develop on other helicopters of the same type design.

Related Service Information Under 1 CFR Part 51

Leonardo Helicopters has issued Emergency Alert Service Bulletin (ASB) No. 189–226, dated July 5, 2019. The ASB specifies visually checking for excess hydraulic fluid in each T/R damper and defines the replacement and reporting criteria. The ASB also specifies performing a ground run and subsequent visual check immediately after installing any affected T/R damper on a helicopter.

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.

AD Requirements

This AD requires, within 10 hours time-in-service (TIS) inspecting the hydraulic fluid level of each affected T/R damper and repeating the inspection at intervals not to exceed 10 hours TIS until the T/R damper accumulates 150 total hours TIS and has been installed for 12 or more consecutive months. Depending on the hydraulic fluid level, this AD requires removing from service the affected T/R damper and emailing photographs of the sight window showing the hydraulic fluid level and certain information to Leonardo S.p.A Helicopters.

After the effective date of this AD, following installation of an affected T/R damper, this AD requires performing a ground run for at least 30 minutes, inspecting the hydraulic fluid level, and repeating the hydraulic fluid level inspection at intervals not to exceed 10 hours TIS until the T/R damper accumulates 150 total hours TIS and has been installed for 12 consecutive months.

Differences Between This AD and the EASA AD

The EASA AD requires returning removed parts to Leonardo Helicopter Division, while this AD does not. Following installation of an affected T/R damper, the EASA AD requires repeating the hydraulic fluid level inspection until the T/R damper accumulates 150 total hours TIS, has been installed for 12 consecutive months, and has been installed for 10 months after the effective date of the EASA AD. This AD requires repeating the hydraulic fluid level inspection until the T/R damper accumulates 150 total hours TIS and has been installed for 12 consecutive months instead.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because FAA has determined that it has good cause to adopt this rule without notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 4 helicopters of U.S. Registry. The FAA estimates that operators may incur the following costs in order to comply with this AD. Labor costs are estimated at $85 per work-hour.

Visually inspecting the hydraulic fluid level on all four T/R dampers requires about 1 work-hour for an estimated cost of $85 per helicopter and $340 for the U.S. fleet per inspection cycle.

If required, replacing a T/R damper requires about 2 work-hours and parts cost about $7,170 for an estimated cost of $7,340 per T/R damper.

Reporting information requires about 1 work-hour for an estimated cost of $85 per helicopter.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

FAA's Justification and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (5 U.S.C.) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because some of the corrective actions are required within 10 hours TIS. Therefore, notice and opportunity for prior public comment are impracticable and contrary to public interest pursuant to 5 U.S.C. 553(b)(3)(B). In addition, for the reasons stated above, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

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

For the reasons discussed, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866, and

2. Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–03–13 Leonardo S.p.A.: Amendment 39–21028; Docket No. FAA–2020–0150; Product Identifier 2019–SW–063–AD.

(a) Applicability

This AD applies to Leonardo S.p.A. Model AW189 helicopters, certificated in any category, with a tail rotor (T/R) damper part number (P/N) 4F6420V00254 with a serial number (S/N) up to LK1229 inclusive, installed, except:

(1) Any T/R damper marked with a final dash ''R'' on the S/N, or

(2) Any T/R damper that has accumulated 150 or more total hours time-in-service (TIS) and has been installed for 12 or more consecutive months.

(b) Unsafe Condition

This AD defines the unsafe condition as leaking T/R damper hydraulic fluid. This condition could result in degradation of T/R damper performance. Multiple leaking T/R dampers could cause T/R damage and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective March 12, 2020.

(d) Compliance

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

(e) Required Actions

(1) Within 10 hours TIS, inspect each T/R damper as follows: With the T/R damper in the upper position and the sight window downward at a 45-degree angle, inspect the hydraulic fluid level through the sight window using a T/R damper inspection tool.

(i) If the fluid level is over the pointing line in the red zone, before further flight, remove from service the T/R damper.

(ii) If the fluid level is under the pointing line in the white zone, repeat the inspection per paragraph (e)(1) at intervals not to exceed 10 hours TIS.

(2) Within 10 days after removing any T/R damper from service, as required by paragraph (e)(1)(i) of this AD, send photos of the sight window showing the hydraulic fluid level and a completed Table 1 of Leonardo Helicopters Emergency Alert Service Bulletin No. 189–226, dated July 5, 2019 to *pse_aw189.mbx.aw@leonardocompany.com*.

(3) For each T/R damper with less than 150 total hours TIS and that has been installed for less than 12 consecutive months, repeat the actions required by paragraph (e)(1) of this AD within every 10 hours TIS until the T/R damper reaches 150 total hours TIS and has been installed for 12 or more consecutive months.

(4) For each T/R damper with less than 150 total hours TIS and that has been installed for 12 or more consecutive months, repeat the actions required by paragraph (e)(1) of this AD within every 10 hours TIS until the T/R damper reaches 150 total hours TIS.

(5) For each T/R damper with 150 or more total hours TIS and that has been installed for less than 12 consecutive months, repeat the actions required by paragraph (e)(1) of this AD until the T/R damper has been installed for 12 consecutive months.

(6) After the effective date of this AD, do not install a T/R damper P/N 4F6420V00254 with S/N up to LK1229 inclusive on any helicopter, unless you have performed a ground run for at least 30 minutes and perform the actions required by paragraph (e)(1) of this AD.

(7) Repeating the inspection until the T/R damper reaches 150 total hours TIS and has been installed for 12 consecutive months constitutes a terminating action for the repetitive inspection required by paragraphs (e)(1) through (5) of this AD.

(f) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

(g) Alternative Methods of Compliance (AMOCs)

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

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

(h) Additional Information

(1) The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD No. 2019–0160, dated July 5, 2019. You may view the EASA AD on the internet at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2020–0150.

(i) Subject

Joint Aircraft Service Component (JASC) Code: 6400, Tail Rotor System.

(j) Material Incorporated by Reference

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

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

(i) Leonardo Helicopters Emergency Alert Service Bulletin No. 189–226, dated July 5, 2019.

(ii) [Reserved]

(3) For Leonardo Helicopters service information identified in this AD, contact Leonardo S.p.A. Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–225074; fax +39–0331–229046; or at *https://www.leonardocompany.com/en/home*.

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

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

Issued in Fort Worth, Texas, on February 13, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03840 Filed 2–25–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0100; Product Identifier 2020–NM–016–AD; Amendment 39–19845; AD 2020–03–21]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc, Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes. This AD was prompted by reports that main landing gear (MLG) trailing arm assemblies were found with compromised paint finish and corrosion on the axle bore inner diameters due to improper removal of contaminants during manufacturing. This AD requires a one-time inspection to determine if an affected MLG trailing arm assembly is installed, repetitive detailed inspections of the inner diameter of the affected MLG trailing arm assembly axle bore for surface finish discrepancies, corrective actions if necessary, and eventual replacement of primer and paint and application of corrosion preventive compound on the inner diameter of all affected MLG trailing arm assembly axle bores, which terminates the repetitive inspections. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective March 12, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of March 12, 2020.

The FAA must receive comments on this AD by April 13, 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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com*; internet *http://www.bombardier.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. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0100.

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–2020–0100; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Darren Gassetto, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7323; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2019–33R1, dated January 23, 2020 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes. You may examine the MCAI on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0100.

This AD was prompted by reports that MLG trailing arm assemblies were found with compromised paint finish and corrosion on the axle bore inner diameters due to improper removal of contaminants during manufacturing. The FAA is issuing this AD to address possible corrosion on the inner diameter of the MLG trailing arm assembly bore, which, if not detected and corrected, could lead to MLG collapse. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

Bombardier has issued the following service information.

- Bombardier Service Bulletin 700–1A11–32–026, Revision 01, dated November 27, 2019.
- Bombardier Service Bulletin 700–32–039, Revision 01, dated November 27, 2019.
- Bombardier Service Bulletin 700–32–5016, Revision 01, dated November 27, 2019.
- Bombardier Service Bulletin 700–32–6016, Revision 01, dated November 27, 2019.

This service information describes procedures for a one-time inspection to determine if an affected MLG trailing arm assembly is installed, repetitive detailed inspections of the inner diameter of the affected MLG trailing arm assembly axle bore for surface finish discrepancies, corrective actions if necessary, and eventual replacement of primer and paint and application of corrosion preventive compound on the inner diameter of all affected MLG trailing arm assembly axle bores, which terminates the repetitive inspections. Surface finish discrepancies include corrosion, paint that is bubbling, loose, flaking, cracked, damaged or missing, or primer or metallic-ceramic coating that is visible. Corrective actions include repair or replacement of the MLG trailing arm assembly. These documents are distinct since they apply to different airplane models and configurations. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Requirements of This AD

This AD requires accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this AD and the MCAI or Service Information.'' This AD also requires sending the inspection results to Bombardier.

Differences Between This AD and the MCAI or Service Information

The MCAI specifies to accomplish the one-time inspection to determine if an affected MLG trailing arm assembly is installed within 3 months from November 27, 2019 (the release date of Revision 01 of the applicable service information specified in the Related Service Information under 1 CFR part 51 paragraph of this AD). The FAA has determined that a compliance time of within 30 days after the effective date of this AD is acceptable to address the unsafe condition.

Explanation of Compliance Time

Most ADs adopt a compliance time relative to the AD's effective date. In this case, however, the FAA is using a fixed compliance date in this AD. The MCAI requires operators to accomplish a detailed inspection of the surface finish of affected MLG trailing arm assemblies at a specified time (which varies according to serial number, with the earliest date being 5/12/2020). That compliance time is necessary to address the unsafe condition and is based on risk analysis requirements, including reports of compromised paint finish and corrosion on the axle bore inner diameters. To support this risk analysis and to provide for coordinated implementation of TCCA's regulations in paragraph (i) of this AD, the FAA is using the same compliance dates in this AD.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because the affected trailing arm assemblies have the potential for improper adhesion between the anti-corrosion layers, which could lead to corrosion on the inner diameter of the MLG trailing arm assembly axle bore and possibly lead to MLG collapse. Therefore, the FAA finds good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reasons stated above, the FAA finds that good cause exists for making this amendment effective in less than 30 days.

Regulatory Flexibility Act (RFA)

The requirements of the RFA do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without notice and comment, RFA analysis is not required.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and the FAA did not precede it by notice and opportunity for public comment. The FAA invites you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–0100; Product Identifier 2020–NM–016–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this AD. The FAA will consider all comments received by the closing date and may amend this AD 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 AD.

Costs of Compliance

The FAA estimates that this AD affects 49 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 33 work-hours × $85 per hour = Up to $2,805.	Up to $200,000	Up to $202,805	Up to $9,937,445.

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on the results of any required actions. The FAA has no way of determining the number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS *

Labor cost	Parts cost	Cost per product
Up to 20 work-hours × $85 per hour = Up to $1,700	Up to $200,000	Up to $201,700.

* Table does not include estimated costs for reporting.

We estimate that it takes about 1 work-hour per product to comply with the on-condition reporting requirement in this AD. The average labor rate is $85 per hour. Based on these figures, we estimate the cost of reporting the inspection results on U.S. operators to be $85 per product.

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

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid

OMB control number. The control number for the collection of information required by this AD is 2120–0056. The paperwork cost associated with this AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–03–21 Bombardier, Inc.: Amendment 39–19845; Docket No. FAA–2020–0100; Product Identifier 2020–NM–016–AD.

(a) Effective Date

This AD becomes effective March 12, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes, certificated in any category, serial numbers 9001 through 9879 inclusive and 9998 and serial numbers 60001 and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Reason

This AD was prompted by reports that main landing gear (MLG) trailing arm assemblies were found with compromised paint finish and corrosion on the axle bore inner diameters due to improper removal of contaminants during manufacturing. The FAA is issuing this AD to address possible corrosion on the inner diameter of the MLG trailing arm assembly axle bore, which, if not detected and corrected, could lead to MLG collapse.

(f) Compliance

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

(g) Definition

For the purposes of this AD, an affected MLG trailing arm assembly is a MLG trailing arm assembly with part number 21410–107 and a serial number listed in Appendix 4, Table 1 of the applicable Bombardier service information specified in figure 1 to paragraphs (g) through (k) and (m) of this AD.

Figure 1 to paragraphs (g) through (k) and (m) – *Applicable Bombardier Service Information*

Airplane Model	Bombardier Service Bulletin
BD-700-1A10	Bombardier Service Bulletin 700-32-039, Revision 01, dated November 27, 2019.
BD-700-1A10	Bombardier Service Bulletin 700-32-6016, Revision 01, dated November 27, 2019.
BD-700-1A11	Bombardier Service Bulletin 700-1A11-32-026, Revision 01, dated November 27, 2019.
BD-700-1A11	Bombardier Service Bulletin 700-32-5016, Revision 01, dated November 27, 2019.

(h) Inspection To Determine Affected MLG Trailing Arm Assembly

For airplanes having serial numbers 9001 through 9879 inclusive and 9998: Within 30 days after the effective date of this AD: Inspect the right hand and left hand MLG trailing arm assemblies to determine if an affected MLG trailing arm assembly is installed, in accordance with Part A of the Accomplishment Instructions of the applicable service information specified in figure 1 to paragraphs (g) through (k) and (m) of this AD. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number and serial number of the MLG trailing arm assembly can be conclusively determined from that review.

(i) Initial Inspection of the MLG Trailing Arm Assembly Surface Finish

If, during the inspection or review required by paragraph (h) of this AD, it is determined that an affected MLG trailing arm assembly is installed: Before the applicable ''1st Inspection Due by Date (MM/DD/YY)'' listed for each affected MLG trailing arm assembly serial number in Appendix 4, Table 1 of the applicable Bombardier service information specified in figure 1 to paragraphs (g) through (k) and (m) of this AD, for each affected MLG trailing arm assembly, do a detailed inspection for surface finish discrepancies on the inner diameter of the affected MLG trailing arm assembly axle bore, and, before further flight, do all corrective actions as applicable, in accordance with Part B of the Accomplishment Instructions of the applicable service information specified in figure 1 to paragraphs (g) through (k) and (m) of this AD. For airplanes on which the actions required by paragraph (k) of this AD are done on all affected MLG trailing arm assemblies, no action is required by this paragraph.

(j) Repeat Inspection

For any affected MLG trailing arm assembly on which the inspection required by paragraph (i) of this AD has been accomplished: Within 33 months from the completion of the initial inspection as required by paragraph (i) of this AD, do a detailed inspection of the affected MLG trailing arm assembly for surface finish discrepancies on the inner diameter of the affected MLG trailing arm assembly axle bore, and, before further flight, do all corrective actions as applicable, in accordance with Part C, and Part B as applicable, of the Accomplishment Instructions of the applicable service information specified in figure 1 to paragraphs (g) through (k) and (m) of this AD. For airplanes on which the actions required by paragraph (k) of this AD are done on all affected MLG trailing arm assemblies, no action is required by this paragraph.

(k) Terminating Action

For airplanes having serial numbers 9001 through 9879 inclusive and 9998: Within 120 months of each affected MLG trailing arm assembly entry into service, or within 5 days after the effective date of this AD, whichever occurs later, replace the primer and paint and apply the corrosion preventive compound on the inner diameter of the axle bore on all affected MLG trailing arm assemblies, in accordance with Part D of the Accomplishment Instructions of the applicable service information specified in figure 1 to paragraphs (g) through (k) and (m) of this AD. This constitutes terminating action for the requirements of paragraphs (i) and (j) of this AD.

(l) Parts Installation Limitation

For all airplanes: As of the effective date of this AD, no person may install an affected MLG trailing arm assembly as a replacement part on any airplane, unless that affected MLG trailing arm assembly is marked ''SB700–32–041ABC'' on the MLG trailing arm assembly modification plate and near the part number.

(m) Reporting Requirement

At the applicable time specified in paragraph (m)(1) or (2) of this AD, submit a report of positive findings of the inspections required by paragraphs (i) and (j) of this AD. Submit the report to Bombardier in accordance with the applicable service information specified in figure 1 to paragraphs (g) through (k) and (m) of this AD. If operators have reported findings as part of obtaining any corrective actions approved by Bombardier, Inc.'s TCCA Design Approval Organization (DAO), they are not required to report those findings as specified in this paragraph.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 10 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 10 days after the effective date of this AD.

(n) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (h) through (k), if those actions were performed before the effective date of this AD using the applicable service information specified in figure 2 to paragraph (n) of this AD.

Figure 2 to paragraph (n) – *Applicable Bombardier Service Information for Credit*

Airplane Model	Bombardier Service Bulletin
BD-700-1A10	Bombardier Service Bulletin 700-32-039, dated May 3, 2019
BD-700-1A10	Bombardier Service Bulletin 700-32-6016, dated May 3, 2019
BD-700-1A11	Bombardier Service Bulletin 700-1A11-32-026, dated May 3, 2019
BD-700-1A11	Bombardier Service Bulletin 700-32-5016, dated May 3, 2019

(o) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a

principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory as required by this AD; the nature and extent of confidentiality to be provided, if any. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

(p) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2019–33R1, dated January 23, 2020, for related information. This MCAI may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0100.

(2) For more information about this AD, contact Darren Gassetto, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7323; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov*.

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (q)(3) and (4) of this AD.

(q) Material Incorporated by Reference

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

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

(i) Bombardier Service Bulletin 700–1A11–32–026, Revision 01, dated November 27, 2019.

(ii) Bombardier Service Bulletin 700–32–039, Revision 01, dated November 27, 2019.

(iii) Bombardier Service Bulletin 700–32–5016, Revision 01, dated November 27, 2019.

(iv) Bombardier Service Bulletin 700–32–6016, Revision 01, dated November 27, 2019.

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* internet *http://www.bombardier.com*.

(4) 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.

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

Issued on February 14, 2020.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03924 Filed 2–24–20; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0720; Product Identifier 2019–NM–117–AD; Amendment 39–19831; AD 2020–02–19]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting an airworthiness directive (AD) that published in the **Federal Register**. That AD applies to certain Bombardier, Inc., Model CL–600–2B19 (Regional Jet series 100 & 440) airplanes. As published, paragraph (h)(2) of that AD specifies an incorrect service information reference for performing the inspection. This document corrects that error. In all other respects, the original document remains the same.

DATES: This correction is effective March 18, 2020.

The effective date of AD 2020–02–19 remains March 18, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of March 18, 2020 (85 FR 7857, February 12, 2020).

ADDRESSES: For service information identified in this final rule, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; Widebody Customer Response Center North America toll-free telephone 1–866–538–1247 or direct-dial telephone 1–514–855–2999; fax 514–855–7401; email *ac.yul@aero.bombardier.com;* internet *https://www.bombardier.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. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0720.

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–2019–0720; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Andrea Jimenez, Aerospace Engineer, Airframe and Mechanical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7330; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov*.

SUPPLEMENTARY INFORMATION: AD 2020–02–19, Amendment 39–19831 (85 FR 7857, February 12, 2020) (''AD 2020–02–19''), currently requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations; revising the applicability to include additional airplanes; and revising certain compliance times. That AD applies to certain Bombardier, Inc., Model CL–600–2B19 (Regional Jet series 100 & 440) airplanes.

Need for the Correction

As published, paragraph (h)(2) of AD 2020–02–19 contains a typographical error. Paragraph (h)(2) of the AD incorrectly specifies Bombardier CL–600–2B19 Airworthiness Requirements Temporary Revision 2B–2265, dated July 19, 2018, to Appendix B—

Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual, for performing the inspection. The correct service information for performing the inspection is Bombardier CL–600–2B19 Maintenance Requirements Temporary Revision 2B–2266, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual.

Related Service Information Under 1 CFR Part 51

Bombardier has issued Bombardier CL–600–2B19 Temporary Revision 2B–2265, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual; and Bombardier CL–600–2B19 Temporary Revision 2B–2266, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual. These temporary revisions describe airworthiness limitations for inspections of the pressure floor skin. 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.

Correction of Publication

This document corrects an error and correctly adds the AD as an amendment to 14 CFR 39.13. Although no other part of the preamble or regulatory information has been corrected, the FAA is publishing the entire rule in the **Federal Register**.

The effective date of this AD remains March 18, 2020.

Since this action only corrects a service information reference for the inspection, it has no adverse economic impact and imposes no additional burden on any person. Therefore, the FAA has determined that notice and public procedures are unnecessary.

List of Subjects in 14 CFR Part 39

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

Adoption of the Correction

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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 [Corrected]

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

2020–02–19 Bombardier, Inc.: Amendment 39–19831; Docket No. FAA–2019–0720; Product Identifier 2019–NM–117–AD.

(a) Effective Date

This AD is effective March 18, 2020.

(b) Affected ADs

This AD replaces AD 2003–09–04 R1, Amendment 39–13305 (68 FR 54985, September 22, 2003) (''AD 2003–09–04 R1'').

(c) Applicability

This AD applies to Bombardier, Inc., Model CL–600–2B19 (Regional Jet series 100 & 440) airplanes, certificated in any category, serial numbers 7003 through 8999 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by a report of fatigue cracks occurring on the pressure floor skin at fuselage stations (FS) 460 and 513. The FAA is issuing this AD to address such fatigue cracks, which could result in failure of the pressure floor skin and consequent rapid decompression of the airplane during flight.

(f) Compliance

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

(g) Maintenance Program Revision for Serial Numbers 7003 Through 8079

For airplane serial numbers 7003 through 8079 inclusive: Within 30 days from the effective date this AD, revise the existing maintenance or inspection program, as applicable, by incorporating the information specified in Airworthiness Limitations (AWL) task number 53–41–149 specified in Bombardier CL–600–2B19 Airworthiness Requirements Temporary Revision 2B–2265, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual.

(1) The initial compliance time for doing the task is at the time specified in figure 1 to paragraph (g)(1) of this AD, or within 90 days after the effective date of this AD, whichever occurs later.

Figure 1 to paragraph (g)(1) – *Initial Inspection Phase-In*

Total Flight Cycles (FC) Accumulated as of October 7, 2003 (the effective date of AD 2003-09-04 R1)	Compliance Schedule for Initial Inspection
8,000 FC or less	Prior to exceeding 10,000 total FC
More than 8,000 FC but less than 10,000 FC	Within 2,000 FC from October 7, 2003 (the effective date of FAA AD 2003-09-04 R1)
10,000 FC or more but less than 15,000 FC	Within 1,500 FC from October 7, 2003 (the effective date of FAA AD 2003-09-04 R1)
15,000 FC or more but less than 17,325 FC	Within 1,000 FC from the effective date of October 7, 2003 (the effective date of FAA AD 2003-09-04 R1)
17,325 FC or more but less than 18,325 FC	Prior to exceeding 18,325 total FC
18,325 FC or more	Not required if the initial inspection has already been performed in accordance with AWL Task number 53-41-149

(2) For airplanes on which Bombardier Service Bulletin 601R–53–067, Bombardier Service Bulletin 601R–53–077, and AWL task number 53–41–194 have been done, the inspections in AWL task number 53–41–149 are not required in the areas covered by doublers at FS460 and FS513.

(3) For airplanes on which the initial inspection has been accomplished at 18,325 or more total flight cycles, and no cracks were found, as of October 7, 2003 (the effective date of AD 2003–09–04), the repetitive interval of 10,000 flight cycles starts from the completion date of the initial inspection.

(4) For airplanes that were previously inspected using AWL task number 53–41–193, perform an inspection using the information specified in AWL task number 53–41–149, provided in Bombardier CL–600–2B19 Airworthiness Requirements Temporary Revision 2B–2265, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual, within 10,000 flight cycles from the previously accomplished inspection.

(h) Maintenance Program Revision for Serial Numbers 8080 Through 8999

(1) For airplane serial numbers 8080 through 8999 inclusive: Within 30 days from the effective date of this AD, revise the existing maintenance or inspection program, as applicable, by incorporating the information specified in AWL task number 53–41–193 specified in Bombardier CL–600–2B19 Airworthiness Limitations Temporary Revision 2B–2266, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual. Except as specified in paragraph (h)(2) of this AD, the initial compliance time for doing the task is at the time specified in Bombardier CL–600–2B19 Airworthiness Requirements Temporary Revision 2B–2266, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual, or within 90 days after the effective date of this AD, whichever occurs later.

(2) For airplanes that were previously inspected using AWL task number 53–41–149, perform an inspection by incorporating the information specified in AWL task number 53–41–193, provided in Bombardier CL–600–2B19 Maintenance Requirements Temporary Revision 2B–2266, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual, within 10,000 flight cycles from the previously accomplished inspection.

(i) Corrective Actions

If any crack is found during any inspection required by this AD, before further flight, repair using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO), and accomplish any repair instructions, including any new airworthiness limitations and inspection requirements accordingly. If approved by the DAO, the approval must include the DAO-authorized signature.

(j) No Alternative Actions or Intervals

After the maintenance or inspection program has been revised as required by paragraphs (g), (h), and (i) of this AD, as applicable, no alternative actions (*e.g.,* inspections) or intervals may be used unless

the actions or intervals are approved as an AMOC in accordance with the procedures specified in paragraph (k)(1) of this AD.

(k) Other FAA AD Provisions

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531.

(i) 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.

(ii) AMOCs approved previously for AD 2003–09–04 R1 are approved as AMOCs for the corresponding provisions of this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or TCCA; or Bombardier, Inc.'s TCCA DAO. If approved by the DAO, the approval must include the DAO-authorized signature.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2002–39R2, dated August 15, 2019, for related information. This MCAI may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0720.

(2) For more information about this AD, contact Andrea Jimenez, Aerospace Engineer, Airframe and Mechanical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7330; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov*.

(m) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on March 18, 2020 (85 FR 7857, February 12, 2020).

(i) Bombardier CL–600–2B19 Maintenance Requirements Temporary Revision 2B–2265, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual.

(ii) Bombardier CL–600–2B19 Maintenance Requirements Temporary Revision 2B–2266, dated July 19, 2018, to Appendix B—Airworthiness Limitations, of Part 2 of the Bombardier Maintenance Requirements Manual.

(4) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; Widebody Customer Response Center North America toll-free telephone 1–866–538–1247 or direct-dial telephone 1–514–855–2999; fax 514–855–7401; email *ac.yul@aero.bombardier.com*; internet *https://www.bombardier.com*.

(5) 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.

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

Issued on February 20, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03828 Filed 2–25–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0121]

RIN 1625–AA00

Safety Zone; Pacific Ocean, Hilo Harbor, HI—Lightering Operations

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the navigable waters of Hilo Harbor, Hawaii. The safety zone is needed to protect personnel, vessels and the marine environment from potential hazards associated with ongoing lightering operations of the vessel MIDWAY ISLAND grounded along the northwest side of Hilo Harbor, particularly through helicopter to shore hoisting ops and swimmers in the water. The USCG is overseeing contractor lightering ops to mitigate the pollution threat from the vessel in this area. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port (COTP) Honolulu.

DATES: This rule is effective without actual notice from February 26, 2020 until 8 p.m. on March 12, 2020. For the purposes of enforcement, actual notice will be used from February 12, 2020 through February 26, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG-USCG–2020–0121 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Chief Jason R. Olney, Waterways Management Division, U.S. Coast Guard; telephone 808–522–8265, email *Jason.R.Olney@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

On February 05, 2020, a temporary final rule [USCG–2020–0113] was issued to establish a safety zone around the grounded vessel MIDWAY ISLAND. That rule expired at 8 p.m. on February 12, 2020. The Coast Guard is issuing this rule to establish the termporary safety zone so the lightering operations can continue.

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because immediate action is needed to respond to the potential safety hazards associated with this lightering operation, and therefore publishing an NPRM is impracticable and contrary to public interest.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the rule's objectives of responding to potential safety hazards associated with the lightering operations and protecting personnel, vessels, and the marine environment within the navigable waters of the safety zone.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. On February 03, 2020, the Coast Guard was informed of a vessel that ran aground along the northwest side of Hilo Harbor, Hawaii. The Coast Guard COTP Sector Honolulu has determined that potential hazards associated with the lightering operations constitute a safety concern for anyone within the designated safety zone. This rule is necessary to protect personnel, vessels, and the marine environment within the navigable waters of the safety zone during ongoing salvage operations.

IV. Discussion of the Rule

This rule establishes a safety zone from February 12, 2020 through 8 p.m. March 12, 2020 or until the lightering operations are complete, whichever is earlier. If the safety zone is terminated prior to 8 p.m. on March 12, 2020, the Coast Guard will provide notice via a broadcast notice to mariners.

The temporary safety zone encompasses all waters extending 100 yards in all directions around the location of ongoing lightering operations near position: 19°44′41.17″ N; 155°05′24.23″ W. This zone extends from the surface of the water to the ocean floor. The zone is intended to protect personnel, vessels, and the marine environment in these navigable waters from potential hazards associated with the lightering operations of a vessel aground in this area. No vessel or person will be permitted to enter the safety zone absent the express authorization of the COTP or his designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the anticipated short duration of the lightering operations and the need to protect personnel, vessels and the marine environment in these navigable waters from potential hazards associated with the lightering operations of the vessel aground in this area. Moreover, the Coast Guard will issue a broadcast notice to mariners on marine channel 16 about the safety zone.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting 30 days that will prohibit entry into the area during lightering efforts. It is categorically excluded from further review under paragraph L60(d) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01,

Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and Recordkeeping Requirements, Security Measures, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T14–0121 to read as follows:

§ 165.T14–0121 Safety Zone; Pacific Ocean, Hilo Harbor, HI—Lightering Operations.

(a) *Location.* The safety zone is located within the COTP Zone (See 33 CFR 3.70–10) and will encompass all navigable waters extending 100 yards in all directions from position: 19°44′41.17″ N; 155°05′24.23″ W. This zone extends from the surface of the water to the ocean floor.

(b) *Regulations.* The general regulations governing safety zones contained in 33 CFR 165.23 apply to the safety zone created by this temporary final rule.

(1) All persons are required to comply with the general regulations governing safety zones found in 33 CFR part 165.

(2) Entry into or remaining in this zone is prohibited unless expressly authorized by the COTP or his designated representative.

(3) Persons desiring to transit the safety zone identified in paragraph (a) of this section may contact the COTP at the Command Center telephone number (808) 842–2600 and (808) 842–2601, fax (808) 842–2642 or on VHF channel 16 (156.8 Mhz) to seek permission to transit the zone. If permission is granted, all persons and vessels must comply with the instructions of the COTP or his designated representative and proceed at the minimum speed necessary to maintain a safe course while in the zone.

(4) The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(c) *Notice of enforcement.* The COTP Honolulu will cause Notice of the Enforcement of these safety zones described in this section to be made by Broadcast to the maritime community via marine safety broadcast notice to mariners on VHF channel 16 (156.8 MHz).

(d) *Definitions.* As used in this section, designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the COTP to assist in enforcing the safety zone described in paragraph (a) of this section.

(e) *Enforcement period.* This rule will be enforced from February 12, 2020, through 8 p.m. on March 12, 2020. If the safety zone is terminated prior to 8 p.m. on March 12, 2020, the Coast Guard will provide notice via a broadcast notice to mariners.

Dated: February 12, 2020.

A.B. Avanni,

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

[FR Doc. 2020–03197 Filed 2–25–20; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2019–0636: FRL–10005–19–Region 10]

Air Plan Approval; WA; Updates to Source-Category Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving revisions to the Washington State Implementation Plan (SIP) that were submitted by the Department of Ecology (Ecology). In 1991, Ecology established source-category regulations for kraft pulp mills, sulfite pulping mills, and primary aluminum plants. These source-category regulations contain requirements specific to these types of facilities. However, the source-category regulations also rely upon cross-references to the general air quality regulations to implement program elements such as new source review permitting. Since 1991, many of the cross-references to the general regulations for air pollution sources have changed. The EPA is approving a revision to the SIP updating the cross-references and other miscellaneous changes.

DATES: This final rule is effective March 27, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2019–0636. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at *https://www.regulations.gov,* or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Jeff Hunt, EPA Region 10, 1200 Sixth Avenue—Suite 155, Seattle, WA 98101, at (206) 553–0256, or *hunt.jeff@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, wherever ''we,'' ''us,'' or ''our'' is used, it means the EPA.

I. Background

On November 5, 2019, Ecology submitted updated portions of Chapters 173–405, 173–410, and 173–415 Washington Administrative Code (WAC) for approval into the SIP. On December 4, 2019, the EPA proposed to approve the submitted changes (84 FR 66366). The reasons for our proposed approval were stated in the proposed rule and will not be re-stated here. The public comment period for our proposed action ended on January 3, 2020. We received no comments.

II. Final Action

We are approving and incorporating by reference into the Washington SIP the revisions to Chapters 173–405, 173–410, and 173–415 WAC, State effective May 24, 2019, submitted by Ecology on November 5, 2019. We are also removing from the SIP the outdated and subsequently repealed provisions of WAC 173–415–045, 173–415–050, 173–415–051, and 173–415–080.

III. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, we are finalizing the incorporation by reference as described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these materials generally available through *https://www.regulations.gov* and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally-enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

IV. Statutory and Executive Order Review

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because it does not address technical standards; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and it will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 27, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 28, 2020.

Chris Hladick,

Regional Administrator, Region 10.

For the reasons stated in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart WW—Washington

■ 2. Amend § 52.2470(c), Table 1:
■ a. Under the heading ''Washington Administrative Code, Chapter 173–405—Kraft Pulping Mills'', by revising the entries ''173–405–021'', ''173–405–072'', ''173–405–086'', and ''173–405–087'';
■ b. Under the heading ''Washington Administrative Code, Chapter 173–410—Sulfite Pulping Mills'' by revising the entries ''173–410–021'', ''173–410–062'', ''173–410–086'', and ''173–410–087''; and
■ c. Under the heading ''Washington Administrative Code, Chapter 173–415—Primary Aluminum Plants'' by:
■ i. Adding the entry ''173–415–015'' in numerical order;
■ ii. Revising the entry ''173–415–020'';
■ iii. Removing the entries ''173–415–045'', ''173–415–050'', and ''173–415–051'';
■ iv. Revising the entry ''173–415–060''; and
■ v. Removing entry ''173–415–080''.

The revisions and additions read as follows:

§ 52.2470 Identification of plan.

* * * * *

(c) * * *

[1] 62 FR 27968 (May 22, 1997).

TABLE 1—REGULATIONS APPROVED STATEWIDE

[Not applicable in Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation) and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction]

State citation	Title/subject	State effective date	EPA approval date	Explanations
Washington Administrative Code, Chapter 173–405—Kraft Pulping Mills				
*	*	*	*	*
173–405–021	Definitions	5/24/19	2/26/20, [Insert **Federal Register** citation].	
*	*	*	*	*
173–405–072	Monitoring Requirements	5/24/19	2/26/20, [Insert **Federal Register** citation].	Except 173–405–072(2).
*	*	*	*	*
173–405–086	New Source Review (NSR) ...	5/24/19	2/26/20, [Insert **Federal Register** citation].	Except provisions related to WAC 173–400–114 and provisions excluded from our approval of WAC 173–400–110 through 173–400–113.
173–405–087	Prevention of Significant Deterioration (PSD).	5/24/19	2/26/20, [Insert **Federal Register** citation].	Except 173–400–720(4)(a)(i through iv), 173–400–720(4)(b)(iii)(C), and 173–400–750(2) second sentence.
*	*	*	*	*
Washington Administrative Code, Chapter 173–410—Sulfite Pulping Mills				
*	*	*	*	*
173–410–021	Definitions	5/24/19	2/26/20, [Insert **Federal Register** citation].	
*	*	*	*	*
173–410–062	Monitoring Requirements	5/24/19	2/26/20, [Insert **Federal Register** citation].	
*	*	*	*	*
173–410–086	New Source Review (NSR) ...	5/24/19	2/26/20, [Insert **Federal Register** citation].	Except provisions related to WAC 173–400–114 and provisions excluded from our approval of WAC 173–400–110 through 173–400–113.
173–410–087	Prevention of Significant Deterioration (PSD).	5/24/19	2/26/20, [Insert **Federal Register** citation].	Except 173–400–720(4)(a)(i through iv), 173–400–720(4)(b)(iii)(C), and 173–400–750(2) second sentence.
*	*	*	*	*
Washington Administrative Code, Chapter 173–415—Primary Aluminum Plants				
*	*	*	*	*
173–415–015	Applicability	5/24/19	2/26/20, [Insert **Federal Register** citation].	Except 173–415–015(3).
173–415–020	Definitions	5/24/19	2/26/20, [Insert **Federal Register** citation].	Except 173–415–020(6).
*	*	*	*	*
173–415–060	Monitoring and Reporting	5/24/19	2/26/20, [Insert **Federal Register** citation].	Except 173–415–060(1)(b).
*	*	*	*	*

* * * * *

[FR Doc. 2020–03250 Filed 2–25–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2019–0493; FRL–10005–65–Region 9]

Air Plan Conditional Approval; Arizona; Maricopa County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to conditionally approve revisions to the Maricopa County Air Quality Department (MCAQD or the County) portion of the Arizona State Implementation Plan (SIP). These revisions concern emissions of volatile organic compounds (VOCs) from organic liquid and gasoline storage and transfer operations. We are conditionally approving local rules that regulate these emission sources under the Clean Air Act (CAA or the Act). We are also conditionally approving the County's Reasonably Available Control Technology (RACT) demonstration for the source categories associated with these rules.

DATES: This rule will be effective on March 27, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2019–0493. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Rebecca Newhouse, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3004 or by email at *newhouse.rebecca@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. Proposed Action

On September 23, 2019 (84 FR 49699), the EPA proposed to conditionally approve the following rules into the Arizona SIP.

Local agency	Document	Revised	Submitted
MCAQD	Rule 350: Storage and Transfer of Organic Liquids (Non-Gasoline) at an Organic Liquid Distribution Facility.	11/02/2016	06/22/2017
MCAQD	Rule 351: Storage and Loading of Gasoline at Bulk Gasoline Plants and Bulk Gasoline Terminals.	11/02/2016	06/22/2017
MCAQD	Rule 352: Gasoline Cargo Tank Testing and Use	11/02/2016	06/22/2017
MCAQD	Rule 353: Storage and Loading of Gasoline at Gasoline Dispensing Facilities	11/02/2016	06/22/2017

We proposed to conditionally approve these rules pursuant to CAA section 110(k)(4) because, although rule deficiencies preclude full SIP approval pursuant to section 110(k)(3), the rules largely comply with the relevant CAA requirements, and because the MCAQD and the Arizona Department of Environmental Quality (ADEQ) have committed to provide the EPA with a SIP submission within one year of this final action that will include specific rule revisions that would adequately address the deficiencies.[1] We also proposed to conditionally approve MCAQD's RACT demonstrations for the 2008 8-hr ozone National Ambient Air Quality Standards (NAAQS) with respect to the VOC source categories covered by Rules 350, 351, 352, and 353. Our proposed action contains more information on the rules, deficiencies, MCAQD and ADEQ commitments, and our evaluation.

[1] Letter dated January 28, 2019, from Philip A. McNeely, Director, MCAQD, to Misael Cabrera, Director, ADEQ, and letter dated February 25, 2019, from Timothy S. Franquist, Director, Air Quality Division, ADEQ, to Michael Stoker, Regional Administrator, EPA, Region IX.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received two comments. One member of the public expressed support for our proposed action, stating that ''[t]he EPA should approve the revisions contingent on Arizona's submission of further revisions to account for the deficiencies of its SIP.''

The second commenter stated that Maricopa County struggles to meet its air quality standards, and described health and welfare impacts of the area's air quality. The commenter wrote that, ''I believe it is due time that Maricopa County enforce and meet the regulatory standards mandated by the EPA,'' and that the County's feet should be ''held to the fire'' because existing air quality actions have not been sufficient. Accordingly, the commenter does not support the EPA's proposal to conditionally approve the SIP revisions. The commenter acknowledged that the changes detailed in the commitment letters allow for RACT to be satisfied, but wrote that the proposed action would set a precedent for changing the regulations without changing the practices that jeopardize young people's health. The commenter cautioned against allowing Maricopa County to satisfy RACT without ''demonstrated action.''

The EPA understands the commenter's concerns about the impacts of air quality in Maricopa County. The commenter does not appear to contest that the rules at issue would meet the RACT standard once the County's commitments are fulfilled. Instead the EPA understands the commenter's concern to be with the proposed conditional approval. Section 110(k)(4) of the Act allows the Administrator to conditionally approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than one year after the date of approval of the plan revision. The EPA believes that Maricopa County and ADEQ have made the necessary commitments to rectify the deficiencies within the statutory timeframe. The commenter does not contest this. Therefore, the EPA does not understand the commenter to have stated that the Administrator is prohibited from conditionally approving Maricopa County's submission; they have instead asked the EPA to exercise its discretion

to respond to the submission in a different manner. The EPA believes that a conditional approval is the most appropriate action for the County's submittal. By conditionally approving the rules, the EPA is able to add the rules to the SIP without waiting for additional revisions. Because the rules as-submitted, despite their deficiencies, would strengthen the SIP, the EPA believes that it is appropriate to add the rules to the SIP now so that the air quality in the area can benefit from the stronger rules while additional revisions are made. If the County were to fail to meet its commitment to correct the identified deficiencies, the conditional approval would be treated as a disapproval, starting a sanctions clock under section 179(b), and a Federal Implementation Plan clock under section 110(c)(1).

Because the commenter does not suggest that the County has not met the statutory requirements for a conditional approval, and a conditional approval would allow the SIP-strengthening provisions in the submittal to go into effect quickly, the EPA is finalizing the conditional approval as proposed.

III. EPA Action

No comments were submitted that change our assessment of the rules as described in our proposed action. Therefore, as authorized in section 110(k)(4) of the Act, the EPA is conditionally approving into the Arizona SIP, Rules 350, 351, 352, and 353, and MCAQD's RACT demonstrations for the 2008 8-hr ozone NAAQS with respect to the following six Control Techniques Guidelines (CTGs), as described in our proposal: Control of Volatile Organic Emissions from Storage of Petroleum Liquids in Fixed-Roof Tanks (EPA–450/2–77–036); Control of Volatile Organic Emissions from Petroleum Liquid Storage in External Floating Roof Tanks (EPA–450/2–78–047); Control of Hydrocarbons from Tank Truck Gasoline Loading Terminals (EPA–450/2–77–026); Control of Volatile Organic Emissions from Bulk Gasoline Plants (EPA–450/2–77–035); Control of Volatile Organic Compound Leaks from Gasoline Tank Trucks and Vapor Collection Systems (EPA–450/2–78–051); and Design Criteria for Stage I Vapor Control Systems—Gasoline Service Stations (EPA–450/R–75–102). If the MCAQD and the ADEQ submit the required rule revisions by the specified deadline, and the EPA approves the submission, then the identified deficiencies will be cured. However, if MCAQD, through the ADEQ, fails to submit these revisions within the required timeframe, the conditional approval will be treated as a disapproval for those rules for which the revisions are not submitted (and the associated RACT SIP CTG source categories).

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the MCAQD rules described in the amendments to 40 CFR part 52 set forth below. Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[2] The EPA has made, and will continue to make, these documents available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://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 not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

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

This action is not an Executive Order 13771 regulatory action because SIP approvals, including conditional approvals, are exempted under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because the conditional approvals will not in-and-of themselves create any new information collection burdens, but will simply conditionally approve certain State requirements for inclusion in the SIP.

[2] 62 FR 27968 (May 22, 1997).

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 not impose any requirements on small entities beyond those imposed by state law.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, will result from this action.

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: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because the conditional approvals will not in-and-of themselves create any new regulations, but will simply conditionally approve certain State requirements for inclusion in the SIP.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

M. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 27, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: January 24, 2020.

Deborah Jordan,

Acting Regional Administrator, Region IX.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart D—Arizona

■ 2. Section 52.119 is amended by adding paragraph (c) to read as follows:

§ 52.119 Identification of plan—conditional approvals.

* * * * *

(c) A plan revision for the Maricopa County Air Quality Department (MCAQD) submitted June 22, 2017, by the Arizona Department of Environmental Quality (ADEQ), the Governor's designee, providing MCAQD's Reasonably Available Control Technology (RACT) demonstration for the 2008 8-hour ozone National Ambient Air Quality Standards, and rule submissions in satisfaction thereof.

(1) The conditional approval is based upon the February 25, 2019 commitment from the State to submit a SIP revision consisting of rule revisions that will cure the identified deficiencies. MCAQD commits to submit these rules to the ADEQ within eleven (11) months after the EPA's conditional approval, and ADEQ commits to make the final submission to the EPA not later than twelve (12) months after the EPA's approval. If the State fails to meet its commitment, the conditional approval will be treated as a disapproval with respect to the rules and CTG categories for which the corrections are not made. The following MCAQD rules and additional materials are conditionally approved:

(i) Rule 350, *Storage and Transfer of Organic Liquids (Non-Gasoline) at an Organic Liquid Distribution Facility;*

(ii) Rule 351, *Storage and Loading of Gasoline at Bulk Gasoline Plants and Bulk Gasoline Terminals;*

(iii) Rule 352, *Gasoline Cargo Tank Testing and Use;*

(iv) Rule 353, *Storage and Loading of Gasoline at Gasoline Dispensing Facilities;* and

(v) The RACT demonstration titled ''Analysis of Reasonably Available Control Technology for the 2008 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) State Implementation Plan (RACT SIP),'' Only those portions of the document beginning with ''Gasoline Bulk Plants, Fixed Roof Petroleum Tanks, External Floating Roof Petroleum Tanks, And Gasoline Loading Terminals'' on page 33 through the first full paragraph on page 35, and Appendix C: CTG RACT Spreadsheet, the rows beginning with ''Gasoline Bulk Plants'' on page 60, through ''Service Stations—Stage I'' on pages 67–69. This demonstration represents the RACT requirement for the following source categories: Control of Volatile Organic Emissions from Storage of Petroleum Liquids in Fixed-Roof Tanks (EPA–450/2–77–036), Control of Volatile Organic Emissions from Petroleum Liquid Storage in External Floating Roof Tanks (EPA–450/2–78–047); Control of Hydrocarbons from Tank Truck Gasoline Loading Terminals (EPA–450/2–77–026); Control of Volatile Organic Emissions from Bulk Gasoline Plants (EPA–450/2–77–035); Control of Volatile Organic Compound Leaks from Gasoline Tank Trucks and Vapor Collection Systems (EPA–450/2–78–051); and Design Criteria for Stage I Vapor Control Systems—Gasoline Service Stations (EPA–450/R–75–102).

(2) [Reserved]

■ 3. Amend § 52.120 as follows:

■ a. In paragraph (c), Table 4, under the table headings ''Post-July 1988 Rule Codification'' and ''Regulation III—Control of Air Contaminants,'' by revising the entries for ''Rule 350,'' ''Rule 351,'' ''Rule 352,'' and ''Rule 353.''

■ b. In paragraph (e), Table 1, under the subheading ''Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas,'' by adding an entry for ''Analysis of Reasonably Available Control Technology for the 2008 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) State Implementation Plan (RACT SIP)'' after the entry for ''Maricopa Association of Governments (MAG) 1987 Carbon Monoxide (CO) Plan for the Maricopa County Area, MAG CO Plan Commitments for Implementation, and Appendix A through E, Exhibit 4, Exhibit D.''

The revisions and addition read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

TABLE 4—EPA-APPROVED MARICOPA COUNTY AIR POLLUTION CONTROL REGULATIONS

County citation	Title/subject	State effective date	EPA approval date	Additional explanation
*	*	*	*	*
Post-July 1988 Rule Codification				
*	*	*	*	*
Regulation III—Control of Air Contaminants				
*	*	*	*	*
Rule 350	Storage and Transfer of Organic Liquids (Non-Gasoline) at an Organic Liquid Distribution Facility.	11/02/2016	2/26/2020, [INSERT **Federal Register** CITATION].	Submitted on June 22, 2017.
Rule 351	Storage and Loading of Gasoline at Bulk Gasoline Plants and Bulk Gasoline Terminals.	11/02/2016	2/26/2020, [INSERT **Federal Register** CITATION].	Submitted on June 22, 2017.
Rule 352	Gasoline Cargo Tank Testing and Use	11/02/2016	2/26/2020, [INSERT **Federal Register** CITATION].	Submitted on June 22, 2017.
Rule 353	Storage and Loading of Gasoline at Gasoline Dispensing Facilities.	11/02/2016	2/26/2020, [INSERT **Federal Register** CITATION].	Submitted on June 22, 2017.
*	*	*	*	*

* * * * * (e) * * *

TABLE 1—EPA-APPROVED NON-REGULATORY AND QUASI-REGULATORY MEASURES

[Excluding certain resolutions and statutes, which are listed in tables 2 and 3, respectively] [1]

Name of SIP provision	Applicable geographic or nonattainment area or title/subject	State submittal date	EPA approval date	Explanation
The State of Arizona Air Pollution Control Implementation Plan				
*	*	*	*	*
Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas				
*	*	*	*	*
Analysis of Reasonably Available Control Technology for the 2008 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) State Implementation Plan (RACT SIP).	Maricopa County portion of Phoenix-Mesa nonattainment area for 2008 8-hour ozone NAAQS.	June 22, 2017	2/26/2020, [INSERT **Federal Register** CITATION].	Only those portions of the document beginning with ''Gasoline Bulk Plants, Fixed Roof Petroleum Tanks, External Floating Roof Petroleum Tanks, And Gasoline Loading Terminals'' on page 33 through the first full paragraph on page 35, and Appendix C: CTG RACT Spreadsheet, the rows beginning with ''Gasoline Bulk Plants'' on page 60, through ''Service Stations—Stage I'' on pages 67–69.
*	*	*	*	*

[1] Table 1 is divided into three parts: Clean Air Act Section 110(a)(2) State Implementation Plan Elements (excluding Part D Elements and Plans), Part D Elements and Plans (other than for the Metropolitan Phoenix or Tucson Areas), and Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas.

* * * * *

[FR Doc. 2020–03247 Filed 2–25–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R08–OAR–2019–0276; FRL–10004–94–Region 8]

Approval and Promulgation of Implementation Plans; State of Utah; Salt Lake County, Utah County, and Ogden City PM_{10} Redesignation to Attainment, Designation of Areas for Air Quality Planning Purposes and State Implementation Plan Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving the State Implementation Plan (SIP) revisions submitted by the State of Utah on January 4, 2016, which include revisions to Utah's Division of Administrative Rule (DAR) R307–110–10 and maintenance plans for the Salt Lake County, Utah County, and Ogden City nonattainment areas (NAAs) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 microns (PM_{10}), and on March 6, 2019, which include PM_{10} redesignation requests and supplemental information

for Salt Lake County, Utah County and Ogden City. These submittals demonstrated that the Salt Lake County, Utah County and Ogden City areas have attained the PM_{10} National Ambient Air Quality Standards (NAAQS), request redesignation to attainment, and include maintenance plans for the areas demonstrating attainment for fifteen years. Also, the EPA is approving Utah's February 27, 2017 submittal, which includes rule revisions to address our October 19, 2016 conditional approval of Utah's DAR R307–302 revisions that were submitted May 9, 2013, May 20, 2014 and September 8, 2015. Additionally, the EPA is approving SIP revisions submitted by the State of Utah on February 15, 2019, with additional non-substantive changes submitted on July 1, 2019, August 20, 2019, and October 15, 2019, which includes revisions that are located in DAR R307–110–17 and SIP Subsections IX.H.1–2. We are also approving the transportation conformity motor vehicle emissions budgets (MVEB), for each of the three maintenance areas, as described in our proposed rule. The EPA is taking this action pursuant to the Clean Air Act (CAA or the Act).

DATES: This rule is effective on March 27, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2019–0276. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Crystal Ostigaard, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD–IO, 1595 Wynkoop Street, Denver, Colorado, 80202–1129, (303) 312–6602, *ostigaard.crystal@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' means the EPA.

I. Background

On November 21, 2019 (84 FR 64245), the EPA proposed to approve the Governor of Utah's January 4, 2016 submission, that contains revisions to R307–110–10 (Control Measures for Area and Point Sources, Part A, Fine Particulate Matter) and the PM_{10} maintenance plans for Salt Lake County, Utah County and Ogden City PM_{10} NAAs. We also proposed to approve the Governor of Utah's March 6, 2019 submittal, that contains the redesignation requests for the Salt Lake County, Utah County and Ogden City PM_{10} NAAs to attainment for the 1987 $p.m._{10}$ standards and provided supplemental information. We used the 2016–2018 ambient air quality data from Salt Lake County, Utah County and Ogden City NAAs as the basis for our decision. In addition, we proposed approval of the emissions inventories found within the maintenance plans to cover the one element of the Moderate PM_{10} nonattainment SIP that was not suspended with the EPA's January 7, 2013 clean data determination (CDD) for the Ogden City NAA.

We also proposed approval of R307–110–17 (Control Measures for Area and Point Sources, Part H, Emission Limits and Operating Practices) and revisions for Section IX.H.1 and 2 that were submitted on February 15, 2019, and with non-substantive changes submitted on July 1, 2019, August 20, 2019 and October 15, 2019. Additionally, we proposed approval of the revisions in R307–302 (Solid Fuel Burning Devices) for incorporation into the Utah SIP as submitted by the State of Utah on May 9, 2013, May 20, 2014, September 8, 2015 and February 27, 2017.

II. Response to Comments

The EPA received five comments on the proposed action and the comments can be found in the docket: EPA–R08–OAR–2019–0276. The Center for Biological Diversity (CBD) and Western Resource Advocates (WRA) submitted a request to extend the comment period to January 22, 2020. The EPA carefully reviewed this request and maintained the original December 23, 2019 deadline for submitting comments. The CBD and WRA did not submit any additional comments by the December 23, 2019 deadline.

The other four comments included two anonymous comments in agreement with the EPA's proposed rule. Another comment was from the Utah Petroleum Association in agreement with the EPA's proposed rule. Finally, the last comment was anonymous but only contained a partial docket number and other random information. The EPA reviewed this comment and has determined that it falls outside the scope of our proposed action and fails to identify any material issue necessitating a response.

III. Final Action

No comments were submitted that changed our assessment of our proposed action. For the reasons stated in our proposed rule, we are finalizing approval of the Governor of Utah's submittal of January 4, 2016, that contains revisions to R307–110–10 and the PM_{10} maintenance plans for Salt Lake County, Utah County and Ogden City PM_{10} NAAs. We are finalizing approval of the Governor of Utah's submittal of March 6, 2019, that contains the redesignation requests for the Salt Lake County, Utah County and Ogden City PM_{10} NAAs to attainment for the 1987 $p.m._{10}$ standards and provided supplemental information. We used the 2016–2018 ambient air quality data from Salt Lake County, Utah County and Ogden City NAAs as the basis for our decision. In addition, we are finalizing approval of the emissions inventories found within the maintenance plans to cover the one element of the Moderate PM_{10} nonattainment SIP that was not suspended with the CDD for the Ogden City NAA.

We are finalizing this redesignation request, the maintenance plans, and R307–110–10 revisions because the Utah Division of Air Quality (UDAQ) has adequately addressed all of the requirements of the Act for redesignation to attainment applicable to the Salt Lake County, Utah County and Ogden City PM_{10} NAAs. Upon the effective date of this final rule, the Salt Lake County, Utah County and Ogden City areas designation status under 40 CFR part 81 will be revised to attainment.

We are also finalizing approval of R307–110–17 and revisions for Section IX.H.1 and 2 that were submitted on February 15, 2019, and with non-substantive changes submitted on July 1, 2019, August 20, 2019 and on October 15, 2019. Additionally, we are finalizing approval of the revisions in R307–302 for incorporation into the Utah SIP as submitted by the State of Utah on May 9, 2013, May 20, 2014, September 8, 2015 and February 27, 2017. This final rule will complete the EPA's October 19, 2016 (81 FR 71988) conditional approval action on the May 9, 2013, May 20, 2014 and September 8, 2015 submittals for R307–302 from UDAQ. We are also approving the transportation conformity MVEBs, for each of the three maintenance areas, as described in our proposed rule.

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes

incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of R307–110–10; R307–110–17; R307–302; Section IX.H.1 and 2; maintenance plans for Salt Lake County, Utah County and Ogden City PM_{10} NAAs; and the Governor of Utah's redesignation requests for Salt Lake County, Utah County and Ogden City PM_{10} NAAs to attainment. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 27, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: February 10, 2020.

Gregory Sopkin,

Regional Administrator, Region 8.

40 CFR parts 52 and 81 are amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart TT—Utah

■ 2. In § 52.2320:
■ a. In the table in paragraph (c):
■ i. Revise the entries ''R307–110–10'' and ''R307–110–17''.
■ ii. Revise the center heading for ''R307–302'' and entries ''R307–302–01'', ''R307–302–02'', ''R307–302–03'', ''R307–302–04'', ''R307–302–05'', and ''R307–302–06''.
■ b. In the table in paragraph (e):
■ i. Revise the entries ''Section IX.H.1. General Requirements: Control Measures for Area and Point Sources, Emission Limits and Operating Practices, PM_{10} Requirements'' and ''Section IX.H.2. Source Specific Emission Limitations in Salt Lake County PM_{10} Nonattainment/Maintenance Area''.
■ ii. Remove the entries for ''Salt Lake County Particulate Matter (PM_{-10}) Attainment Plan Summary'' and ''Utah County Particulate Matter (PM_{-10}) Attainment Plan Summary'' and add in their places the entries ''Salt Lake County Particulate Matter (PM_{10}) Attainment Plan Summary'' and ''Utah County Particulate Matter (PM_{10}) Attainment Plan Summary'', respectively.

[1] 62 FR 27968 (May 22, 1997).

■ iii. Add the entry ''Ogden City Particulate Matter (PM_{10}) Attainment Plan Summary'' at the end of the table.

The revisions and additions read as follows:

§ 52.2320 Identification of plan.

* * * * *

(c) * * *

Rule No.	Rule title	State effective date	Final rule citation, date	Comments
*	*	*	*	*
R307–110. General Requirements: State Implementation Plan				
*	*	*	*	*
R307–110–10	Section IX. Control Measures for Area and Point Sources, Part A, Fine Particulate Matter.	12/3/2015	[insert **Federal Register** citation], 2/26/2020.	
*	*	*	*	*
R307–110–17	Section IX, Control Measures for Area and Point Sources, Part H, Emission Limits.	1/3/2019	[insert **Federal Register** citation], 2/26/2020.	Except for Section IX.H.21.e. which is conditionally approved through one year 7/5/16, IX.H.21.g., Sections of IX.H.21 that reference and apply to the source specific emission limitations disapproved in Section IX.H.22, and Sections IX.H.22.a.ii–iii, IX.H.22.b.ii, and IX.H.22.c.
*	*	*	*	*
R307–302. Solid Fuel Burning Devices				
R307–302–1	Purpose and Definitions	2/1/2017	[insert **Federal Register** citation], 2/26/2020.	
R307–302–2	Applicability	2/1/2017	[insert **Federal Register** citation], 2/26/2020.	
R307–302–3	No-Burn Periods for Particulates.	2/1/2017	[insert **Federal Register** citation], 2/26/2020.	
R307–302–4	No-Burn Periods for Carbon Monoxide.	2/1/2017	[insert **Federal Register** citation], 2/26/2020.	
R307–302–5	Opacity and Prohibited Fuels for Heating Appliances.	2/1/2017	[insert **Federal Register** citation], 2/26/2020.	
R307–302–6	Prohibition	2/1/2017	[insert **Federal Register** citation], 2/26/2020.	
*	*	*	*	*

* * * * *

(e) * * *

Rule title	State effective date	Final rule citation, date	Comments
*	*	*	*
IX. Control Measures for Area and Point Sources			
*	*	*	*
Section IX.H.1. General Requirements: Control Measures for Area and Point Sources, Emission Limits and Operating Practices, PM_{10} Requirements.	1/3/2019	[insert **Federal Register** citation], 2/26/2020.	
Section IX.H.2. Source Specific Emission Limitations in Salt Lake County PM_{10} Nonattainment/Maintenance Area.	1/3/2019	[insert **Federal Register** citation], 2/26/2020.	
*	*	*	*
Maintenance Plans			

Rule title	State effective date	Final rule citation, date	Comments
* * *	*	* *	*
Salt Lake County Particulate Matter (PM_{10}) Attainment Plan Summary.	12/3/2015	[insert **Federal Register** citation], 2/26/2020.	
Utah County Particulate Matter (PM_{10}) Attainment Plan Summary.	12/3/2015	[insert **Federal Register** citation], 2/26/2020.	
Ogden City Particulate Matter (PM_{10}) Attainment Plan Summary.	12/3/2015	[insert **Federal Register** citation], 2/26/2020.	

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 3. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart C—Section 107 Attainment Status Designations

■ 4. In § 81.345, the table titled ''UTAH—PM–10'' is amended by revising the entries ''Salt Lake County'', ''Utah County'', and ''Ogden Area Weber County (part) City of Ogden'' to read as follows:

§ 81.345 Utah.

* * * * *

UTAH—PM–10

Designated area	Designation		Classification	
	Date	Type	Date	Type
Salt Lake County	3/27/2020	Attainment.		
Utah County	3/27/2020	Attainment.		
Ogden Area Weber County (part) City of Ogden	3/27/2020	Attainment.		
* * * *	*		*	*

* * * * *

[FR Doc. 2020–03022 Filed 2–25–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 180117042–8884–02]

RTID 0648–XT035

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

ACTION: Temporary rule; closure of the General category January fishery for 2020.

SUMMARY: NMFS closes the Atlantic bluefin tuna (BFT) General category fishery for the January subquota period. The intent of this closure is to prevent overharvest of the adjusted January subquota.

DATES: Effective 11:30 p.m., local time, February 24, 2020, through May 31, 2020.

FOR FURTHER INFORMATION CONTACT: Nicholas Velseboer 978–675–2168, Sarah McLaughlin, 978–281–9260, or Larry Redd, 301–427–8503.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006) and amendments.

NMFS is required, under regulations at § 635.28(a)(1), to file a closure notice for publication with the Office of the Federal Register when a BFT quota (or subquota) is reached or is projected to be reached. On and after the effective date and time of such notification, for the remainder of the fishing year or for a specified period as indicated in the notification, retaining, possessing, or landing BFT under that quota category is prohibited until the opening of the subsequent quota period or until such date as specified in the notice.

The base quota for the General category is 555.7 mt. See § 635.27(a). Each of the General category time periods (January, June through August, September, October through November, and December) is allocated a subquota or portion of the annual General category quota. Although it is called the ''January'' subquota, the regulations allow the General category fishery under this quota to continue until the subquota is reached or March 31, whichever comes first. The baseline subquotas for each time period are as follows: 29.5 mt for January; 277.9 mt for June through August; 147.3 mt for September; 72.2 mt for October through November; and 28.9 mt for December. Any unused General category quota rolls forward from one time period to the next and is available for use in subsequent time periods within the fishing year. Effective January 1, 2020, NMFS transferred 19.5 mt of the 28.9-mt General category quota allocated for the December 2020 period to the January 2020 period, resulting in an adjusted subquota of 49 mt for the January period and a subquota of 9.4 mt for the December 2020 period (85 FR 17, January 2, 2020). Effective February 5, 2020, NMFS transferred an additional 51 mt from the Reserve category to the General category, in the same notice as NMFS made the annual reallocation of Purse Seine category quota to the Reserve category, resulting in an adjusted subquota of 100 mt for the

General category 2020 January subquota period and 143 mt for the Reserve category (85 FR 6828, February 6, 2020).

Closure of the January 2020 General Category Fishery

Based on the best available General category BFT Landings information (*i.e.,* 88.1 mt landed as of February 21, 2020), as well as average catch rates and anticipated fishing conditions, NMFS projects that the adjusted General category January 2020 subquota of 100 mt will be reached shortly, and that the General category fishery should be closed. Therefore, retaining, possessing, or landing large medium or giant BFT by persons aboard vessels permitted in the Atlantic tunas General category and the HMS Charter/Headboat category (while fishing commercially) must cease at 11:30 p.m. local time on February 24, 2020. The General category will reopen automatically on June 1, 2020, for the June through August 2020 subquota period. This action applies to those vessels permitted in the General category, as well as to those HMS Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT. For information regarding the HMS Charter/Headboat commercial sale endorsement, see 82 FR 57543, December 6, 2017. The intent of this closure is to prevent overharvest of the available January subquota.

Fishermen may catch and release (or tag and release) BFT of all sizes, subject to the requirements of the catch-and-release and tag-and-release programs at § 635.26. All BFT that are released must be handled in a manner that will maximize their survival, and without removing the fish from the water, consistent with requirements at § 635.21(a)(1). For additional information on safe handling, see the ''Careful Catch and Release'' brochure available at *https://www.fisheries.noaa.gov/resource/outreach-and-education/careful-catch-and-release-brochure/*.

Monitoring and Reporting

NMFS will continue to monitor the BFT fisheries closely. Dealers are required to submit landing reports within 24 hours of a dealer receiving BFT. Late reporting by dealers compromises NMFS' ability to timely implement actions such as quota and retention limit adjustment, as well as closures, and may result in enforcement actions. Additionally, and separate from the dealer reporting requirement, General and HMS Charter/Headboat category vessel owners are required to report the catch of all BFT retained or discarded dead within 24 hours of the landing(s) or end of each trip, by accessing *hmspermits.noaa.gov,* using the HMS Catch Reporting app, or calling (888) 872–8862 (Monday through Friday from 8 a.m. until 4:30 p.m.).

Classification

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the 2006 Consolidated HMS FMP and amendments provide for inseason retention limit adjustments and fishery closures to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. These fisheries are currently underway and delaying this action would be contrary to the public interest as it could result in BFT landings exceeding the January 2020 subquota, which could result in the need to reduce quota for the General category later in the year and thus could affect later fishing opportunities. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, there is good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under § 635.28(a)(1) (BFT fishery closures), and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: February 21, 2020.

Karyl K. Brewster-Geisz,

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

[FR Doc. 2020–03871 Filed 2–21–20; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 180831813–9170–02]

RTID 0648–XY071

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 630 in the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in Statistical Area 630 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2020 total allowable catch of pollock for Statistical Area 630 in the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), February 23, 2020, through 1200 hours, A.l.t., March 10, 2020.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of the 2020 total allowable catch (TAC) of pollock in Statistical Area 630 of the GOA is 5,783 metric tons (mt) as established by the final 2019 and 2020 harvest specifications for groundfish in the GOA (84 FR 9416, March 14, 2019) and inseason adjustment (84 FR 70436, December 23, 2019).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the A season allowance of the 2020 TAC of pollock in Statistical Area 630 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 300 mt and is setting aside the remaining 5,483 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 630 of the GOA.

While this closure is effective the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and

opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for pollock in Statistical Area 630 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 20, 2020.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: February 21, 2020.

Karyl K. Brewster-Geisz,

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

[FR Doc. 2020–03873 Filed 2–21–20; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 38
Wednesday, February 26, 2020

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

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 25 and 195

[Docket ID OCC–2018–0008]

RIN 1557–AE34

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 345

RIN 3064–AF22

Community Reinvestment Act Regulations; Extension of Comment Period

AGENCY: Office of the Comptroller of the Currency, Treasury, and Federal Deposit Insurance Corporation.

ACTION: Joint notice of proposed rulemaking: Extension of comment period.

SUMMARY: On January 9, 2020, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) (collectively, the agencies) published in the **Federal Register** a Notice of Proposed Rulemaking (NPR) entitled ''Community Reinvestment Act Regulations'' proposing comprehensive amendments to the rules implementing the Community Reinvestment Act (CRA). The NPR provided for a 60-day comment period, which would have closed on March 9, 2020. The FDIC and the OCC have determined that an extension of the comment period until April 8, 2020, is appropriate. This action will allow interested persons additional time to analyze the proposal and prepare their comments.

DATES: The comment period for the CRA-related NPR published on January 9, 2020 (85 FR 1204),[1] is extended from March 9, 2020, to April 8, 2020.

ADDRESSES: You may submit comments by any of the following methods:

[1] 85 FR 1204 (Jan. 9, 2020).

OCC: Commenters are encouraged to submit comments through the Federal eRulemaking Portal or email, if possible. Please use the title ''Community Reinvestment Act Regulations'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov Classic* or *Regulations.gov Beta: Regulations.gov Classic:* Go to *https://www.regulations.gov/*. Enter ''Docket ID OCC–2018–0008'' in the Search Box and click ''Search.'' Click on ''Comment Now'' to submit public comments. For help with submitting effective comments please click on ''View Commenter's Checklist.'' Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov*, including instructions for submitting public comments.

Regulations.gov Beta: Go to *https://beta.regulations.gov/* or click ''Visit New *Regulations.gov* Site'' from the *Regulations.gov* Classic homepage. Enter ''Docket ID OCC–2018–0008'' in the Search Box and click ''Search.'' Public comments can be submitted via the ''Comment'' box below the displayed document information or by clicking on the document title and then clicking the ''Comment'' box on the top-left side of the screen. For help with submitting effective comments please click on ''Commenter's Checklist.'' For assistance with the *Regulations.gov* Beta site, please call (877) 378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email *regulations@erulemakinghelpdesk.com*.

- *Email: cra.reg@occ.treas.gov*.
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2018–0008'' in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- *Viewing Comments Electronically—Regulations.gov Classic or Regulations.gov Beta:*

Regulations.gov Classic: Go to *https://www.regulations.gov/*. Enter ''Docket ID OCC–2018–0008'' in the Search box and click ''Search.'' Click on ''Open Docket Folder'' on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on ''View all documents and comments in this docket'' and then using the filtering tools on the left side of the screen. Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov*. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Regulations.gov Beta: Go to *https://beta.regulations.gov/* or click ''Visit New *Regulations.gov* Site'' from the *Regulations.gov* Classic homepage. Enter ''Docket ID OCC–2018–0008'' in the Search Box and click ''Search.'' Click on the ''Comments'' tab. Comments can be viewed and filtered by clicking on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Results'' options on the left side of the screen. Supporting materials can be viewed by clicking on the ''Documents'' tab and filtered by clicking on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Results'' options on the left side of the screen.'' For assistance with the *Regulations.gov* Beta site, please call (877) 378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email *regulations@erulemakinghelpdesk.com*. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington,

DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FDIC: You may submit comments, identified by RIN 3064–AF22, by any of the following methods:

- Agency Website: *http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the Agency website.
- *Email: Comments@fdic.gov.* Include the RIN 3064–AF22 on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

Instructions: All comments received must include the agency name and RIN 3064–AF22 for this rulemaking. All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1002, Arlington, VA 22226 by telephone at (877) 275–3342 or (703) 562–2200.

FOR FURTHER INFORMATION CONTACT:

OCC: Vonda Eanes, Director for CRA and Fair Lending Policy, Bobbie K. Kennedy, Technical Expert for CRA and Fair Lending, or Karen Bellesi, Director for Community Development. Bank Supervision Policy, (202) 649–5470; or Allison Hester-Haddad, Counsel, Emily R. Boyes, Counsel, or Elizabeth Small, Senior Attorney, Chief Counsel's Office, (202) 649–5490; Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. For persons who are deaf or hearing impaired, TTY users may contact (202) 649–5597.

FDIC: Patience R. Singleton, Senior Policy Analyst, Supervisory Policy Branch, Division of Depositor and Consumer Protection, (202) 898–6859; Richard M. Schwartz, Counsel, Legal Division (202) 898–7424, Counsel, Legal Division (202) 898–6560, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: On January 9, 2020, the agencies published in the **Federal Register** [2] an NPR proposing comprehensive amendments to the regulations implementing the Community Reinvestment Act.[3] This is the first comprehensive amendment of the regulation since 1995.[4]

The NPR stated that the comment period would close on March 9, 2020. The agencies have received requests to extend the comment period. An extension of the comment period will provide additional opportunity for the public to prepare comments to address the matters raised by the NPR.

Therefore, the OCC and FDIC are extending the comment period for the CRA-related NPR from March 9, 2020 to April 8, 2020.

Dated: February 19, 2020.

Joseph M. Otting,

Comptroller of the Currency.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on February 19, 2020.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2020–03766 Filed 2–25–20; 8:45 am]

BILLING CODE 4810–33–P 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 328

RIN 3064–ZA14

Request for Information on FDIC Sign and Advertising Requirements and Potential Technological Solutions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC is seeking input regarding potential modernization of its sign and advertising rules to reflect that deposit-taking via physical branch, digital, and mobile banking channels continues to evolve since the FDIC last significantly updated its rules in 2006. As banks adjust their business models to innovate and remain competitive, the FDIC is considering how to revise and clarify its sign and advertising rules related to FDIC deposit insurance. The FDIC is issuing this Request for Information (RFI) to inform FDIC efforts to align the policy objectives of its rules and keep pace with how today's banks offer deposit products and services and how consumers connect with banks, including through evolving channels. The FDIC is also seeking input on how to address potential misrepresentations by nonbanks about deposit insurance. In addition, the FDIC requests information about how technological or other solutions could be leveraged to help consumers better distinguish FDIC-insured banks and savings associations from entities that are not insured by the FDIC (nonbanks), particularly across web and digital channels.

DATES: Comments must be received by March 19, 2020.

ADDRESSES: You may submit comments, identified by RIN 3064–ZA14, by any of the following methods:

- *Agency Website: https://www.fdic.gov/regulations/laws/federal/.* Follow the instructions for submitting comments on the Agency website.
- *Email: Comments@fdic.gov.* Include RIN 3064–ZA14 in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW, building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m., EST.

All comments received must include the agency name and RIN for this rulemaking.

Public Inspection: All comments received will be posted without change to *https://www.fdic.gov/regulations/laws/federal/*—including any personal information provided—for public inspection. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1002, Arlington, VA 22226 by telephone at (877) 275–3342 or (703) 562–2200.

FOR FURTHER INFORMATION CONTACT: David Friedman, Senior Policy Analyst, Division of Depositor and Consumer Protection, (202) 898–7168, *dfriedman@fdic.gov;* Edward Hof, Senior Consumer Affairs Specialist, Division of Depositor and Consumer Protection, (202) 898–7213, *edwhof@fdic.gov;* or Richard M. Schwartz, Counsel, Legal Division, (202) 898–7424, *rischwartz@fdic.gov.*

SUPPLEMENTARY INFORMATION: The FDIC is an independent federal agency with a mission of maintaining stability and public confidence in the nation's financial system by insuring bank deposits, examining and supervising financial institutions for safety and soundness and consumer protection, making large and complex financial institutions resolvable, and managing

[2] *Id.*

[3] 12 U.S.C. 2901, *et seq.*

[4] 60 FR 22156 (May 4, 1995).

receiverships. Today, there are more than five thousand FDIC-insured banks and savings associations in the United States. The FDIC insures money deposited in FDIC-insured banks and savings associations, and FDIC deposit insurance is backed by the full faith and credit of the United States.

FDIC Official Sign and Advertising Statement Requirements

The FDIC's official sign and advertising statement regulations (12 CFR part 328) require banks to continuously display the FDIC sign where insured deposits are usually and normally received in the bank's principal place of business and at all of its branches and to use an official advertising statement, such as ''Member FDIC,'' when advertising deposit products and services. Sign and advertising statements requirements are set forth in the Banking Act of 1935. The last major changes to the regulations were made in 2006 [1] and the rules do not reflect evolving banking channels and operations.

Technology and Innovation

The FDIC has begun a number of initiatives focused on innovation and technology. For example, the FDIC established the FDIC Tech Lab (''FDiTech'') to foster innovation in the financial services sector, while simultaneously protecting consumers, markets, and the Deposit Insurance Fund. FDiTech is working to lay the foundation for the next chapter of banking by encouraging innovation that meets consumer demand, promotes community banking, reduces compliance burdens, and modernizes the FDIC's supervision of banks.

Technology has advanced the business of banking in many ways, including how and where depositors interface with banks and savings associations when making deposits. The internet, through online and mobile banking, smart phone applications (''apps''), digital wallets, and other tools, has had a profound effect on the way banking and deposit-taking is conducted. Some banks have no physical branches. Remote deposit capture for depositing checks, introduced in the early 2000s, has become a common feature of many banking apps. In addition, some banks have moved away from the traditional branch/bank teller models to electronically-staffed kiosks and pop-up facilities and teller-less cafes where deposits can be accepted on tablets. In addition, some consumers ''deposit'' funds with prepaid account providers and technologically-focused financial companies (''fintechs''), some of which are not themselves FDIC-insured banks.[2]

Given these banking industry developments, the FDIC is seeking information on its sign and advertising requirements to align with how banks offer products through various deposit-taking channels and how consumers interface with banks.

Potential Consumer Confusion/ Misleading Advertisements

Consumers may have difficulty distinguishing FDIC-insured banks and savings associations from other entities when they look for deposit products online. The types of potentially confusing, and sometimes misleading, situations consumers may encounter can generally be put into two broad categories: (1) Legitimate third-party business relationships with banks or savings associations; or (2) misrepresentations by certain non-FDIC insured entities.

The first circumstance relates to certain nonbanks (such as fintechs or prepaid account providers) that establish legitimate business relationships with FDIC-insured banks and savings associations. In marketing their services, some nonbanks create websites that prominently display the FDIC logo. Consumers contact the FDIC about such websites, at times under the impression that these websites belong to FDIC-insured banks or savings associations. These nonbank entities typically are not claiming to be banks. Instead, the representation is that they will deposit customer funds at one or more FDIC-insured banks or savings associations, and obtain deposit insurance for customers.

At times, this sort of representation is explicit and clear. However, in other situations, a nonbank may highlight the FDIC logo to communicate safety of funds, while omitting or minimizing significant details about deposit insurance coverage.[3] This type of marketing may lead to consumer confusion about whether funds are insured.

In the second type of situation, entities establish websites and falsely claim to be ''Member FDIC.'' These websites commonly advertise above market interest rates and, by including the FDIC logo or in some other way claiming to be an FDIC-insured bank or savings association, they seek to convey legitimacy. More often than not, these entities are not themselves insured banks or do not have a relationship with an insured bank and do not offer accounts insured by the FDIC. In 2019, the FDIC requested that internet service providers take down over 65 such websites. Consumers who do not realize these websites are fraudulent may divulge personally identifiable information (''PII'') or transfer money, often by wire. In some cases, the amount of money can be significant, and the consumer often cannot recover his/her funds. To assist consumers, the FDIC maintains a database (BankFind [4]) that consumers can use to determine whether an entity is an FDIC-insured bank or savings association. In addition, FDIC staff responds to consumers who ask whether an entity is an FDIC-insured bank or savings association.

Request for Comment

Given the significant changes in the marketplace, technological developments, and rapidly evolving consumer behaviors, the FDIC is issuing this RFI to seek public input regarding modernizing the FDIC's official sign and advertising rules (12 CFR part 328) to reflect the continued evolution of physical branch, digital, and mobile banking channels. The FDIC is also seeking input about how it might address misrepresentations in this area. In addition, this RFI is requesting information about how technological and other solutions could be leveraged to allow consumers to better distinguish FDIC-insured banks or savings associations from nonbanks across digital and mobile channels.

The FDIC encourages comments from all interested parties, including but not limited to insured banks and savings associations, technology companies and fintechs, other financial institutions or companies, depositors and financial consumers (of both FDIC-insured and uninsured institutions), consumer groups, researchers, trade associations, and other members of the financial services industry. In particular, the FDIC requests input on the following topics and questions:

Official Sign

The Federal Deposit Insurance Act (''FDI Act'') requires that insured depository institutions display a sign relating to the insurance of deposits at each place of business maintained by

[1] 71 FR 40440 (July 17, 2006).

[2] Some uninsured companies enter into deposit arrangements with FDIC-insured banks, which may, under some circumstances, result in ''pass-through'' deposit insurance being applied per customer. *See* generally, 12 CFR part 330.

[3] For example, a determination as to the amount of the deposits held by a failed bank or savings association that may be covered will depend on certain regulatory requirements having been met.

[4] *https://research2.fdic.gov/bankfind/.*

that institution in accordance with regulations issued by the FDIC.[5] The implementing regulation, 12 CFR 328.2(a), specifies that the sign be displayed continuously at each station or window where insured deposits are usually and normally received in the depository institution's principal place of business and at all of its branches.[6] The official sign must be 7″ x 3″ with black lettering on a gold background.[7] The official sign is permitted—but not required—to be displayed in other locations [8] and on or at ''Remote Service Facilities.'' [9] In lieu of the official sign, banks may vary the sign subject to the minimum standards set for the sign.[10] Non-English equivalent signs must be approved by the FDIC.

The FDIC seeks comments on all aspects of the sign regulation, including the following specific questions:

1. Should the rule continue to require the sign be a minimum size and a specific color? Is this needed to ensure consumers understand ''deposit insurance?''

2. Should the rule continue to link the placement of the sign to each teller station or window where insured deposits are usually and normally received?

3. Should the rule take into account changes in places where deposits are ''usually and normally received'' by banks? How?

4. Should the FDIC's current approach of allowing for permissive or optional placement and use of signage be broadened? How?

5. Does the rule's definition of ''Remote Service Facility'' appropriately reflect current banking practices? For example, should the list of facilities (any automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility where deposits are received) be broadened? If so, what other ''facilities'' should be included?

6. Are FDIC-insured institutions currently displaying a digital representation of the FDIC sign or logo on their websites/mobile apps at account opening? If not, should they do so?

7. Are FDIC-insured institutions currently displaying a digital representation of the FDIC sign or logo on their websites/mobile apps each time a consumer deposits funds? If not, should they do so?

8. Are alternative means of displaying an official FDIC sign, beyond a two-dimensional placard, appropriate in places such as cafes and through digital means? How might this be implemented for different delivery channels (*e.g.,* brick-and-mortar, website, app-based)?

9. As noted above, the current regulation requires that the official FDIC sign be displayed continuously at each station or window where insured deposits are usually and normally received in the depository institution's principal place of business and at all of its branches. Should the rule continue to require that the sign be displayed continuously, or should it allow for digital displays or representations that are not continuously displayed?

10. To what extent do the existing rules enable consumers to distinguish between FDIC-insured institutions and uninsured entities? Are there data, surveys, and studies on this issue?

Official Advertising Statement

The current rule requires bank advertisements [11] that promote deposit products and services or promote non-specific banking products and services offered by the institution to state that the bank is a ''Member of the Federal Deposit Insurance Corporation,'' ''Member of FDIC,'' or ''Member FDIC,'' or that the bank use the FDIC's symbol (taken from the official sign).[12] The advertising statement seeks to enable consumers to recognize FDIC-insured deposit products, as contrasted with non-deposit investment products that are not insured. Size, print legibility and proportions are prescribed.[13] Insured and uninsured (foreign) branches must be identified.[14]

Insured depository institutions may not include the official advertising statement or other statements that imply Federal deposit insurance in any advertisement relating solely to ''non-deposit products'' or ''hybrid products.'' [15] With ''mixed'' advertisements for both insured deposit products and uninsured or hybrid products, the official advertising statement must be segregated within the ad.[16] ''Hybrid product'' means ''a product or service that has both deposit product features and non-deposit product features.'' [17] ''Non-deposit products'' are defined to include ''insurance products, annuities, mutual funds and securities'' but not credit products.[18]

The FDIC seeks comments on all aspects of the official advertising statement regulation, including the following specific questions:

11. Can the regulation be better clarified regarding which types of advertising require the inclusion of the official advertising statement? Should some forms of advertising currently subject to the requirement be made exempt? Are there newer forms of advertising that do not now but should include the official advertising statement?

12. How do banks currently provide the advertising statement when promoting deposit products through non-traditional channels?

13. If a bank is identified in a nonbank's promotion or advertisement for a deposit product or service, should the advertising statement be required, or conversely, should it be prohibited given that the deposit product or service is from an uninsured entity?

Misrepresentations

The rule seeks to ensure that only insured banks and savings associations use the FDIC sign and advertising statement so consumers can have confidence when deposit accounts are advertised as insured. It is illegal to misuse the FDIC name or make false representations regarding deposit insurance.[19] Moreover, under the FDI Act, the FDIC has the authority to issue cease and desist orders and impose civil money penalties against any person who: (1) Falsely represents or implies that any deposit liability is insured by the FDIC by use of the FDIC name or symbol; or (2) otherwise knowingly misrepresents that any deposit liability is insured (or the extent of such insurance), if such deposit liability is not so insured.[20]

The FDIC has not issued specific regulations regarding false representations related to FDIC insurance. The FDIC seeks information regarding misrepresentations in this

[5] *See* 12 U.S.C. 1828(a)(1)(A).

[6] Part 328 does not apply to uninsured offices or branches of insured depository institutions located outside the United States. 12 CFR 328.0.

[7] 12 CFR 328.1(a).

[8] 12 CFR 328.2(a)(1)(i).

[9] 12 CFR 328.2(a)(1)(ii). ''*Remote Service Facilities*'' are defined as including ''any automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility where deposits are received.''

[10] 12 CFR 328.2(a)(2).

[11] ''Advertisement'' is defined as ''a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business.'' 12 CFR 328.3(a).

[12] 12 CFR 328.3(c)(1).

[13] 12 CFR 328.3(b)(2).

[14] 12 CFR 328.3(c)(2).

[15] 12 CFR 328.3(e)(2) and (e)(3).

[16] 12 CFR 328.3(e)(4).

[17] 12 CFR 328.3(e)(1)(ii).

[18] 12 CFR 328.3(e)(1)(i).

[19] 18 U.S.C. 709 (may not, without authorization, use ''the words ''Federal Deposit'', ''Federal Deposit Insurance'', or ''Federal Deposit Insurance Corporation'' as the name of a business or advertise or otherwise falsely represent that deposits are FDIC insured).

[20] *See* 12 U.S.C. 1828(a)(4)(C)–(D).

area, including the following specific questions:

14. Are there examples of potential risks related to misrepresentations involving FDIC deposit insurance coverage that the FDIC should address, including those related to deposit products through use of the internet or other emerging technologies?

15. What changes can be made to the FDIC sign and advertising statement requirements that could deal with preventing misrepresentations regarding FDIC deposit insurance?

16. Are there ways that certain nonbanks should be able to advertise or otherwise represent a legitimate business relationship with an FDIC-insured institution that would be clear to consumers and consistent with the provision on misrepresentation?

17. In allowing the use of their name or mark, should banks be responsible for ensuring the proper use of the FDIC's logo, advertising and representations by nonbanks with whom the banks do business?

Technological Solutions

The FDIC regularly receives reports of fraudulent communications made to consumers that appear to be from FDIC-insured entities, but actually originate from fraudsters. These types of scams may involve a variety of electronic communication channels, including emails, websites, text messages, and social media posts. Some scam messages might ask the recipient to ''confirm'' or ''update'' confidential personal financial information, such as bank account numbers, Social Security numbers, dates of birth and other valuable details. Other scams might ask for payments or deposits to be sent, for example, by money order, Automated Clearing House (''ACH'') credit, wire transfer service, peer-to-peer payment service, gift cards, or digital currency. Banks also face risks that fraudsters may be using their names and brands to perpetrate such frauds.

The FDIC is exploring whether technological or other solutions might enable consumers to validate when they are interacting with a FDIC-insured financial institution, and not a fraudster, when visiting websites and using apps on mobile devices. The FDIC seeks comments on how technology might be utilized to allow consumers to distinguish FDIC-insured banks and savings association from nonbanks across various web and digital channels, including the following specific questions:

18. Do consumers look for the FDIC name or logo when using financial institution websites and apps to confirm the validity of insured institutions' authenticity? Do they look for the logo when deciding to open new deposit accounts? During every interaction?

19. What technological options or other approaches could be utilized to allow consumers to distinguish FDIC-insured banks and savings associations from nonbanks across web and digital channels? What are the benefits and drawbacks of each approach? Is it necessary or desirable for the FDIC to try to ''solve'' this by rule, or can private sector initiatives better address this issue?

20. If the FDIC develops a technological solution to allow consumers to distinguish FDIC-insured banks and savings associations from nonbanks across web and digital channels, what challenges would institutions have in implementing such solutions? How would any solution work with third parties that have established legitimate business relationships with banks or savings associations?

21. If the FDIC develops a technological solution to allow consumers to distinguish FDIC-insured banks and savings associations from nonbanks across web and digital channels, should its use be limited to FDIC-insured banks, or should third parties that market or facilitate access to deposit products (*e.g.,* prepaid program managers, fintechs) be permitted or required to use such a logo in certain circumstances?

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on February 20, 2020.

Annmarie H. Boyd,

Assistant Executive Secretary.

[FR Doc. 2020–03689 Filed 2–25–20; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0091; Product Identifier 2020–NM–012–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 adopt a new airworthiness directive (AD) for certain The Boeing Company Model 737–8 and 737–9 airplanes. This proposed AD was prompted by a report that certain exterior fairing panels on the top of the engine nacelle and strut (the thumbnail fairing and mid strut fairing panels) may not have the quality of electrical bonding necessary to ensure adequate shielding of the underlying wiring from the electromagnetic effects of lightning strikes or high intensity radiated fields (HIRF), which could potentially lead to a dual engine power loss event from a critical lightning or HIRF exposure event. This proposed AD would require a detailed inspection of the thumbnail fairing panels and mid strut fairing panels for excessive rework of the metallic (aluminum foil) inner surface layer, replacement of any excessively reworked panels, and modification of the thumbnail fairing assembly to ensure adequate bonding. 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 March 27, 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–2020–0091.

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–2020–0091; 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: Christopher Baker, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3552; email: *christopher.r.baker@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–2020–0091; Product Identifier 2020–NM–012–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.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, 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.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Christopher Baker, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3552; email: *christopher.r.baker@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The FAA has received a report from Boeing indicating that exterior fairing panels on the top of the engine nacelle and strut (the thumbnail fairing and mid strut fairing panels) may not have the quality of electrical bonding necessary to ensure adequate shielding of the underlying wiring from the electromagnetic effects of lightning strikes or HIRF. Excessive rework of the surface of the metallic (aluminum foil) inner layer of those panels can result in cuts to that layer. This metallic layer functions as part of the shielding for aircraft wiring, including wiring associated with the engine control systems. Cuts to the metallic layer, depending on their size and location, could create the potential for HIRF exposure or lightning attachment to induce spurious signals onto the underlying airplane wiring, including wiring associated with the engine control systems. Such spurious signals could cause a loss of engine thrust control. This loss of thrust control could simultaneously affect both engines in two different ways. The wiring for both engines could be independently exposed to the electromagnetic effects from the same HIRF or lightning event, or the signals induced on one engine's control system could be induced onto the other engine's wiring via common avionics system connections. This condition, if not addressed, could result in a forced off-airport landing or excessive flightcrew workload due to loss of thrust control on both engines.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Special Attention Service Bulletin 737–54–1056, dated December 11, 2019. This service information describes procedures for a detailed inspection of the thumbnail fairing panels and mid strut fairing panels for excessive rework of the metallic (aluminum foil) inner surface layer (resulting in foil cuts), replacement of any excessively reworked panels, and modification of the thumbnail fairing assembly to ensure adequate bonding. Modification actions include doing a form-in-place gasket of the thumbnail land assemblies; preparing the mating surfaces between the thumbnail fairing panel and the left and right thumbnail land assemblies; and doing a bond check of the thumbnail fairing panel and the thumbnail land assemblies on the left and right side of the thumbnail fairing panel on both engines.

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 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 the service information described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.'' For information on the procedures, see this service information at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0091.

Differences Between This Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 737–54–1056, dated December 11, 2019, specifies a compliance time of 6 months to do the actions. However, for this proposed AD, the actions must be done before further flight. The proposed compliance time is based on the potential for a common-cause failure of both engines. The FAA has determined this compliance time is appropriate to address the identified unsafe condition.

Additionally, the effectivity of Boeing Special Attention Service Bulletin 737–54–1056, dated December 11, 2019, lists certain line numbers of Model 737–8 and 737–9 airplanes. However, the FAA is not certain that the service bulletin lists all airplanes affected by the unsafe condition identified in this proposed AD. Thus, the applicability of this proposed AD is expanded to include all line numbers for Model 737–8 and 737–9 airplanes that may be affected by the identified unsafe condition. This will ensure that all potentially affected airplanes are subject to the proposed AD.

Costs of Compliance

The FAA estimates that this proposed AD affects 128 airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	5 work-hours × $85 per hour = $425	$0	$425	$54,400

The FAA estimates the following costs to do any necessary modifications that would be required based on the results of the proposed inspection. The FAA has no way of determining the number of aircraft that might need these modifications:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Modification	Up to 7 work-hours × $85 per hour = Up to $595	(*)	Up to $595 *.

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

According to the manufacturer, all of the costs of this proposed AD will be covered under warranty, thereby reducing the cost impact on affected persons. The FAA does not control warranty coverage for affected persons. As a result, the FAA has included all known costs in the 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):

The Boeing Company: Docket No. FAA–2020–0091; Product Identifier 2020–NM–012–AD.

(a) Comments Due Date

The FAA must receive comments by March 27, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–8 and 737–9 airplanes included in line numbers 5602 through 7901, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 54, Nacelles/pylons.

(e) Unsafe Condition

This AD was prompted by a report that certain exterior fairing panels on the top of the engine nacelle and strut (the thumbnail fairing and mid strut fairing panels) may not have the quality of electrical bonding necessary to ensure adequate shielding of the underlying wiring from the electromagnetic effects of lightning strikes or high intensity radiated fields (HIRF), which could potentially lead to a dual engine power loss event from a critical lightning or HIRF exposure event. The FAA is issuing this AD to address this condition, which could result in a forced off-airport landing or excessive flightcrew workload due to loss of thrust control on both engines.

(f) Compliance

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

(g) Detailed Inspection and Modification

Before further flight, do a detailed inspection of the thumbnail fairing panels and mid strut fairing panels for excessive rework of the metallic (aluminum foil) inner surface layer, and, before further flight, do the modification as applicable in accordance with Steps 4., 6. through 9., inclusive, 11., and 12. of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–54–1056, dated December 11, 2019.

(h) Special Flight Permit

Special flight permits, as described in 14 CFR 21.197 and 21.199, may be issued to operate the airplane to a location where the requirements of this AD can be accomplished, but concurrence by the Manager, Seattle ACO Branch, FAA, is required before issuance of the special flight permit. Requests for a special flight permit

must be submitted to the FAA with a description of the electromagnetic field radiation sources (type, location, frequency, and power level) along the planned route. Send requests for a special flight permit to the person identified in paragraph (j)(1) of this AD.

(i) 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 (j)(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.

(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, Seattle 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.

(j) Related Information

(1) For more information about this AD, contact Christopher Baker, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3552; email: *christopher.r.baker@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 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 on February 19, 2020.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03864 Filed 2–25–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0171; Product Identifier 2018–SW–028–AD]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron, Inc. 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 Bell Helicopter Textron, Inc. (Bell) Model 214ST helicopters. This proposed AD was prompted by the discovery of bolts with nonconforming external thread root radii. This proposed AD would require removing the affected bolts from service and would prohibit installing an affected bolt on any helicopter. 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 April 13, 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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, TX 76101; telephone 817–280–3391; fax 817–280–6466; or at *https://www.bellcustomer.com.* You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

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–2020–0171; 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, 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: Haytham Alaidy, Aviation Safety Engineer, DSCO Branch, Compliance and Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: 817–222–5224; fax: 817–222–4960; email *haytham.alaidy@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 ''FAA–2020–0171; Product Identifier 2018–SW–028–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 Bell Model 214ST helicopters with certain serial-numbered spindle to yoke bolts (bolts) part number (P/N) 214–010–262–103 installed. Bell indicates that a former bolt supplier manufactured a number of P/N 214–010–262–103 bolts with nonconforming external thread root radii. This proposed AD would apply to Model 214ST helicopters with a non-conforming bolt installed and would require removing each bolt from service. The proposed AD would also prohibit installing a non-conforming bolt on any helicopter. The proposed actions are intended to prevent the spindle separating from the yoke and subsequent loss of control of the helicopter.

Related Service Information

The FAA reviewed Bell Helicopter Textron Alert Service Bulletin 214ST–

18–93 Revision A, dated April 17, 2019, for Model 214ST helicopters. This service information specifies inspecting the historical records and spare parts to determine the serial number (S/N) of each bolt. If the S/N of the bolt indicates it is a non-conforming bolt, the service information specifies torque checking the bolt every 25 hours until the bolt reaches its life limit.

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 apply to Model 214ST helicopters with a bolt P/N 214–010–262–103 with S/N BH179163, BH179164, BH179169, BH179170, BH179171, BH179175, BH179176, BH179178, BH224783, BH224751, BH224756, BH224764, BH224765, BH383851, BH383853, BH383855, BH383856, BH383857, BH383858, BH383860, BH383861, BH383862, BH383864, BH383865, BH383868, BH383872, BH383873, BH383878, or BH383879 installed. This proposed AD would require, within 25 hours time-in-service (TIS), removing each affected bolt from service. This proposed AD would also prohibit, after the effective date of this AD, installing an affected bolt on any helicopter.

Differences Between This Proposed AD and the Service Information

The service information specifies torque checking the bolt every 25 hours until it is replaced upon reaching its life limit, while this proposed AD would require removing each bolt from service within 25 hours TIS.

Costs of Compliance

The FAA estimates that this proposed AD would affect 16 helicopters of U.S. registry. The FAA estimates that operators may incur the following costs in order to comply with this proposed AD. Labor costs are estimated at $85 per work-hour.

Replacing 1 bolt would take about 8 work-hours and parts would cost about $7,073 for an estimated cost of $7,753 per helicopter.

The FAA has no way of determining the number of bolts that might need to be replaced.

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 amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bell Helicopter Textron, Inc.: Docket No. FAA–2020–0171; Product Identifier 2018–SW–028–AD.

(a) Comments Due Date

The FAA must receive comments by April 13, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bell Helicopter Textron, Inc. Model 214ST helicopters, certificated in any category, with a spindle to yoke bolt (bolt) part number (P/N) 214–010–262–103 and serial number (S/N) BH179163, BH179164, BH179169, BH179170, BH179171, BH179175, BH179176, BH179178, BH224783, BH224751, BH224756, BH224764, BH224765, BH383851, BH383853, BH383855, BH383856, BH383857, BH383858, BH383860, BH383861, BH383862, BH383864, BH383865, BH383868, BH383872, BH383873, BH383878, or BH383879 installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 6200, Main Rotor.

(e) Unsafe Condition

This AD was prompted by the discovery that bolts have nonconforming external thread root radii. The unsafe condition, if not addressed, could result in the spindle separating from the yoke and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

(1) Within 25 hours time-in-service, remove from service each bolt listed in paragraph (c) of this AD.

(2) After the effective date of this AD, do not install on any helicopter a bolt with a P/N and S/N listed in paragraph (c) of this AD.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, DSCO Branch, Compliance and Airworthiness Division, 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-ASW-190-COS@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 Haytham Alaidy, Aviation Safety Engineer, DSCO Branch, Compliance and Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: 817–222–5224; fax: 817–222–4960; email: *haytham.alaidy@faa.gov*.

(2) For information about AMOCs, contact *9-ASW-190-COS@faa.gov*.

Issued in Fort Worth, Texas, on February 13, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03851 Filed 2–25–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0142; Airspace Docket No. 20–AGL–7]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Big Rapids, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace extending upward from 700 feet above the surface at Roben-Hood Airport, Big Rapids, MI. The FAA is proposing this action as the result of an airspace review caused by the cancellation and revision of the instrument procedures at this airport. The geographic coordinates of the airport would also be updated to coincide with the FAA's aeronautic database. Airspace design is necessary for the safety and management of instrument flight rules (IFR) operations at this airport.

DATES: Comments must be received on or before April 13, 2020.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–9826, or (800) 647–5527. You must identify FAA Docket No. FAA–2020–0142/Airspace Docket No. 20–AGL–7, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

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: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

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 extending upward from 700 feet above the surface at Roben-Hood Airport, Big Rapids, MI, to support IFR operations at this 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. Commenters 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–2020–0142/Airspace Docket No. 20–AGL–7.'' 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 Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

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 extending upward from 700 feet above the surface within a 6.6-mile radius (decreased from a 6.7-mile

radius) of Roben-Hood Airport, Big Rapids, MI; removing the White Cloud VORTAC and associated extensions from the airspace legal description; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautic database.

This action is the result of an airspace review caused by the cancellation and revision of the instrument procedures at this airport.

Class E airspace designations are published in paragraph 6005 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 designation 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 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AGL MI E5 Big Rapids, MI [Amended]

Roben-Hood Airport, MI
(Lat. 43°43′22″ N, long 85°30′15″ W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Roben-Hood Airport.

Issued in Fort Worth, Texas, on February 19, 2020.

Steve Szukala,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2020–03779 Filed 2–25–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0140; Airspace Docket No. 20–ASO–5]

RIN 2120–AA66

Proposed Amendment of the Class E Airspace; Greenville and Madisonville, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace extending upward from 700 feet above the surface at Muhlenberg County Airport, Greenville, KY, and Madisonville Regional Airport, Madisonville, KY. The FAA is proposing this action as the result of the decommissioning of the Central City VHF omnidirectional range (VOR) navigation aid, which provided navigation information for the instrument procedures at these airports, as part of the VOR Minimum Operational Network (MON) Program. Additionally, the name of Madisonville Regional Airport and the geographic coordinates of both airports would be updated to coincide with the FAA's aeronautical database.

DATES: Comments must be received on or before April 13, 2020.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–9826, or (800) 647–5527. You must identify FAA Docket No. FAA–2020–0140/Airspace Docket No. 20–ASO–5, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

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: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

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 extending upward from 700 feet above the surface at Muhlenberg County Airport, Greenville, KY, and Madisonville Regional Airport, Madisonville, KY, to support instrument flight rule operations at these airports.

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. Commenters 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–2020–0140/Airspace Docket No. 20–ASO–5.'' 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 Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

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 extending upward from 700 feet above the surface to within a 6.5-mile radius (increased from a 6.4-mile radius) of Muhlenberg County Airport, Greenville, KY; removing the city associated with the airport in the airspace legal description to comply with changes to FAA Order 7400.2M, Procedures for Handling Airspace Matters; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautic database;

And amending the Class E airspace extending upward from 700 feet above the surface at Madisonville Regional Airport, Madisonville, KY, by updating the name (previously Madisonville Municipal Airport) and geographic coordinates of the airport to coincide with the FAA's aeronautic database.

This action is the result of an airspace review caused by the decommissioning of the Central City VOR, which provided navigation information for the instrument procedures at these airports, as part of the VOR MON Program.

Class E airspace designations are published in paragraph 6005 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 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASO KY E5 Greenville, KY [Amended]

Muhlenberg County Airport, KY
(Lat. 37°13′34″ N, long. 87°09′23″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Muhlenberg County Airport.

* * * * *

ASO KY E5 Madisonville, KY [Amended]

Madisonville Regional Airport, KY
(Lat. 37°21′21″ N, long. 87°23′54″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Madisonville Regional Airport.

Issued in Fort Worth, Texas, on February 19, 2020.

Steve Szukala,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2020–03780 Filed 2–25–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1300, 1301, and 1304

[Docket No. DEA–459]

RIN 1117–AB43

Registration Requirements for Narcotic Treatment Programs With Mobile Components

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Drug Enforcement Administration (DEA) proposes to revise the existing regulations for narcotic treatment programs (NTPs) to allow a mobile component associated with the registered program to be considered a coincident activity. The NTP registrants that operate or wish to operate mobile components (in the state that the registrant is registered in) to dispense narcotic drugs in schedules II–V at a remote location for the purpose of maintenance or detoxification treatment would not be required to obtain a separate registration for a mobile component. This proposed rule would waive the requirement of a separate registration at each principal place of business or professional practice where controlled substances are dispensed for those NTPs with mobile components that fully comply with the requirements of the proposed rule, once finalized. These revisions to the regulations are intended to make maintenance or detoxification treatments more widely available, while ensuring that safeguards are in place to reduce the likelihood of diversion.

DATES: Electronic comments must be submitted, and written comments must be postmarked, on or before April 27, 2020. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

ADDRESSES: To ensure proper handling of comments, please reference ''RIN 1117–AB43/Docket No. DEA–459'' on all correspondence, including any attachments.

- *Electronic comments:* The Drug Enforcement Administration encourages that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *http://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number for your comment. Please be aware that submitted comments are not instantaneously available for public view on *http://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted, and there is no need to resubmit the same comment.
- *Paper comments:* Paper comments that duplicate the electronic submission are not necessary and are discouraged. Should you wish to mail a paper comment *in lieu* of an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, Diversion Control Division; Mailing Address: 8701 Morrissette Drive, Springfield, VA 22152.

FOR FURTHER INFORMATION CONTACT: Scott A. Brinks, Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, Diversion Control Division; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 362–3261.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received are considered part of the public record. They will, unless reasonable cause is given, be made available by the Drug Enforcement Administration (DEA) for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. The Freedom of Information Act (FOIA) applies to all comments received. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be made publicly available, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all of the personal identifying information you do not want made publicly available in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be made publicly available, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment.

Comments containing personal identifying information and confidential business information identified as directed above will generally be made publicly available in redacted form. If a comment has so much confidential business information or personal identifying information that it cannot be effectively redacted, all or part of that comment may not be made publicly available. Comments posted to *http://www.regulations.gov* may include any personal identifying information (such as name, address, and phone number) included in the text of your electronic submission that is not identified as directed above as confidential.

An electronic copy of this document and supplemental information to this notice of proposed rulemaking are available in their entirety under the tab ''Supporting Documents'' of the public docket of this action at *http://www.regulations.gov* under FDMS Docket ID: DEA–459 (RIN 1117–AB43/Docket Number DEA–459) for easy reference.

I. Background and Purpose

A. Legal Authority

The Controlled Substances Act (CSA) generally provides, with certain exceptions, that all persons who are required to register under the Act must obtain a separate registration ''at each principal place of business or professional practice'' where such persons manufacture, distribute, or dispense a controlled substance. 21 U.S.C. 822(e)(1). However, the CSA authorizes the Administrator of DEA (by delegation from the Attorney General) to issue regulations waiving the requirement of registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety. 21 U.S.C. 822(d).

Pursuant to this latter provision, DEA is hereby proposing a regulation that would waive the requirement of a separate registration for NTPs that

utilize mobile components. Specifically, under the proposed rule, an NTP would be permitted to dispense narcotic drugs in schedules II–V at a location remote from, but within the same state as, the NTP's registered location, for the purpose of maintenance or detoxification treatment. Under this proposed rule, regardless of whether the NTP is dispensing narcotic drugs at a remote location on such a regular basis that the location would constitute a principal place of business or professional practice within the meaning of the CSA (see discussion below), the NTP would not need to have a separate registration with DEA at that location as long as it complies with the requirements of the proposed rule. Such remote dispensing by an NTP would be deemed a coincident activity permitted under the NTP's registration. In the interest of helping to alleviate the ongoing opioid epidemic in the United States, the Acting Administrator finds that this proposed waiver of registration is consistent with the public health and safety.

B. Purpose of the Proposed Rule

The impetuses for this notice of proposed rulemaking (NPRM) are the opioid epidemic currently affecting the nation and the desire to design additional ways to curtail this epidemic. During 2017, 70,237 deaths occurred as a result of drug overdoses, including 47,600 deaths (67.8%) that involved an opioid.[1] Further, annual drug overdose deaths have more than tripled since 1999.[2] From 2015 to 2016, drug overdose deaths increased in all drug categories examined by the Centers for Disease Control and Prevention; the largest increase occurred among deaths involving synthetic opioids other than methadone (synthetic opioids), which includes illicitly manufactured fentanyl. Consequently, the demand for evidence-based medication-assisted treatment for substance use disorders (SUD), including opioid use disorder (OUD), has increased over the years, especially for services provided by NTPs; in some areas, this has resulted in long waiting lists and high service fees. Additionally, in rural and other underserved communities, the distance to the nearest NTP or the lack of consistent access to transportation may prevent or substantially impede access to these critical services.

In April of 2000, DEA, in association with the American Methadone Treatment Association (now the American Association for the Treatment of Opioid Dependence), developed guidelines for NTPs to follow to ensure greater stability in the treatment process by using the same standard throughout the United States.[3] As the nature of the opioid epidemic evolves, new methods and guidelines to further increase accessibility for persons with OUD also need to evolve. Alternative methods, such as mobile components of NTPs, can be used to bring treatment to those in rural or other areas where NTPs are not accessible, or to allow people who concurrently are unable to travel to an NTP to receive care. This has prompted some NTPs to purchase vehicles (in this NPRM, the word ''conveyance'' will be used interchangeably with ''mobile component'' to describe such vehicles) for the purposes of dispensing controlled substances outside of their registered location, but within states in which they are registered. Under the proposed rule, mobile components of NTPs would not be authorized to function as hospitals, long-term care facilities, or emergency medical service vehicles, and would not be authorized to transport patients.

There are more than 1,700 NTPs registered with DEA, including opioid treatment programs, detoxification treatment services that utilize methadone, and compounders. Prior to 2007, DEA authorized mobile NTPs on an ad hoc basis. Since then, it has placed a moratorium on further such authorizations, resulting in a gradual decline in the number of mobile NTPs. During the past five years, 19 NTPs have operated a mobile component. Currently, eight NTPs operate mobile units under those agreements.[4] The vast majority of authorized mobile NTP components complied with the CSA and its implementing regulations. This NPRM builds on the existing experience and provides additional flexibility for NTPs in operating mobile components subject to the regulatory restrictions put into place to prevent the diversion of controlled substances. This NPRM is thus aimed at helping to alleviate the opioid crisis in the United States by formalizing the requirements for operating a mobile NTP and thereby allowing for greater access to OUD treatment while maintaining appropriate controls to reduce the likelihood of diversion.

C. Why This Proposed Rule Is Legally Necessary

As indicated above, the CSA generally requires all persons who dispense controlled substances—including NTPs—to be registered at each ''principal place of business or professional practice'' where they dispense controlled substances. This requirement is reiterated in DEA regulations. 21 CFR 1301.12. While the CSA and DEA regulations do not define the term ''principal place of business or professional practice,'' in one case, a federal court looked to 21 CFR 1301.12(b)(3) in evaluating this question and focused on whether the practitioner ''regularly engaged in the dispensing or administering of controlled substances'' at a particular location as determinative of whether a separate registration is required at such location. *United States* v. *Clinical Leasing,* 930 F.3d 394, 395–396 (5th Cir. 1991). That court stated: ''If a physician intends to dispense controlled substances from a particular location several times a week or month, he must first [obtain] a separate registration for the location.'' *Id.* In another case (a DEA administrative proceeding), the agency explained that where a practitioner travels to numerous locations to administer controlled substances on an ''as-needed and random basis'' and under other circumstances that were not indicative of maintaining a principal place of professional practice at such locations, the practitioner was not required to be separately registered at such locations. *Jeffrey J. Becker, DDS,* 77 FR 72387, 72388 (Dec. 5, 2012).

It is not necessary for purposes of this proposed rule to attempt to define precisely the meaning of the term ''principal place of business or professional practice'' or to attempt to examine the various scenarios in which that term might apply to a mobile NTP. It is sufficient to note that there may be circumstances in which a mobile NTP would operate in such a manner that it would be considered to have a ''principal place of business or professional practice'' at one or more consistent remote locations and, therefore, would need to obtain a separate registration at such remote locations under 21 U.S.C. 822(e)(1). Because DEA has concluded that it is consistent with the public health and safety to allow mobile NTPs to operate without obtaining such separate registrations at remote locations, the agency is hereby proposing to waive this requirement through the promulgation

[1] ''Opioid Overdose.'' *Drug Overdose Deaths.* June 27, 2019. Accessed November 15, 2019. *https://www.cdc.gov/drugoverdose/data/statedeaths.html.*

[2] Scholl L., Seth P., Kariisa M., Wilson N., & Baldwin G., *Drug and Opioid-Involved Overdose Deaths—United States, 2013–2017,* 67 MMWR Morbidity Mortality Weekly Report 1419–1427 (2019). Accessed September 12, 2019. DOI: *http://dx.doi.org/10.15585/mmwr.mm675152e1.*

[3] Drug Enforcement Administration, *Narcotic Treatment Programs Best Practice Guideline* (2000).

[4] Data collected from DEA field offices in June 2019.

of the proposed rule. *See* 21 U.S.C. 822(d). DEA is proposing that the regulations would be amended to specify that operating a mobile NTP will be a coincident activity of a registered NTP.

It should be noted that DEA has always required, with limited exceptions, practitioners to have separate registrations in each state in which they dispense controlled substances. *See, e.g.,* Clarification of Registration Requirements for Individual Practitioners, 71 FR 69478, 69478 (Dec. 1, 2006) (explaining that a practitioner must maintain a DEA registration for each state in which he or she dispenses controlled substances because DEA registrations are based on state licenses to dispense controlled substances). Thus, under the proposed rule, a mobile NTP would be able to only dispense controlled substances in states in which the NTP is registered with DEA to dispense controlled substances.

D. Why the Proposed Waiver of Registration Is Consistent With the Public Health and Safety

As indicated, the CSA allows DEA to issue a regulation waiving the requirement of registration for certain categories of registrants where the Administrator finds it consistent with the public health and safety. For the reasons discussed above, DEA concludes that allowing for the use of mobile NTPs under the conditions specified in this proposed rule would increase access to OUD treatment, which will be beneficial to the public health and safety. This conclusion is further supported by DEA's belief that under the conditions specified in the proposed rule, there would be minimal risk of diversion. DEA bases this view about the minimal diversion risk on historical information gathered from mobile components that have operated or are currently operating.

A review of theft and loss reports from 2005 to 2017 shows that NTPs did not distinguish thefts and losses occurring at the registered location from those occurring at mobile facilities. There was only one report that concluded theft or loss occurred at a mobile NTP. However, this mobile NTP is no longer operational as the registrant voluntarily surrendered DEA registration. Furthermore, since 2017, there have not been any additional mobile NTP reports of thefts or losses of controlled substances submitted to DEA.

E. Summary of Costs and Benefits

DEA conducted an analysis of the costs and benefits of this proposed rule, and concludes that its promulgation will result in a net cost savings between $1,297,670 and $1,482,272 over a five-year period. This proposed rule would enable NTPs to expand their treatment availability to patients via mobile units rather than being limited to registering and opening additional brick-and-mortar locations only. DEA's comparative analysis shows that the cost of operating a mobile unit is less than the cost of operating a physical location, yielding the aforementioned savings. A complete discussion of the costs and benefits of this proposed rule can be found in the Regulatory Analyses below.

II. Scope of the Proposed Rule

This proposed rule describes under what circumstances mobile components of NTPs would be able to transport and dispense controlled substances away from their registered locations within the same state as the registered NTP. The rule also sets forth proposed requirements for security, recordkeeping, reporting, and inventory for those mobile components that wish to transport controlled substances away from a registered location for dispensing at a mobile NTP.

It is important to note that these mobile components would not be permitted to share or transfer controlled substances from one mobile component to another while deployed outside of the registered location. Nor would mobile components be permitted to act as reverse distributors.[5] Likewise, stationary NTPs with mobile components would not be allowed to modify their registrations to authorize their mobile components to act as collectors[6] under 21 CFR 1301.51 and 1317.40. Finally, as stated above, these proposed mobile components of NTPs would not be authorized to function as hospitals, long-term care facilities, or emergency medical service vehicles, and may not transport patients.

[5] 21 CFR 1300.01 defines a *reverse distributor* as a person registered with the Administration as a reverse distributor. To reverse distribute means to acquire controlled substances from another registrant or law enforcement for the purpose of: (1) Return to the registered manufacturer or another registrant authorized by the manufacturer to accept returns on the manufacturer's behalf; or (2) destruction.

[6] 21 CFR 1300.01 defines *collector* as a registered manufacturer, distributor, reverse distributor, narcotic treatment program, hospital/clinic with an on-site pharmacy, or retail pharmacy that is authorized to receive a controlled substance for the purpose of destruction from an ultimate user, a person lawfully entitled to dispose of an ultimate user decedent's property, or a long-term care facility on behalf of an ultimate user that resides or has resided at that facility.

A. Part 1300: Definitions

In section 1300.01, DEA is proposing to add a definition for mobile narcotic treatment programs (mobile NTPs). This definition reflects that a mobile NTP is a motor vehicle that serves as a mobile component of an NTP, which engages in maintenance and/or detoxification treatment with narcotic drugs in schedules II–V, at a location remote from, but within the same state as, the registered NTP, and which operates under the registration of the NTP. Because the proposed mobile NTP definition references a motor vehicle, DEA also proposes to separately define ''motor vehicle'' as a vehicle propelled under its own motive power and lawfully used on public streets, roads, or highways with more than three wheels in contact with the ground; a motor vehicle does not include a trailer in this context. Therefore, under DEA's proposed rule, a trailer could not serve as a mobile NTP.

B. Part 1301: Registration of Manufacturers, Distributors, and Dispensers of Controlled Substances

DEA regulations have always required that all registrants maintain effective security to guard against theft and diversion of controlled substances. *See* 21 CFR 1301.71–77. The need for such security applies equally in the mobile NTP context. Thus, this NPRM contains provisions (described below) that would require NTPs to secure controlled substances while operating a mobile component away from the registered location.

Also, as indicated, DEA proposes to revise section 1301.13 to make operating a mobile component of an NTP a coincident activity of an existing NTP registration, provided the NTP has obtained prior approval from the local DEA office. DEA intends to lessen the regulatory burden on NTPs by waiving the separate DEA registration requirement, as discussed above, and allowing them to operate a mobile component of an NTP in the same state as the registered NTP, under its existing registration. As a result, the mobile component of an NTP would not have to apply for a separate registration, as it would be considered coincident activity. Furthermore, DEA proposes to specify in the regulations that the records generated during the operations of a mobile component of an NTP shall be maintained at the location of the registered NTP, rather than requiring such records to be stored at the location of the mobile component. This is discussed in part 1304 of the proposed

rule, which is titled Records and Reports of Registrants.

DEA is proposing to revise section 1301.72 to ensure controlled substances in a mobile component of an NTP are protected against theft and diversion. To achieve this end, DEA is proposing that the security requirements under 21 CFR 1301.72(a)(1) and 21 CFR 1301.72(d) become applicable to the mobile components of an NTP. The storage area for controlled substances in a mobile component of a NTP must not be accessible from outside the vehicle. The proposed requirement to secure the controlled substances in a securely locked safe in the conveyance will assist in adequately securing the controlled substances. Since small quantities of controlled substances will be present in the mobile component, DEA is proposing that the safe used by these mobile components have safeguards against forced entry, lock manipulation, and radiological attacks. The safe must also be bolted or cemented to the floor or wall in such a way that it cannot be readily moved. DEA is also proposing that the safe be equipped with an alarm system that transmits a signal directly to a central protection company or a local or State police agency which has a legal duty to respond, or a 24-hour control station operated by the registrant, or such other protection as the Administrator may approve if there is an attempted unauthorized entry into the safe.

Upon completion of the operation of the conveyance on a given day, the conveyance would need to be immediately returned to the registered location, and all controlled substances removed from the conveyance and secured within the registered location. If the mobile component is disabled for any reason (mechanical failure, accident, fire, etc.), the registrant would be required to have a protocol in place to ensure that the controlled substances on the conveyance are secure and accounted for. If the conveyance is taken to an automotive repair shop, all controlled substances would need to be removed and secured at the registered location.

Under the proposed rule, registrants would not be required to obtain a separate registration for conveyances (mobile components) utilized by the registrant to transport controlled substances away from registered locations for dispensing within the same state at unregistered locations. Vehicles must possess valid county/city and state information (*e.g.,* a vehicle information number (VIN) or license plate number) on file in the fixed NTP. Registrants will also be required to provide proper city/county and state licensing and registration to DEA at the time of inspection and prior to transporting controlled substances away from their registered location.

DEA takes this opportunity to remind authorized persons transporting controlled substances to dispense at an unregistered location that the DEA-approved conveyance they utilize to transport these controlled substances is a controlled premise subject to administrative inspection pursuant to 21 U.S.C. 880. The CSA includes in its definition of controlled premises ''conveyances, where persons registered under [21 U.S.C. 823] (or exempt from registration under [21 U.S.C. 822(d)] or by regulation of the Attorney General) . . . may lawfully hold . . . distribute, dispense, administer, or otherwise dispose of controlled substances.'' 21 U.S.C. 880(a)(2). Included within this section's scope of inspection for controlled premises, the CSA grants DEA inspectors the right, ''[e]xcept as may otherwise be indicated in an applicable inspection warrant . . . to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished drugs . . . and other substances or materials, containers, and labeling found therein.'' 21 U.S.C. 880(b)(3).

DEA is aware that state and federal security requirements for controlled substances may vary. However, it is the responsibility of the registrant to be aware of these requirements and follow both state and federal regulations, or whichever has the stricter requirements. Registrants and practitioners should continue to consult with their State Opioid Treatment Authority or equivalent office to ensure compliance, as referenced in DEA April 2000 Narcotic Treatment Program Best Practice Guide.

DEA is proposing to revise 21 CFR 1301.74 to include mobile components of DEA-registered NTPs, since the existing regulations do not contain such a provision. As described in the proposed revisions to section 1301.74, personnel who are authorized to dispense controlled substances for narcotic treatment must ensure proper security measures and patient dosage. For example, DEA is proposing that persons enrolled in any NTP, including those who received treatment at a mobile NTP, would be required to wait in an area that is physically separated from the narcotic storage and dispensing area by a physical entrance such as a door or other entryway.

Under the proposed revisions, the distribution and delivery of narcotic drugs in schedules II–V to mobile NTPs would only be permitted by the registrant at the registrant's registered location. Persons who are permitted to deliver narcotic drugs in schedules II–V to mobile NTPs will not be able to: Receive narcotic drugs in schedules II–V from other mobile NTPs or any other entity; deliver narcotic drugs in schedules II–V to other mobile NTPs or any other entity; or conduct reverse distribution of controlled substances on a mobile NTP. Any controlled substances being transported for disposal from the dispensing location of the mobile component shall be secured and disposed of in compliance with part 1317 and all other applicable federal, state, tribal, and local laws and regulations.

Finally, the proposed physical security controls of mobile components would need to be implemented by the NTP pursuant to 21 CFR 1301.72 and 1301.74. In the event of a security breach in which controlled substances are lost or stolen, the registrant must determine the significance of the loss and look to the theft and loss reporting requirements in 21 CFR 1301.74(c).

C. Part 1304: Records and Reports of Registrants

Under the proposed rule, the recordkeeping requirements of 21 CFR 1304 would apply to mobile components of NTPs. DEA is proposing revisions to sections 1304.04 and 1304.24 to include mobile components. As with brick and mortar NTPs, the records of the mobile components would be stored at the registered location of the NTP in a manner that meets all applicable security and confidentiality requirements, and must be readily retrievable.

Currently 21 CFR 1304.24(b) requires that a brick and mortar NTP maintain the records, required by 21 CFR 1304.24(a), in a dispensing log at the NTP site. It is understood that this log is in paper form. As an alternative to maintaining a paper dispensing log, DEA is proposing that an NTP or its mobile component may also use an automated/computerized data processing system for the storage and retrieval of the program's dispensing records, if a number of conditions are met: The automated system maintains the same information required in 21 CFR 1304.24(a) for paper records; the automated system has the capability of producing a hard copy printout of the program's dispensing records; the NTP or its mobile component prints a hard copy of each day's dispensing log, which is then initialed appropriately by each person who dispensed medication

to the program's patients; and the automated system is approved by DEA.[7]

DEA also is proposing that the NTP's computer software program be required to be capable of producing accurate summary reports for the brick and mortar location and its mobile component, for any time-frame selected by DEA personnel during an investigation. Further, if these summary reports are maintained in hard copy form, DEA proposes that they should be kept in a systematically organized file located at the registered site of the NTP. Additionally, DEA is also proposing that the NTP or its mobile component be required to maintain an off-site back-up of all computer generated program information.

Finally, DEA is proposing that NTPs be required to retain all records for the brick and mortar NTP as well as the mobile component two years from the date of execution. This time period is the same period as that required by 21 CFR 1304.04(a). However, because some states require that records be retained for longer than two years, the NTP should contact its State Opioid Treatment Authority for information about state requirements.

Regulatory Analyses

Summary of Costs and Benefits

DEA examined each of the provisions of the proposed rule to estimate its economic impact. DEA's analytic approach focuses on comparing the costs and/or cost-savings of a ''no action'' baseline regulatory environment with the costs and/or cost-savings of the regulatory environment that would result from the promulgation of this proposed rule. This is the standard analytic framework codified in the OMB Circular A–4, published on September 17, 2003. This proposed rule is an enabling rule designed to expand access to medication-assisted treatment (MAT) offered by NTPs in underserved communities. Previously, DEA had only authorized mobile NTPs on an ad hoc basis, and had placed a moratorium on further such authorizations in 2007. Thus, DEA compared the costs of delivering MAT services in a baseline regulatory environment in which no new mobile NTPs are authorized, to the costs of delivering an equivalent level of MAT services in the proposed regulatory environment in which a registered NTP may begin to operate a mobile component as a coincident activity. This analysis, detailed below, finds that this proposed rule will result in a cost savings for DEA registered NTPs in the form of reduced startup, labor, and operating costs of MAT services delivered via a mobile component. DEA also recognizes that this proposed rule is likely to result in benefits in the form of economic burden reductions (health care costs, criminal justice costs, and lost productivity costs), as access to treatment for underserved communities is expected to expand. However, DEA does not have a good basis to estimate the totality of this benefit with any accuracy since data on the number of patients treated via existing mobile components are not available. Thus, while these benefits are not quantified, DEA expects that this proposed rule will result in a net benefit to society.

MAT has been shown to be an effective opioid treatment option—a 2014 meta-analysis concluded that MAT has significantly increased treatment retention and decreased illicit opioid use.[8] While it is estimated that 2 million Americans have an OUD involving medications, and another 526,000 had an OUD involving heroin, in 2018, only 19.7% of Americans with an OUD received any specialty treatment.[9] A review of private insurance data found that, following an opioid-related hospitalization, fewer than 11% of covered patients received MAT in combination with psychosocial services. An additional 6% received MAT without psychosocial services, and 43% received psychosocial services only.[10] As of 2016, over 90% of NTPs were located in urban areas, forcing rural patients to travel great distances to receive their doses of medication.[11] Some rural patients report that the burden of traveling daily to receive their medication effectively prevents them from working,[12] further increasing the risk that they will discontinue treatment.[13]

Because DEA is not currently authorizing new mobile NTPs, for an NTP registrant to provide MAT services to patient populations with little or no access to an NTP, the registrant would be required to register and open another brick-and-mortar location in the underserved geographic area. The many fixed capital and operating expenses associated with the startup and ongoing operation of a new facility discourage providers from doing this. For example, registrants would be required to obtain another NTP registration at $244 per year and incur the cost of renting additional office space, and ensuring that the new location meets DEA requirements, that it is appropriately licensed by the state, and that it is accredited by an accrediting organization approved by the Substance Abuse and Mental Health Services Administration (SAMHSA). Additionally, opening a new location would entail additional staffing and facilities costs. Under the proposed regulatory environment, registrants would be able to operate a mobile component as a coincident activity of their existing facility, foregoing the expenses of a brick-and-mortar expansion in favor of the comparatively lower cost of operating a mobile component.

DEA believes it is reasonable to assume that in any given geographic region, the fixed capital expenses of opening a new brick-and-mortar location (most significantly office rent) will always exceed the capital expenses of operating a mobile component (most significantly the purchase price of a conveyance to be converted to a mobile NTP). These major capital expenses are discussed and compared in detail in the following paragraph; however, it is important to first set boundaries for this analysis by discussing what costs will not be included and why. DEA assumes that two significant expenses are the same for both activities, and therefore, are excluded from the analysis: The

[7] This is not a new alternative. DEA has previously informed NTPs that they could use an automated/computerized data processing system meeting these requirements for the storage and retrieval of their dispensing records. *See* Narcotic Treatment Programs Best Practice Guideline (April 2000), *https://www.deadiversion.usdoj.gov/pubs/manuals/narcotic/narcotic.pdf* pp. 14, 20, and 21.

[8] Thomas C.P., Fullerton C.A., Kim M., et al. Medication-Assisted Treatment with Buprenorphine: Assessing the Evidence. Psychiatry Serv. 2014;65(2):158–170. doi:10.1176/appi.ps.201300256.

[9] Substance Abuse and Mental Health Services Administration. (2019). Key substance use and mental health indicators in the United States: Results from the 2018 National Survey on Drug Use and Health (HHS Publication No. PEP19–5068, NSDUH Series H–54). Rockville, MD: Center for Behavioral Health Statistics and Quality, Substance Abuse and Mental Health Services Administration.

[10] Ali, M.M., Mutter, R. (2016). The CBHSQ Report: Patients Who Are Privately Insured Receive Limited Follow-up Services After Opioid-Related Hospitalizations. Rockville, MD: Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality. Retrieved by ONDCP on August 18, 2017 at *http://www.samhsa.gov/data/sites/default/files/report_2117/ShortReport-2117.pdf.*

[11] Leonardson J., Gale J.A. Distribution of Substance Abuse Treatment Facilities Across the Rural—Urban Continuum. 2016. *https://muskie.usm.maine.edu/Publications/rural/pb35bSubstAbuseTreatmentFacilities.pdf.*

[12] Sigmon S.C. Access to Treatment for Opioid Dependence in Rural America: Challenges and Future Directions. JAMA Psychiatry. 2014;71(4):359–360. doi:10.1001/jamapsychiatry.2013.4450.

[13] Leonardson J., Gale J.A. Distribution of Substance Abuse Treatment Facilities Across the Rural—Urban Continuum. 2016. *https://muskie.usm.maine.edu/Publications/rural/pb35bSubstAbuseTreatmentFacilities.pdf.*

labor required to dispense narcotic drugs in schedules II–V, and the cost to outfit an NTP office or mobile conveyance with sufficient medical and office equipment. Labor costs are considered to be equal for both activities as the proposed rule does not change the requirements for the types of personnel that are authorized to dispense controlled substances. Whether an NTP expands via a brick-and-mortar location or mobile component, DEA assumes that the registrant would need to expand the quantity and type of labor required to dispense narcotic drugs in schedules II–V, at the same rate for both. However, it is likely that brick and mortar locations would be required to employ a medical administrative assistant to handle records management, billing, and reception; functions that a mobile component of an existing NTP would outsource to the labor provided by the parent brick and mortar NTP. DEA assumes that a new brick and mortar NTP requires one medical assistant, and calculates that the total annual compensation for this medical assistant to be $48,994.[14]

DEA also recognizes that there are startup costs that will be the same for both activities. This includes the purchase of medical equipment and basic office supplies, and the installation of a section 1301.72(a)(1)(iii)-compliant alarm system. Such startup costs are accordingly also omitted from this analysis. Whether MAT services are being rendered via a mobile conveyance or traditional office environment, the same type and quantity of labor, medical equipment, and security equipment is assumed needed to deliver the same amount of treatment while adhering to DEA regulations.

According to the National Association of Realtors, the average annual price per square foot for office space throughout the United States was $46 in the first quarter of 2017.[15] Based on DEA's knowledge of registrant operations, NTPs require a minimum of 1,000 square feet of office space, which equates to a conservative estimate of yearly rent for NTPs of $46,000. Assuming the NTP agrees to a five-year lease, the present value of the cost of five years of office rent is $188,609.08 at a 7% discount rate and $210,666.53 at a 3% discount rate. In comparison, commercial vehicles suitable for service as a mobile NTP range in price from $30,000 to $40,000.[16] Furthermore, the proposed rule would not require an NTP to obtain a separate registration for the mobile component at a cost of $244 per year, which is a cost that a new brick-and-mortar location would be forced to incur. The present value of registration costs per registrant over a five-year period is $1,000.45 at a 7% discount rate and $1,117.45 at a 3% discount rate.

There are also several operating expenses that are unique to a mobile conveyance that should be factored into this analysis. The first is the cost of the narcotic safe and associated installation costs. DEA recognizes that while both a mobile conveyance and a traditional NTP office require a safe, the confined space of a mobile conveyance likely requires some amount of customization in the installation process in order to meet the requirements of 21 CFR 1301.72(a)(1). To account for this unique installation cost, DEA doubled the highest quoted price of the safe[17] and attributed that full amount to the mobile conveyance, while attributing only the purchase price of the safe to the cost of a brick-and-mortar NTP. The second set of costs unique to the operation of a mobile component are maintenance and transportation expenses such as fuel, repair, insurance, permits, licenses, tires, tolls, and driver wages and benefits. The American Transportation Research Institute estimates that the average marginal cost per mile of operating a straight truck in 2016 (the most recent year in which this figure was updated) was $1.63. This figure is inclusive of all previously listed expenses.[18] Based on DEA's knowledge of the operations of existing mobile NTPs, DEA estimates that a mobile NTP operating under the proposed rule would travel no greater than 5,000 miles per year (roughly 100 miles per week). This equates to an annual transportation and maintenance expense of $8,150.00 per year. DEA requests input concerning these assumptions especially in light of the needs for this service in rural locations where clients may be located far from one another.

Comparing the present value of the costs associated with operating a mobile NTP over a five-year period with the present value of the costs associated with opening a brick-and-mortar NTP over a five-year period yields a net present value of cost savings between $318,855 (at a 7% discount rate) and $359,131 (at a 3% discount rate) for the operation of a mobile NTP. The comparison of costs between the baseline and proposed regulatory environment are summarized in the tables below:

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[14] The total annual cost of compensation is based on the median annual wage for Occupation Code 31–9092 Medical Assistants ($33,610). May 2018 National Occupational Employment and Wage Estimates, United States, BUREAU OF LABOR STATISTICS, *https://www.bls.gov/oes/current/oes_nat.htm#31-9092* (last visited November 11, 2019). Average benefits for employees in private industry is 31.4% of total compensation. Employer Costs for Employee Compensation—June, 2019, BUREAU OF LABOR STATISTICS, *https://www.bls.gov/news.release/pdf/ecec.pdf* (last visited November 11, 2019). The 31.4% of total compensation equates to 45.8% (31.4% / 68.6%) load on wages and salaries. $33,610 × (1 + 0.4577) = $48,994.17.

[15] ''2017 Q1 Commercial Real Estate Market Survey.'' *www.nar.realtor,* 2017, *www.nar.realtor/research-and-statistics/research-reports/commercial-real-estate-market-survey/2017-q1-commercial-real-estate-market-survey.*

[16] Price range gathered by searching *commercialtrucktrader.com* for class 1, 2, and 3 light duty box trucks and class 4, 5, and 6 medium duty box trucks. These vehicle classes were used based on DEA's knowledge of the types of vehicles currently used by registrants for mobile components.

[17] Quotes for safes meeting DEA's regulatory specifications were sourced online from three leading manufacturers: Healthcare Logistics, Medicus Health and Harloff. The highest price quoted was $899.00. Doubling the price to account for installation yields a total cost of $1,798.00.

[18] Hooper, Alan, and Dan Murray. An Analysis of the Operational Costs of Trucking: 2017 Update. ATRI, American Transportation Research Institute, 2017, *atri-online.org/wp-content/uploads/2017/10/ATRI-Operational-Costs-of-Trucking-2017-10-2017.pdf.*

Baseline Regulatory Environment – Total Brick-and-Mortar NTP Expansion Costs*

Office rent per year	$46,000.00				
Cost of safe[19]	$899.00				
Labor Cost	$48,994.00				
Registration fee	$244.00				
NPV 3%	Year 1	Year 2	Year 3	Year 4	Year 5
$437,036	$96,137.00	$95,238.00	$95,238.00	$95,238.00	$95,238.00
NPV 7%	Year 1	Year 2	Year 3	Year 4	Year 5
$391,335	$96,137.00	$95,238.00	$95,238.00	$95,238.00	$95,238.00

*All figures rounded to the nearest whole dollar.

Proposed Regulatory Environment – Total Mobile NTP Costs*

Vehicle purchase price	$40,000.00				
Cost to install DEA compliant safe	$1,798.00				
Maintenance cost per year	$8,150.00				
NPV 3%	Year 1	Year 2	Year 3	Year 4	Year 5
$77,905	$49,948.00	$8,150.00	$8,150.00	$8,150.00	$8,150.00
NPV 7%	Year 1	Year 2	Year 3	Year 4	Year 5
$72,480	$49,948.00	$8,150.00	$8,150.00	$8,150.00	$8,150.00

*All figures rounded to the nearest whole dollar.

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DEA does not have a systematic method for estimating how many NTP registrants that are currently deterred or prevented from opening additional brick-and-mortar sites due to costs might take advantage of this enabling rule to begin operating a mobile NTP. DEA also recognizes that, because of their fixed locations, brick-and-mortar sites are more limited in the geographic area they can reasonably serve than are mobile units. DEA conservatively estimates, however, that this number would at least equal the number of NTP registrants that operated mobile components at some point in the previous five years under ad hoc agreements with DEA field offices. There have been 19 such NTP registrants, and there are currently eight with mobile components still in operation. Therefore, DEA considers it a reasonable assumption that at least 11 additional NTP registrants would begin operating a mobile NTP after the promulgation of this rule, bringing the total number of mobile NTPs to at least the previous total of 19. This yields a total cost savings for all of those NTPs over a five-year period of $3,507,405 [20] (at a 7% discount rate) to $3,950,441 [21] (at a 3% discount rate).

For the reasons outlined in the comparative analysis discussed above, DEA concludes that moving from the baseline regulatory environment to the regulatory environment of the proposed rule results in a cost reduction for NTP registrants that wish to expand their services to new geographic areas, and will spur an increase in the number of mobile NTPs. Therefore, this proposed rule is a deregulatory action that will result in a net cost savings between $3,507,405 and $3,950,441.

Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)

This proposed rule was developed in accordance with the principles of Executive Orders 12866, 13563, and 13771. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. DEA expects that this proposed rule will not have an annual effect on the economy of $100 million or more in at least one year and therefore is not an economically significant regulatory action. DEA examined each of the provisions of the proposed rule to estimate its economic impact, comparing the costs and/or cost-savings of a ''no action'' baseline regulatory environment with the costs and/or cost-savings of the regulatory environment that would result from the promulgation of this proposed rule. This proposed rule is an enabling rule designed to expand the supply of medication-assisted treatment (MAT) providers, and DEA currently has only authorized mobile NTPs on an ad hoc basis, with a present moratorium on further such authorizations. Thus, DEA compared the costs of delivering MAT

[19] The cost of a safe is a one-time expense incurred in the first year of operation.

[20] The proposed regulatory environment yields a five-year cost savings (discounted at 7%) of $318,855 over the current regulatory environment. $318,855 × 11 = $3,507,405.

[21] The proposed regulatory environment yields a five-year cost savings (discounted at 3%) of $359,131 over the current regulatory environment. $359,131 × 11 = $3,950,441.

services in a baseline regulatory environment in which no new mobile NTPs are authorized, to the costs of delivering an equivalent level of MAT services in the proposed regulatory environment in which a registered NTP may begin to operate a mobile component as a coincident activity, subject to the provisions of this proposed rule. DEA's analysis, summarized in the preceding section, finds that this proposed rule will result in a net cost-savings between $3,507,405 and $3,950,441, and is therefore below the $100 million threshold.

For a number of years, DEA has allowed registered NTPs to utilize mobile units as part of their programs through special arrangements with local DEA field offices. The use of these mobile units was in response to the opioid epidemic that is currently affecting the nation. With the number of deaths attributed to overdoses increasing, the demand for access to medication-assisted treatment increased. In many areas, this has resulted in long wait lists and high service fees for services provided by NTPs. Alternative guidelines and methods were sought to increase accessibility to treatment for people with SUD including OUD, especially in rural areas or areas where NTPs are not accessible, or to allow those who have health conditions that prevent them from traveling long distances to receive maintenance or detoxification treatment. Mobile units associated with the registered NTP were seen as an alternative because they increased accessibility to treatment in the areas that needed it.

This NPRM builds on the existing experience and provides additional flexibility for NTPs in operating mobile units, subject to regulatory restrictions put into place to prevent the diversion of controlled substances. DEA is proposing to revise 21 CFR 1301.13 to make operating a mobile component of an NTP a coincident activity of an existing NTP registration, and intends to lessen the regulatory burden on NTPs by waiving the separate DEA registration requirement. These mobile units would be required to maintain effective security to guard against theft and diversion of controlled substances in accordance with 21 CFR 1301.72. The mobile NTPs would also be subject to the recordkeeping requirements in 21 CFR 1304.04 and 1304.24. Many of the current mobile units are already following these regulatory requirements. This proposed rule, once finalized, will ensure that these regulatory requirements can be enforced consistently over any current or future NTP wishing to operate a mobile unit.

Thus, this proposed rule, once promulgated, would enable any NTP registered with DEA to engage in an activity that was previously authorized through special arrangements with DEA field offices. Furthermore, DEA's purpose for allowing registered NTPs to operate a mobile unit as a coincident activity is to expand the availability of MAT in accordance with the priorities outlined in The President's Commission on Combating Drug Addiction and The Opioid Crisis, published on November 1, 2017.

The Office of Information and Regulatory Affairs (OIRA) has determined that the proposed rule is a ''significant regulatory action'' under Executive Order 12866. Accordingly, this rule has been reviewed by OIRA.

Executive Order 13771 was issued on January 30, 2017, and published in the **Federal Register** on February 3, 2017. 82 FR 9339. Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment or otherwise promulgates a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Guidance from OMB, issued on April 5, 2017, explains that the above requirements only apply to each new ''significant regulatory action that . . . . imposes costs.'' Although this proposed rule is a significant regulatory action under Executive Order 12866, this proposed rule is expected to be an Executive Order 13771 ''deregulatory action,'' as defined by OMB—that is, a regulatory action with total costs less than zero. The result of DEA's analysis shows that moving from the baseline regulatory environment to the regulatory environment of the proposed rule results in a cost reduction for NTP registrants that wish to serve new geographic areas, and will increase the number of mobile NTP units. Therefore, this proposed rule is expected to be a deregulatory action that will result in a net cost savings between $3,507,405 and $3,950,441.

Executive Order 12988, Civil Justice Reform

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13132, Federalism

This proposed rule does not have federalism implications warranting the application of Executive Order 13132. The proposed rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications warranting the application of Executive Order 13175. It does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA), DEA evaluated the impact of this rule on small entities. DEA's evaluation of economic impact by size category indicates that the rule will not, if promulgated, have a significant economic impact on a substantial number of these small entities.

The RFA requires agencies to analyze options for regulatory relief of small entities unless it can certify that the rule will not have a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. DEA evaluated the impact of this rule on small entities and discussions of its findings are below.

Description and Estimate of the Number of Small Entities

To determine the proposed rule's effect on small entities, DEA must first calculate the total number of affected entities. To do this, DEA must determine the total number of NTP entities in the United States, as those are the entities that are able to take advantage of this enabling rule.

DEA begins with the number of relevant DEA registrations—that is, NTP registrations. The number of NTP entities differs from the number of NTP registrations, however, because NTP entities often hold more than one DEA registration, such as where a registrant handles controlled substances at

multiple locations, requiring the entity to hold registrations for each of these locations. DEA does not, in the general course of business, collect or otherwise maintain information regarding associated or parent organizations holding multiple registrations. Therefore, to derive the total number of NTP entities from the number of NTP registrations, DEA needs to develop a relationship, or ratio, between the total number of NTP registrations and the number of entities possessing those registrations.

To do so, DEA first determined the North American Industry Classification System (NAICS) [22] classification codes that most closely represent the affected business activity—namely, NTP activity. The business activity and its corresponding representative NAICS codes are listed in the table below.

BUSINESS ACTIVITY AND REPRESENTATIVE NAICS CODES

Business activity	NAICS codes
Narcotic Treatment Program	622210—Psychiatric and Substance Abuse Hospitals. 621420—Outpatient Mental Health and Substance Abuse Centers.

DEA then gathered economic data for those codes using the U.S. Census Bureau, Statistics of U.S. Businesses (SUSB). Specifically, DEA used the SUSB data to determine the number of ''firms'' and the number of ''establishments'' in the United States that correspond to each relevant NAICS code. (For the purposes of this analysis, the term ''firm'' as defined in the SUSB is used interchangeably with ''entity'' as defined in the RFA.) From this, DEA calculated a firm-to-establishment ratio—*i.e.,* the average number of organizations for each establishment engaged in these activities. DEA calculated this ratio to be 0.53, as listed in the table below. In other words, each organization engaged in activities covered by these NAICS codes operated, on average, slightly fewer than two establishments.

FIRM-TO-ESTABLISHMENT RATIO BY NAICS CODE

NAICS code	Number of firms	Number of establishments	Firm to establishment ratio
Total Narcotic Treatment Program	5,889	11,109	0.53
622210—Psychiatric and Substance Abuse Hospitals	417	635	.66
621420—Outpatient Mental Health and Substance Abuse Centers	5,472	10,474	.52

Source: SUSB.[23] (Accessed 5/1/2017)

Because an entity generally must obtain a separate registration ''at each principal place of business or professional practice'' where it manufactures, distributes, or dispenses a controlled substance, *see* 21 U.S.C. 822(e)(1), the number of NTP establishments should be roughly equivalent to the number of DEA registrations for NTPs. Thus, DEA applied the calculated firm-to-establishment ratio of 0.53 to the 1,605 NTP registrations in DEA's database to estimate the number of NTP entities, resulting in an estimate of 851 NTP entities in the United States. The table below summarizes this calculation.

NUMBER OF ENTITIES BY BUSINESS ACTIVITY

Business activity	NAICS code	Number of registrations/ establishment	Entity to establishment ratio	Number of entities
Narcotic Treatment Program	622210, 621420	1,605	0.53	851
Grand Total	.....	1,605	.....	851

Thus, based on these calculations, DEA estimates that 851 entities could currently make use of the proposed rule, including the eight NTP entities that currently operate mobile NTP components. Of these, DEA estimates that at least an additional 11 entities will choose to operate a mobile NTP as a coincident activity in response to the proposed rule, matching the previous total of 19 mobile NTPs that were in operation over the previous five years. Because the proposed rule is an enabling rule and thus does not affect entities that choose not to change their behavior in response to it, only NTP entities that choose to establish mobile NTP units would be affected by the rule. Therefore, DEA estimates that 1.29% (11 of 851) of total NTP entities in the

[22] The North American Industry Classification System (NAICS) is the standard used by the Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. *https://www.census.gov/eos/www/naics/* (last accessed: 1/10/2019).

[23] Data for NAICS codes related to NTPs are based on the 2014 SUSB Annual Datasets by Establishment Industry, December 2016. SUSB annual or static data includes: Number of firms, number of establishments, employment, and annual payroll for most U.S. business establishments. The data are tabulated by geographic area, industry, and employment size of the enterprise. The industry classification is based on 2012 North American Industry Classification System (NAICS) codes.

United States would be affected by this proposed rule.

To estimate the number of NTP entities that are small entities for RFA purposes, DEA used a process similar to that used to estimate the total number of NTP entities. As described above, U.S. Small Business Administration (SBA)[24] size standards—based on the number of employees or annual receipts, depending on the industry—determine what constitutes a ''small entity'' under the RFA. The SBA has established these size standards for business activities corresponding to each NAICS code. The SBA size standards for each of the NAICS codes that best correspond to NTPs are listed below: Firms below this SBA size standard (based on annual receipts for these codes) are small firms—and thus small entities under the RFA.

SBA Size Standards

NAICS codes	Description	Size standards ($ million in annual receipts)	Size standards (number of employees)
622210	Psychiatric and Substance Abuse Hospitals	38.5	
621420	Outpatient Mental Health and Substance Abuse Centers	15	

Source: SBA, February 26, 2016. (Accessed 5/1/2017)

DEA used SUSB data to estimate the number of small firms for each of these NAICS codes. In 2012, the last year for which the SUSB has published the necessary receipts data,[25] 180 of 411 (43.78%) firms within code 622210 fell below the SBA size standard and thus were small firms.[26] 4,369 of 4,987 (87.61%) firms within code 621420 fell below the standard. DEA assumes that these percentages of small firms for each code have remained constant in recent years. DEA then applied these percentages to the updated totals found in the 2014 SUSB Annual Datasets by Establishment Industry, resulting in approximately 183 firms (43.78% of the total 417) within code 622210 and 4,794 firms (87.61% of the total 5,472) within code 621420 classified as small firms. Combining these values indicates that, for these codes, 4,977 of 5,889 firms, or 84.51%, are small firms. Thus, since these are the NAICS codes that most closely correspond to NTP entities, DEA estimates that 84.51% of NTP entities are small firms. As described above, DEA has concluded that there are roughly 851 total NTP entities in the United States. Accordingly, DEA estimates that 719 (84.51%) of the total 851 NTP entities are small entities. The analysis is summarized in the table below.

Summary of Registration, Establishment, Entity, and Small Entity

Business activity	Number of registrations/ establishments	Entity to establishment ratio	Number of entities	Percent small entities	Number of small entities
Narcotic Treatment Program	1,605	0.53	851	84.51	719
Percent Small Entity					84.51%

In consultation with the SBA's Office of Advocacy, DEA has adopted the SBA standard that the amount of small entities affected by a proposed rule is ''substantial'' if 30% or more of the relevant group of small entities will be affected by the rule. As described in the Summary of Costs and Benefits section, this proposed rule is an enabling rule and a deregulatory action resulting in a total cost savings of at least $3,507,405 over a five-year period. The proposed rule allows NTP registrants another option for expanding the reach of their services, if they so choose, without requiring that current or future NTP registrants change their business practices or incur any costs. DEA estimates that only an additional 11 entities will choose to operate a mobile NTP as a coincident activity in response to the proposed rule. Because the proposed rule is an enabling rule and thus does not affect entities that do not change their behavior in response to it, only these 11 NTP entities and the 8 NTPs currently operating units under ad hoc agreements are affected by the rule. Therefore, DEA estimates that 2.23% (19 of 851) of total NTP entities in the United States are affected by this proposed rule. DEA estimates that 11 NTPs not already operating a mobile NTP (or 1.29% of all NTPs) will choose to operate a mobile unit. DEA has no reason to conclude that the percentage of small NTP entities that begin operating mobile components in response to the rule will differ from the percentage of total NTPs (11 of 851, or 1.29%), especially since most NTP entities are small. Thus, DEA estimates that 1.29% (9 of the 719[27]) of small NTP entities will choose to begin operating a mobile NTP as a coincident activity in response to the rule.

Estimating Impact on Small Entities

The 9 affected small entities are estimated to realize the same cost savings as other affected entities, as calculated above: Between $318,855 (at a 7% discount rate) and $359,131 (at a 3% discount rate) per entity over a five-

[24] The SBA is an independent agency of the Federal Government to aid, counsel, assist, and protect the interests of small business concerns, to preserve free competitive enterprise, and to maintain and strengthen the overall economy of the nation. *https://www.sba.gov/about-sba* (last accessed: 1/10/2019).

[25] SUSB receipts data are available only for Economic Census years (years ending in 2 and 7). Thus, DEA used SUSB data from 2012, the most recent available annual receipt data.

[26] SUSB data gives the number of firms for each NAICS code within a series of ranges of annual receipts. Thus, to determine the number of firms falling below the SBA size standard, DEA added together the number of firms in each range falling completely below the SBA standard. Because the SBA size standard for code 622210 falls within the middle of a range, DEA's calculations may slightly underestimate the number of small firms for this code.

[27] $0.0129 \times 719 = 9.2751$. Rounding down to the nearest whole number yields 9.

year period. DEA generally considers impacts that are greater than 3% of yearly revenue to be a ''significant economic impact'' on an entity, and recognizes that this amount of cost savings rises above that threshold for those small entities. However, since the percent of affected small entities is less than 30% (1.29%), this proposed rule does not impact a substantial number of small entities. Therefore, this proposed rule does not rise to the level of certification as economically significant.

The table below summarizes the analysis.

SUMMARY OF ANALYSIS

Business activity	Estimated number of small entities (establishments)	Estimated number of affected small entities	Percentage of small entities affected	Economic impact of compliance
Narcotic Treatment Program	719	9	1.29 (Not Substantial) ...	Not significant.

DEA examined the economic impact of the proposed rule for each affected industry for various size ranges. Based on the analysis above, and because of these facts, DEA certifies this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

In accordance with the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1501 *et seq.,* DEA has determined that this action would not result in 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 1 year.'' Therefore, neither a Small Government Agency Plan nor any other action is required under UMRA of 1995.

Paperwork Reduction Act of 1995

This action does not impose a new collection of information requirement under the Paperwork Reduction Act of 1995. 44 U.S.C. 3501–3521. This action would not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. Although the proposed rule revises certain recordkeeping and reporting provisions to explicitly apply them to mobile NTPs, these provisions already apply to NTPs in general and thus do not impose any new collection of information requirement.

List of Subjects

21 CFR Part 1300

Chemicals, traffic control.

21 CFR Part 1301

Administrative practice and procedure, Drug traffic control, Security measures.

21 CFR Part 1304

Drug traffic control, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, DEA proposes to amend 21 CFR parts 1300, 1301, and 1304 as follows:

PART 1300—DEFINITIONS

■ 1. The authority citation for part 1300 continues to read as follows:

Authority: 21 U.S.C. 802, 821, 822, 829, 871(b), 951, 958(f).

■ 2. In § 1300.01(b), add in alphabetical order the definition of ''Mobile Narcotic Treatment Program'' and ''Motor vehicle'' to read as follows:

§ 1300.01 Definitions relating to controlled substances.

* * * * *

(b) * * *

Mobile Narcotic Treatment Program means a motor vehicle, as defined in this section, that serves as a mobile component (conveyance) that is operating under the registration of a narcotic treatment program, and engages in maintenance and/or detoxification treatment with narcotic drugs in schedules II–V, at a location remote from, but within the same State as, its registered location. Operating a mobile narcotic treatment program is a coincident activity of an existing narcotic treatment program listed in 21 CFR 1301.13(e).

Motor vehicle means a vehicle propelled under its own motive power and lawfully used on public streets, roads, or highways with more than three wheels in contact with the ground. This term does not include a trailer.

* * * * *

PART 1301—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

■ 3. The authority citation for part 1301 continues to read as follows:

Authority: 21 U.S.C. 821, 822, 823, 824, 831, 871(b), 875, 877, 886a, 951, 952, 956, 957, 958, 965 unless otherwise noted.

■ 4. In § 1301.13, revise paragraph (e)(1)(vii) in the table, and add paragraph (e)(4) to read as follows:

§ 1301.13 Application for registration; time for application; expiration date; registration for independent activities; application forms, fees, contents and signature; coincident activities.

* * * * *

(e) * * *

(1) * * *

Business activity	Controlled substances	DEA application forms	Application fee ($)	Registration period (years)	Coincident activities allowed
*	*	*	*	*	* *
(vii) Narcotic Treatment Program (including compounder).	Narcotic Drugs in Schedules II–V.	New–363, Renewal–363a.	244	1	May operate one or more mobile narcotic treatment programs as defined under § 1300.01(b), provided approval has been obtained under § 1301.13(e)(4).
*	*	*	*	*	* *

* * * * *

(4) For any narcotic treatment program intending to operate a mobile narcotic treatment program, the registrant must notify the local DEA

office, in writing, its intent to do so, and the narcotic treatment program must receive explicit written approval from the local DEA office prior to operating the mobile narcotic treatment program. The mobile narcotic treatment program may only operate in the same State in which the narcotic treatment program is registered.

(i) Registrants are not required to obtain a separate registration for conveyances (mobile components) utilized by the registrant to transport controlled substances away from registered locations for dispensing at unregistered locations as part of a mobile narcotic treatment program. Vehicles must possess valid county/city and state information (*e.g.,* a vehicle identification number (VIN) or license plate number) on file at the registered location of the fixed narcotic treatment program. Registrants are also required to provide proper city/county and state licensing and registration to DEA at the time of inspection, and prior to transporting controlled substances away from their registered location.

(ii) A mobile narcotic treatment program is not permitted to reverse distribute, share, or transfer controlled substances from one mobile component to another mobile component while deployed outside of the registered location. Stationary narcotic treatment programs with mobile components are not allowed to modify their registrations to authorize their mobile components to act as collectors under 21 CFR 1301.51 and 1317.40. These mobile components of narcotic treatment programs may not function as hospitals, long-term care facilities, or emergency medical service vehicles, and will not transport patients.

* * * * *

■ 5. In § 1301.72, revise the section heading and add paragraph (e) to read as follows:

§ 1301.72 Physical security controls for non-practitioners; narcotic treatment programs and compounders for narcotic treatment programs; mobile narcotic treatment programs; storage areas.

* * * * *

(e) *Mobile Narcotic Treatment Programs.* For any conveyance operated as a mobile narcotic treatment program (NTP), a securely locked safe must be installed and used to store narcotic drugs in schedules II–V for the purpose of maintenance or detoxification treatment, when not located at the registrant's registered location. The safe must conform to the requirements set forth in paragraph (a)(1) of this section. The mobile component must also be equipped with an alarm system that conforms to the requirements set forth paragraph (a)(1)(iii) of this section. The storage area of the mobile component must conform to the accessibility requirements in paragraph (d) of this section. The storage area for controlled substances in a mobile component of an NTP must not be accessible from outside of the vehicle. The person transporting the controlled substances on behalf of the mobile NTP is required to retain control over the controlled substances when transferring controlled substances between the registered location and the conveyance, from the conveyance to the dispensing location, and when dispensing at the dispensing location. At all other times during transportation, all controlled substances must be properly secured in the safe. Upon completion of the operation of the conveyance on a given day, the conveyance must be immediately returned to the registered location, and all controlled substances must be removed from the conveyance and secured within the registered location. All registrants of NTPs with mobile components shall be required to establish a standard operating procedure to ensure, if the mobile component becomes inoperable (mechanical failure, accidents, fire, etc.), that the controlled substances on the inoperable conveyance are accounted for, removed from the inoperable conveyance, and secured at the registered location.

* * * * *

■ 6. In § 1301.74:

■ a. Revise the section heading;

■ b. Revise paragraphs (j) through (l);

■ c. Redesignate paragraph (m) as paragraph (o).

■ d. Add new paragraphs (m) and (n); and

The revisions and additions are to read as follows:

§ 1301.74 Other security controls for non-practitioners; narcotic treatment programs and compounders for narcotic treatment programs; mobile narcotic treatment programs.

* * * * *

(j) Persons enrolled in any narcotic treatment program, including those receiving treatment at a mobile narcotic treatment program, will be required to wait in an area that is physically separated from the narcotic storage and dispensing area by a physical entrance such as a door or other entryway. Patients will need to wait outside of a mobile NTP if that unit does not have seating or a reception area that is separated from the narcotic storage and dispensing area. This requirement will be enforced by the program physician and employees.

(k) All narcotic treatment programs, including mobile narcotic treatment programs, must comply with standards established by the Secretary of Health and Human Services (after consultation with the Administration) respecting the quantities of narcotic drugs which may be provided to persons enrolled in a narcotic treatment program or mobile narcotic treatment program, for unsupervised use (*e.g.,* take home or non-directly observed therapy).

(l) DEA may exercise discretion regarding the degree of security required in narcotic treatment programs, including mobile narcotic treatment programs, based on such factors as the location of a program, the number of patients enrolled in a program and the number of physicians, staff members and security guards. Personnel that are authorized to dispense controlled substances for narcotic treatment must ensure proper security measures and patient dosage. Similarly, such factors will be taken into consideration when evaluating existing security or requiring new security at a narcotic treatment program or mobile narcotic treatment program.

(m) Any controlled substances being transported for disposal from the dispensing location of a mobile narcotic treatment program shall be secured and disposed of in compliance with part 1317, and all other applicable federal, state, tribal, and local laws and regulations.

(n) A conveyance used as part of a mobile NTP may only be supplied with narcotic drugs by the registered NTP that operates such conveyance. Persons permitted to dispense controlled substances to mobile NTPs shall not:

(1) Receive controlled substances from other mobile NTPs or any other entity;

(2) Deliver controlled substances to other mobile NTPs or any other entity; or

(3) Conduct reverse distribution of controlled substances on a mobile NTP.

* * * * *

PART 1304—RECORDS AND REPORTS OF REGISTRANTS

■ 7. The authority citation for part 1304 continues to read as follows:

Authority: 21 U.S.C. 821, 827, 831, 871(b), 958(e)–(g), and 965, unless otherwise noted.

§ 1304.04 [Amended]

■ 8. In § 1304.04, amend paragraph (f) by adding ''mobile narcotic treatment program,'' after ''exporter,''.

■ 9. In § 1304.24, revise the section heading and paragraphs (a) and (b) to read as follows:

§ 1304.24 Records for maintenance treatment programs, mobile narcotic treatment programs, and detoxification treatment programs.

(a) Each person registered or authorized (by § 1301.22 of this chapter) to maintain and/or detoxify controlled substance users in a narcotic treatment program, including a mobile narcotic treatment program, shall maintain records with the following information for each narcotic controlled substance:

(1) Name of substance;

(2) Strength of substance;

(3) Dosage form;

(4) Date dispensed;

(5) Adequate identification of patient (consumer);

(6) Amount consumed;

(7) Amount and dosage form taken home by patient; and

(8) Dispenser's initials.

(b) The records required by paragraph (a) of this section will be maintained in a dispensing log at the NTP site, or in the case of a mobile NTP, at the registered site of the NTP, and will be maintained in compliance with § 1304.22 without reference to § 1304.03.

(1) As an alternative to maintaining a paper dispensing log, an NTP or its mobile component may also use an automated/computerized data processing system for the storage and retrieval of the program's dispensing records, if the following conditions are met:

(i) The automated system maintains the information required in paragraph (a);

(ii) The automated system has the capability of producing a hard copy printout of the program's dispensing records;

(iii) The NTP or its mobile component prints a hard copy of each day's dispensing log, which is then initialed appropriately by each person who dispensed medication to the program's patients;

(iv) The automated system is approved by DEA;

(v) The NTP or its mobile component maintains an off-site back-up of all computer generated program information; and

(vi) The automated system is capable of producing accurate summary reports for both the registered site of the NTP and any mobile component, for any time-frame selected by DEA personnel during an investigation. If these summary reports are maintained in hard copy form, they must be kept in a systematically organized file located at the registered site of the NTP.

(2) The NTP must retain all records for the NTP as well as any mobile component two years from the date of execution, in accordance with § 1304.04(a). However, if the State in which the NTP is located requires that records be retained longer than two years, the NTP should contact its State Opioid Treatment Authority for information about state requirements.

* * * * *

Date: February 14, 2020.

Uttam Dhillon,

Acting Administrator.

[FR Doc. 2020–03627 Filed 2–25–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–100814–19]

RIN 1545–BP23

Meals and Entertainment Expenses Under Section 274

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance under section 274 of the Internal Revenue Code (Code) regarding certain statutory amendments made to section 274 by 2017 legislation. Specifically, the proposed regulations address the elimination of the deduction under section 274 for expenditures related to entertainment, amusement, or recreation activities, and provide guidance to determine whether an activity is of a type generally considered to be entertainment. The proposed regulations also address the limitation on the deduction of food and beverage expenses under section 274(k) and (n), including the applicability of the exceptions under section 274(e)(2), (3), (4), (7), (8), and (9). These proposed regulations affect taxpayers who pay or incur expenses for meals or entertainment in taxable years beginning after December 31, 2017. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by April 13, 2020. Outlines of topics to be discussed at the public hearing scheduled for April 7, 2020, at 10 a.m. must be received by April 13, 2020. If no outlines are received by April 13, 2020, the public hearing will be cancelled.

ADDRESSES: Submit electronic submissions via the Federal Rulemaking Portal at *www.regulations.gov* (indicate IRS and REG–100814–19) by following the online instructions for submitting comments. Once submitted to the Federal Rulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) will publish for public availability any comment received to their public docket, whether submitted electronically or in hard copy. Send hard copy submissions to: CC:PA:LPD:PR (REG–100814–19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, call Patrick Clinton of the Office of Associate Chief Counsel (Income Tax and Accounting), (202) 317–7005; concerning the submission of comments, the hearing, or to be placed on the building access list to attend the hearing, call Regina Johnson, (202) 317–6901 (not toll-free numbers), or email *fdms.database@irscounsel.treas.gov.*

SUPPLEMENTARY INFORMATION:

Background

1. Statutory Framework

This document contains proposed regulations under section 274 of the Code that amend the Income Tax Regulations (26 CFR part 1). Section 274 was added to the Code by section 4 of the Revenue Act of 1962, Public Law 87–834 (76 Stat. 960) and has been amended numerous times over the years. In general, section 274 limits or disallows deductions for certain meal and entertainment expenditures that otherwise would be allowable under chapter 1 of the Code, primarily under section 162(a), which allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

On December 22, 2017, section 274 was amended by section 13304 of Public Law 115–97 (131 Stat. 2054), commonly referred to as the Tax Cuts and Jobs Act, (TCJA) to revise the rules for deducting expenditures for meals and entertainment, effective for amounts paid or incurred after December 31, 2017.

2. Business Meals and Entertainment

Section 274(a)(1)(A) generally disallows a deduction for any item with respect to an activity of a type considered to constitute entertainment, amusement, or recreation

(entertainment expenditures). However, prior to the amendment by the TCJA, section 274(a)(1)(A) provided exceptions to that disallowance if the taxpayer established that: (1) The item was directly related to the active conduct of the taxpayer's trade or business (directly related exception), or (2) in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), the item was associated with the active conduct of the taxpayer's trade or business (business discussion exception). Section 274(e)(1) through (9) also provides exceptions to the rule in section 274(a) that disallows a deduction for entertainment expenditures. The TCJA did not change the application of the section 274(e) exceptions to entertainment expenditures.

Section 274(a)(1)(B) disallows a deduction for any item with respect to a facility used in connection with an activity referred to in section 274(a)(1)(A). Section 274(a)(2) provides that, for purposes of applying section 274(a)(1), dues or fees to any social, athletic, or sporting club or organization shall be treated as items with respect to facilities. Section 274(a)(3) disallows a deduction for amounts paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose.

Prior to amendment by the TCJA, section 274(n)(1) generally limited the deduction of food or beverage expenses and entertainment expenditures to 50 percent of the amount that otherwise would have been allowable. Thus, under prior law, taxpayers could deduct 50 percent of meal expenses and 50 percent of entertainment expenditures that met the directly related or business discussion exception. Distinguishing between meal expenses and entertainment expenditures was unnecessary for purposes of the 50 percent limitation.

Section 13304(a)(1) of the TCJA repealed the directly related and business discussion exceptions to the general prohibition on deducting entertainment expenditures in section 274(a)(1)(A). Also, section 13304(a)(2)(D) of the TCJA amended the 50 percent limitation in section 274(n)(1) to remove the reference to entertainment expenditures. Thus, entertainment expenditures are no longer deductible unless one of the nine exceptions to section 274(a) in section 274(e) applies.

While the TCJA eliminated the deduction for entertainment expenses, Congress did not amend the provisions relating to the deductibility of business meals. Thus, taxpayers generally may continue to deduct 50 percent of the food and beverage expenses associated with operating their trade or business, including meals consumed by employees on work travel. See H.R. Rep. No. 115–466, at 407 (2017) (Conf. Rep.). However, as before the TCJA, no deduction is allowed for the expense of any food or beverages unless (a) the expense is not lavish or extravagant under the circumstances, and (b) the taxpayer (or an employee of the taxpayer) is present at the furnishing of the food or beverages. See section 274(k).

Prior to amendment by the TCJA, section 274(d) provided substantiation requirements for deductions under section 162 or 212 for any traveling expense (including meals and lodging while away from home), and for any item with respect to an activity of a type considered to constitute entertainment, amusement, or recreation or with respect to a facility used in connection with such activity. Section 13304(a)(2)(A) of the TCJA repealed the substantiation requirements for entertainment expenditures. Traveling expenses (including meals and lodging while away from home), however, remain subject to the section 274(d) substantiation requirements. Food and beverage expenses are subject to the substantiation requirements under section 162 and the requirement to maintain books and records under section 6001.

On October 15, 2018, the Treasury Department and the IRS published Notice 2018–76, 2018–42 I.R.B. 599, providing transitional guidance on the deductibility of expenses for certain business meals and requesting comments for future guidance to further clarify the treatment of business meal expenses and entertainment expenditures under section 274. Under the notice, taxpayers may deduct 50 percent of an otherwise allowable business meal expense if: (1) The expense is an ordinary and necessary expense under section 162(a) paid or incurred during the taxable year in carrying on any trade or business; (2) the expense is not lavish or extravagant under the circumstances; (3) the taxpayer, or an employee of the taxpayer, is present at the furnishing of the food or beverages; (4) the food and beverages are provided to a current or potential business customer, client, consultant, or similar business contact; and (5) in the case of food and beverages provided during or at an entertainment activity, the food and beverages are purchased separately from the entertainment, or the cost of the food and beverages is stated separately from the cost of the entertainment on one or more bills, invoices, or receipts. The notice provides that the entertainment disallowance rule may not be circumvented through inflating the amount charged for food and beverages.

The Treasury Department and the IRS received approximately 25 comments in response to Notice 2018–76. All comments were considered and are available at *www.regulations.gov* or upon request. Several of the comments addressing the notice are summarized in the Explanation of Provisions. However, comments recommending statutory revisions or addressing provisions outside the scope of these proposed regulations are not discussed in this preamble. The Treasury Department and the IRS continue to study comments on issues related to section 274 that are beyond the scope of these proposed regulations and may discuss those comments that are beyond the scope of these regulations in the final regulations or future guidance.

3. Travel Meals

Section 274(n)(1) generally limits the deduction of food or beverage expenses, including expenses for food or beverages consumed while away from home, to 50 percent of the amount that otherwise would have been allowable, unless one of the six exceptions to section 274(n) in section 274(e) applies. However, no deduction is allowed for the expense of any food or beverages unless (a) the expense is not lavish or extravagant under the circumstances, and (b) the taxpayer (or an employee of the taxpayer) is present at the furnishing of the food or beverages. See section 274(k). Section 274(d) provides substantiation requirements for traveling expenses, including food and beverage expenses incurred while on business travel away from home.

Section 274(m) provides additional limitations on travel expenses. Section 274(m)(1) generally limits the deduction for luxury water transportation expenses to twice the highest federal per diem rate allowable at the time of travel, and section 274(m)(2) generally disallows a deduction for expenses for travel as a form of education. Section 274(m)(3) provides that no deduction is allowed under chapter 1 of the Code (other than section 217) for travel expenses paid or incurred with respect to a spouse, dependent, or other individual accompanying the taxpayer (or an officer or employee of the taxpayer) on business travel, unless: (A) The spouse, dependent, or other individual is an employee of the taxpayer, (B) the travel

of the spouse, dependent, or other individual is for a bona fide business purpose, and (C) such expenses would otherwise be deductible by the spouse, dependent, or other individual.

4. Employer-Provided Meals

Prior to amendment by the TCJA, section 274(n)(1) generally limited the deduction for food or beverage expenses to 50 percent of the amount that otherwise would have been allowable, subject to an exception in section 274(n)(2)(B) in the case of an expense for food or beverages that is excludable from the gross income of the recipient under section 132 by reason of section 132(e), relating to *de minimis* fringes. Section 132(e)(1) defines ''*de minimis* fringe'' as any property or service the value of which is, after taking into account the frequency with which similar fringes are provided by the employer to its employees, so small as to make accounting for it unreasonable or administratively impracticable. Section 132(e)(2) provides that the operation by an employer of any eating facility for employees is treated as a *de minimis* fringe if (1) the facility is located on or near the business premises of the employer, and (2) revenue derived from the facility normally equals or exceeds the direct operating costs of the facility. Thus, under prior law, employers generally were allowed to fully deduct an expense for food or beverages provided to their employees if the amount was excludable from the gross income of the employee as a *de minimis* fringe. However, the TCJA repealed section 274(n)(2)(B), meaning that expenses for food or beverages that are *de minimis* fringes under section 132(e) are no longer excepted from section 274(n)(1). As a result, these expenses, like other food or beverage expenses generally, are subject to the 50 percent limitation unless one of the six exceptions to section 274(n) in section 274(e) applies.

5. Section 274(e) Exceptions to Section 274(k) and (n)

Section 274(k)(2) and (n)(2)(A) provide that the limitations on the deduction of food or beverage expenses in sections 274(k)(1) and (n)(1), respectively, do not apply if the expense is described in paragraph (2), (3), (4), (7), (8), or (9) of section 274(e). Expenses described in paragraph (1), (5), and (6) of section 274(e) are not exceptions to the limitations on the deduction of food or beverage expenses in section 274(k)(1) and (n)(1). However, they are exceptions to the disallowance on deduction of entertainment expenses in section 274(a).

Section 274(e)(2) applies to expenses for goods, services, and facilities to the extent that the expenses are treated as compensation to the recipient. Section 274(e)(3) applies to expenses incurred by a taxpayer in connection with the performance of services for an employer or other person under a reimbursement or other expense allowance arrangement. Section 274(e)(4) applies to expenses for recreational, social, or similar activities for employees. Section 274(e)(7) applies to expenses for goods, services, and facilities made available to the general public. Section 274(e)(8) applies to expenses for goods or services that are sold by the taxpayer in a bona fide transaction for adequate and full consideration in money or money's worth. Section 274(e)(9) applies to expenses for goods, services, and facilities to the extent that the expenses are treated as income to a person other than an employee.

Explanation of Provisions

The proposed regulations describe and clarify the statutory requirements of section 274(a), 274(k), and 274(n), as well as the applicability of certain exceptions under section 274(e) to food or beverage expenses. To implement the TCJA's disallowance of entertainment expenditures under section 274(a), the proposed regulations add a new section at § 1.274–11 (proposed § 1.274–11) for entertainment expenditures paid or incurred after December 31, 2017. The proposed regulations also add a new section at § 1.274–12 (proposed § 1.274–12) to address food or beverage expenses under section 274(k) and 274(n) paid or incurred after December 31, 2017, including the application of the exceptions in section 274(e)(2), (3), (4), (7), (8), and (9). Specifically, proposed § 1.274–12 addresses expenses for business meals as described in Notice 2018–76, as well as expenses for other meals including travel meals and employer-provided meals.

1. Entertainment Expenditures

A. In General

Proposed § 1.274–11 restates the statutory rules under section 274(a), including the application of the entertainment deduction disallowance rule to dues or fees to any social, athletic, or sporting club or organization. The proposed regulations substantially incorporate the existing definition of entertainment in § 1.274–2(b)(1), with minor modifications to remove outdated language. The proposed regulations also confirm that the nine exceptions in section 274(e) continue to apply to entertainment expenditures under section 274(a). Finally, as described further in part I.B. of this Explanation of Provisions, the proposed regulations provide that for purposes of section 274(a), the term ''entertainment'' does not include food or beverages unless the food or beverages are provided at or during an entertainment activity and the costs of the food or beverages are not separately stated from the entertainment costs.

Taxpayers may continue to rely upon the existing rules in § 1.274–2, to the extent applicable and not superseded by the TCJA, for entertainment expenditures paid or incurred after December 31, 2017.

B. Separately Stated Food or Beverages Not Entertainment

The proposed regulations substantially incorporate the guidance in Notice 2018–76 to distinguish between entertainment expenditures and food or beverage expenses in the context of business meals provided at or during an entertainment activity. In addition, the proposed regulations generally apply the guidance in Notice 2018–76 to all food or beverages, including travel meals and employer-provided meals, provided at or during an entertainment activity. However, in response to a comment on the notice, the proposed regulations further clarify the rules applicable to food or beverages provided at or during an entertainment activity.

Notice 2018–76 explains that in the case of food and beverages provided during or at an entertainment activity, the taxpayer may deduct 50 percent of an otherwise allowable business expense if the food and beverages are purchased separately from the entertainment, or if the cost of the food and beverages is stated separately from the cost of the entertainment on one or more bills, invoices, or receipts. The notice provides that the entertainment disallowance rule may not be circumvented through inflating the amount charged for food and beverages. Taxpayers may continue to rely on the guidance in Notice 2018–76 until these proposed regulations are finalized.

One commenter asked for clarification of the requirement in the notice that the entertainment disallowance rule may not be circumvented by inflating the amount charged for food and beverages on one or more bills, invoices, or receipts. In response, the proposed regulations provide that the amount charged for food or beverages on a bill, invoice, or receipt must reflect the venue's usual selling cost for those items if they were to be purchased separately from the entertainment, or

must approximate the reasonable value of those items. Further, the proposed regulations provide that unless food or beverages provided at or during an entertainment activity are purchased separately from the entertainment, or the cost of the food or beverages is stated separately from the cost of the entertainment on one or more bills, invoices, or receipts, no allocation can be made and the entire amount is a nondeductible entertainment expenditure. Finally, in accordance with the TCJA's amendments to section 274(a)(1) specifically repealing the ''directly related'' and ''business discussion'' exceptions to the general disallowance rule for entertainment expenditures, the proposed regulations clarify that the entertainment disallowance rule applies whether or not the expenditure for the activity is related to or associated with the active conduct of the taxpayer's trade or business. The Treasury Department and the IRS request comments on these rules.

2. Food or Beverage Expenses

A. Business Meal Expenses

As noted earlier in this Explanation of Provisions, the proposed regulations substantially incorporate the guidance in Notice 2018–76 addressing business meals provided during or at an entertainment activity. The proposed regulations also incorporate other statutory requirements taxpayers must meet to deduct 50 percent of an otherwise allowable business meal expense. Specifically, the expense must not be lavish or extravagant under the circumstances and the taxpayer, or an employee of the taxpayer, must be present at the furnishing of the food or beverages.

The proposed regulations also address the general requirement in Notice 2018–76 that the food and beverages be provided to a business contact, which was described in the notice as a ''current or potential business customer, client, consultant, or similar business contact.'' This requirement is to ensure that the meal expenses are directly connected with or pertaining to the taxpayer's trade or business, as required under section 162. One commenter on Notice 2018–76 requested a definition of ''potential business contact,'' suggesting that the term could be interpreted broadly to include almost anyone. In response to the comment, and to conform the rule more closely to the trade or business requirement in section 162, the proposed regulations follow the definition of ''business associate'' as currently provided in § 1.274–2(b)(2)(iii). Thus, the proposed regulations provide that the food or beverages must be provided to a ''person with whom the taxpayer could reasonably expect to engage or deal in the active conduct of the taxpayer's trade or business such as the taxpayer's customer, client, supplier, employee, agent, partner, or professional adviser, whether established or prospective.'' In addition to clarifying this definition for purposes of determining whether a business meal expense is deductible, the proposed regulations apply this standard to the deduction of food or beverage expenses generally. In particular, the proposed regulations include employees as a type of business associate, making the standard applicable to employer-provided meals as well as to situations in which a taxpayer provides meals to both employees and non-employee business associates at the same event. The Treasury Department and the IRS request comments on this standard.

B. Travel Meal Expenses

Although the TCJA did not specifically amend the rules for travel expenses, the proposed regulations are intended to provide comprehensive rules for food and beverage expenses and thus apply the general rules for meal expenses from Notice 2018–76, as revised in these proposed regulations, to travel meals. In addition, the proposed regulations incorporate the substantiation requirements in section 274(d), unchanged by the TCJA, to travel meals. Finally, the proposed regulations apply the limitations in section 274(m)(3) to expenses for food or beverages paid or incurred while on travel for spouses, dependents or other individuals accompanying the taxpayer (or an officer or employee of the taxpayer) on business travel. These limitations do not apply to deductions for moving expenses under section 217. However, the TCJA amended section 217 to suspend the deduction for moving expenses for taxable years beginning after December 31, 2017, and before January 1, 2026, except with respect to certain members of the Armed Forces. Thus, the proposed regulations revise the reference to section 217 to reflect that amendment.

C. Other Food or Beverage Expenses

The proposed regulations apply the business meal guidance in Notice 2018–76, as revised in these proposed regulations, to food or beverage expenses generally. Under section 274(n)(1), the deduction for food or beverage expenses generally is limited to 50 percent of the amount that would otherwise be allowable. Prior to the TCJA, under section 274(n)(2)(B), expenses for food or beverages that were excludable from employee income as *de minimis* fringe benefits under section 132(e) were not subject to the 50 percent deduction limitation under section 274(n)(1) and could be fully deducted. The TCJA repealed section 274(n)(2)(B) so that expenses for food or beverages excludable from employee income under section 132(e) are subject to the section 274(n)(1) deduction limitation unless another exception under section 274(n)(2) applies.

Under section 274(k)(1), in order for food or beverage expenses to be deductible the food or beverages must not be lavish or extravagant under the circumstances and the taxpayer or an employee of the taxpayer must be present at the furnishing of the food or beverages. However, as discussed in part E of this Explanation of Provisions, section 274(e) provides six exceptions to the limitations on the deduction of food or beverages in section 274(k)(1) and 274(n)(1) and the proposed regulations explain how those exceptions apply.

In response to comments that the Treasury Department and the IRS received after enactment of the TCJA, the proposed regulations address several scenarios involving the deductibility of food or beverage expenses. For example, commenters requested guidance on the deductibility of expenses for: (i) Food or beverages provided to food service workers who consume the food or beverages while working in a restaurant or catering business; (ii) snacks available to employees in a pantry, break room, or copy room; (iii) refreshments provided by a real estate agent at an open house; (iv) food or beverages provided by a seasonal camp to camp counselors; (v) food or beverages provided to employees at a company cafeteria; and (vi) food or beverages provided at company holiday parties and picnics. The Treasury Department and the IRS considered all comments received and provide examples in proposed § 1.274–12(c) to address many of the factual scenarios raised by commenters.

D. Definitions

The proposed regulations provide that the deduction limitation rules generally apply to all food and beverages, whether characterized as meals, snacks, or other types of food or beverage items. In addition, unless one of the six exceptions under section 274(n)(2)(A) applies, the deduction limitations apply regardless of whether the food or beverages are treated as *de minimis* fringe benefits under section 132(e).

The proposed regulations define food or beverage expenses to mean the cost of food or beverages, including any delivery fees, tips, and sales tax. In the case of employer-provided meals at an eating facility, food or beverage expenses do not include expenses for the operation of the eating facility such as salaries of employees preparing and serving meals, and other overhead costs.

E. Section 274(e) Exceptions to Section 274(k) and (n)

Section 274(k)(2) and (n)(2)(A) provide that the limitations on deductions in section 274(k)(1) and (n)(1), respectively, do not apply to any expense described in section 274(e)(2), (3), (4), (7), (8), and (9). The proposed regulations, therefore, provide that the deduction limitations are not applicable to expenditures for business meals, travel meals, or other food or beverages that fall within one of these exceptions.

i. Expenses Treated as Compensation Under Section 274(e)(2) or (e)(9)

Pursuant to section 274(e)(2), the proposed regulations provide that the limitations in section 274(k)(1) and (n)(1) do not apply to expenditures for food or beverages of an employee of the taxpayer (including food or beverages of a spouse, dependent or other individual accompanying the employee on travel described in section 274(m)(3)), to the extent the taxpayer treats the expenses as compensation to the employee on the taxpayer's income tax return as originally filed, and as wages to the employee for purposes of withholding under chapter 24 of the Code relating to collection of income tax at source on wages.

Pursuant to section 274(e)(9), the proposed regulations provide that the limitations in section 274(k)(1) and (n)(1) do not apply to expenses for food or beverages of a person who is not an employee of the taxpayer to the extent the expenses are includible in the gross income of the recipient of the food or beverages as compensation for services rendered, or as a prize or award under section 74.

The Treasury Department and the IRS are aware that some taxpayers may attempt to claim a full deduction under section 274(e)(2) or (e)(9) by including a value that is less than the amount required to be included under § 1.61–21, which provides the rules for valuation of fringe benefits, or by purportedly including a value of zero, as compensation and as wages to the employee, or as includible in gross income by a person who is not an employee of the taxpayer. The proposed regulations therefore provide that expenses for food or beverages with a value that is less than the amount required to be included in gross income under § 1.61–21, or for which the amount required to be included in gross income is zero, will not be considered as having been treated as compensation and as wages to the employee, or as includible in gross income by a recipient of the food or beverages who is not an employee of the taxpayer for purposes of section 274(e)(2) and (e)(9).

ii. Reimbursed Food or Beverage Expenses

Pursuant to section 274(e)(3), the proposed regulations provide that in the case of expenses for food or beverages paid or incurred by one person in connection with the performance of services for another person (whether or not the other person is an employer) under a reimbursement or other expense allowance arrangement, the limitations on deductions in section 274(k)(1) and (n)(1) apply either to the person who makes the expenditure or to the person who actually bears the expense, but not to both. Section 274(e)(3)(B) provides that if the services are performed for a person other than an employer, such as by an independent contractor, the exception in section 274(e)(3) applies only if the taxpayer, in this case, the independent contractor, accounts, to the extent provided by section 274(d), to such person. The proposed regulations therefore provide that the deduction limitations in section 274(k)(1) and (n)(1) apply to an independent contractor unless, under a reimbursement or other expense allowance arrangement, the contractor accounts to the client or customer with substantiation that satisfies the requirements of section 274(d).

iii. Recreational Expenses for Employees

Pursuant to section 274(e)(4), the proposed regulations provide that any food or beverage expense paid or incurred by a taxpayer for a recreational, social, or similar activity, primarily for the benefit of the taxpayer's employees, is not subject to the deduction limitations in section 274(k)(1) and (n)(1). However, activities that discriminate in favor of highly compensated employees, officers, shareholders or others who own a 10-percent or greater interest in the business are not considered paid or incurred primarily for the benefit of employees.

The Treasury Department and the IRS have received several questions and comments on the deductibility of food or beverage expenses for recreational, social and similar activities for employees. Many commenters requested confirmation that food or beverage expenses for company holiday parties and picnics that do not discriminate in favor of highly compensated employees are not subject to the deduction limitations in section 274(k)(1) and (n)(1) because the exception in section 274(e)(4) applies. Commenters also suggested that expenses for snacks and beverages available to all employees in a pantry, break room, or copy room are not subject to the deduction limitations in section 274(k)(1) and (n)(1) because the exception in section 274(e)(4) applies.

In response to the questions and comments received, the proposed regulations confirm the rules in the existing regulations that the exception in section 274(e)(4) applies to food or beverage expenses for company holiday parties, annual picnics, or summer outings that do not discriminate in favor of highly compensated employees. However, an example in the proposed regulations demonstrates the section 274(e)(4) exception does not apply to free food or beverages provided in a break room because the mere provision or availability of food or beverages is not a recreational, social, or similar activity, despite the fact that employees may incidentally socialize while they are in the break room.

In addition, the proposed regulations provide that the exception in section 274(e)(4) does not apply to food or beverage expenses that are excludable under section 119 as meals provided for the convenience of the employer. Because these food or beverages are, by definition, furnished for the employer's convenience, they cannot also be primarily for the benefit of the employees, even if some social activity occurs during the provision of food or beverages.

iv. Items Available to the Public

Pursuant to section 274(e)(7), the proposed regulations provide that any food or beverage expense of a taxpayer is not subject to the deduction limitations in section 274(k)(1) and (n)(1) to the extent the food or beverages are made available to the general public. In addition, the proposed regulations provide that this exception applies to the entire amount of the expense for food or beverages provided to employees if similar food or beverages are provided by the employer to, and are primarily consumed by, the general public. For this purpose, ''primarily consumed'' means greater than 50 percent of actual or reasonably estimated consumption, and ''general public'' includes, but is not limited to,

customers, clients, and visitors. The proposed regulations also provide that the general public does not include employees, partners, or independent contractors of the taxpayer. Further, an exclusive list of guests also is not considered the general public. See *Churchill Downs, Inc.* v. *Commissioner,* 307 F.3d 423 (6th Cir. 2002).

Commenters have requested guidance as to whether the exception in section 274(e)(7) for food or beverages made available by the taxpayer to the general public applies in various situations. The Treasury Department and the IRS considered these comments and included examples in the proposed regulations to illustrate that the exception in section 274(e)(7) generally applies to the entire food or beverage expense if the food or beverages are primarily consumed by the general public.

v. Goods or Services Sold to Customers

Pursuant to section 274(e)(8), the proposed regulations provide that any expense for food or beverages that are sold to customers in a bona fide transaction for an adequate and full consideration in money or money's worth is not subject to the deduction limitations in section 274(k)(1) and (n)(1). The proposed regulations clarify that money or money's worth does not include payment through services provided.

The Treasury Department and the IRS are aware of concerns raised by commenters that it is a common business practice for employers of restaurant and food service workers to provide food or beverages at no cost or at a discount to their employees. The Joint Committee on Taxation's Bluebook on the TCJA explains that amendments made by the TCJA to limit the deduction for expenses of the employer associated with providing food or beverages to employees through an employer-operated eating facility that meets the requirements of section 132(e)(2) do not affect other exceptions to the 50-percent limitation on deductions for food or beverage expenses. For example, a restaurant or catering business may continue to deduct 100 percent of its costs for food or beverage items, purchased in connection with preparing and providing meals to its paying customers, which are also consumed at the worksite by employees who work in the employer's restaurant or catering business. Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), at 186 n.940 and at 188 n.956, December 2018. The proposed regulations incorporate this interpretation of the exception in section 274(e)(8).

Finally, the proposed regulations provide that for purposes of the section 274(e)(8) exception to the deduction limitations in section 274(k)(1) and (n)(1), the term ''customer'' includes anyone who is sold food or beverages in a bona fide transaction for an adequate and full consideration in money or money's worth. For example, employees of the taxpayer are customers when they purchase food or beverages from the taxpayer in a bona fide transaction for arm's length, fair market value prices.

Request for Comments

The Treasury Department and the IRS request comments on all aspects of these proposed regulations. Regarding entertainment expenditures under proposed § 1.274–11, comments are specifically requested about the definition of entertainment, including how to distinguish entertainment from advertising and travel; the use of the objective test in defining entertainment activities; the application of the exceptions in section 274(e) to entertainment expenditures; and whether additional issues or examples should be addressed in the regulations. Regarding food or beverage expenses under proposed § 1.274–12, comments are specifically requested about the changes from Notice 2018–76 to the rules for business meals; the application of the exceptions in section 274(e) to food or beverage expenses; and whether additional issues or examples should be addressed in the regulations.

Proposed Applicability Date

Section 7805(b)(1)(A) and (B) of the Code generally provide that no temporary, proposed, or final regulation relating to the internal revenue laws may apply to any taxable period ending before the earliest of (A) the date on which the regulation is filed with the **Federal Register**, or (B) in the case of a final regulation, the date on which a proposed or temporary regulation to which the final regulation relates was filed with the **Federal Register**.

Consistent with authority provided by section 7805(b)(1)(A), these regulations are proposed to apply for taxable years that begin on or after the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**. Pending the issuance of the final regulations, a taxpayer may rely on these proposed regulations for entertainment expenditures and food or beverage expenses, as applicable, paid or incurred after December 31, 2017. In addition, a taxpayer may rely on the guidance in Notice 2018–76 until these proposed regulations are finalized.

Special Analyses

These proposed regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

In accordance with 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 the rule may affect a substantial number of small entities, the economic impact of the regulations is not likely to be significant. Data are not readily available about the number of taxpayers affected, but the number is likely to be substantial for both large and small entities because the rule may affect entities that incur meal and entertainment expenses. The economic impact of these regulations is not likely to be significant, however, because these proposed regulations substantially incorporate prior guidance and otherwise clarify the application of the TCJA changes to section 274 related to meals and entertainment. The proposed regulations will assist taxpayers in understanding the changes to section 274 and make it easier for taxpayers to comply with those changes. Notwithstanding this certification, the Treasury Department and the IRS welcome comments on the impact of these regulations on small entities.

Pursuant to section 7805(f), these proposed regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

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 (updated annually for inflation). 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.

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.

Statement of Availability of IRS Documents

Notices cited in this preamble 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.*

Comments

Before these proposed regulations 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. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at *http://www.regulations.gov* or upon request.

Drafting Information

The principal author of this proposed regulation is Patrick Clinton, Office of the Associate Chief Counsel (Income Tax & Accounting). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income Taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAX

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order for §§ 1.274–11 and 1.274–12 to read in part as follows:

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

Section 1.274–11 also issued under 26 U.S.C. 274.

Section 1.274–12 also issued under 26 U.S.C. 274.

* * * * *

■ **Par. 2.** Section 1.274–11 is added to read as follows:

§ 1.274–11 Disallowance of deductions for certain entertainment, amusement, or recreation expenditures paid or incurred after December 31, 2017.

(a) *In general.* Except as provided in this section, no deduction otherwise allowable under chapter 1 of the Internal Revenue Code (Code) is allowed for any expenditure with respect to an activity that is of a type generally considered to be entertainment, or with respect to a facility used in connection with an entertainment activity. For purposes of this paragraph (a), dues or fees to any social, athletic, or sporting club or organization are treated as items with respect to facilities and, thus, are not deductible. In addition, no deduction otherwise allowable under chapter 1 of the Code is allowed for amounts paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose.

(b) *Definitions*—(1) *Entertainment*—(i) *In general.* For section 274 purposes, the term *entertainment* means any activity which is of a type generally considered to constitute entertainment, amusement, or recreation, such as entertaining at bars, theaters, country clubs, golf and athletic clubs, sporting events, and on hunting, fishing, vacation and similar trips, including such activity relating solely to the taxpayer or the taxpayer's family. These activities are treated as entertainment under this section, subject to the objective test, regardless of whether the expenditure for the activity is related to or associated with the active conduct of the taxpayer's trade or business. The term *entertainment* may include an activity, the cost of which otherwise is a business expense of the taxpayer, which satisfies the personal, living, or family needs of any individual, such as a hotel suite or an automobile to a business customer or the customer's family. The term *entertainment* does not include activities which, although satisfying personal, living, or family needs of an individual, are clearly not regarded as constituting entertainment, such as a hotel room maintained by an employer for lodging of employees while in business travel status or an automobile used in the active conduct of trade or business even though used for routine personal purposes such as commuting to and from work. On the other hand, the providing of a hotel room or an automobile by an employer to an employee who is on vacation would constitute entertainment of the employee.

(ii) *Food or beverages.* Under this section, the term *entertainment* does not include food or beverages unless the food or beverages are provided during or at an entertainment activity. Food or beverages provided during or at an entertainment activity generally are treated as part of the entertainment activity. However, in the case of food or beverages provided during or at an entertainment activity, the food or beverages are not considered entertainment if the food or beverages are purchased separately from the entertainment, or the cost of the food or beverages is stated separately from the cost of the entertainment on one or more bills, invoices, or receipts. The amount charged for food or beverages on a bill, invoice, or receipt must reflect the venue's usual selling cost for those items if they were to be purchased separately from the entertainment, or must approximate the reasonable value of those items. Unless the food or beverages are purchased separately from the entertainment, or the cost of the food or beverages is stated separately from the cost of the entertainment on one or more bills, invoices, or receipts, no allocation can be made and the entire amount is a nondeductible entertainment expenditure.

(iii) *Objective test.* An objective test is used to determine whether an activity is of a type generally considered to be entertainment. Thus, if an activity is generally considered to be entertainment, it will be treated as entertainment for purposes of this section and section 274(a) regardless of whether the expenditure can also be described otherwise, and even though the expenditure relates to the taxpayer alone. This objective test precludes arguments that *entertainment* means only entertainment of others or that an expenditure for entertainment should be characterized as an expenditure for advertising or public relations. However, in applying this test the taxpayer's trade or business is considered. Thus, although attending a theatrical performance generally would be considered entertainment, it would not be so considered in the case of a professional theater critic, attending in a professional capacity. Similarly, if a manufacturer of dresses conducts a fashion show to introduce its products to a group of store buyers, the show generally would not be considered entertainment. However, if an appliance distributor sponsors a fashion show, the fashion show generally would be considered to be entertainment.

(2) *Expenditure.* The term *expenditure* as used in this section includes amounts paid or incurred for goods, services,

facilities, and other items, including items such as losses and depreciation.

(3) *Expenditures for production of income.* For purposes of this section, any reference to *trade or business* includes an activity described in section 212.

(c) *Exceptions.* Paragraph (a) of this section does not apply to any expenditure described in section 274(e)(1), (2), (3), (4), (5), (6), (7), (8), or (9).

(d) *Examples.* The following examples illustrate the application of paragraphs (a) and (b) of this section. In each example, neither the taxpayer nor the business associate is engaged in a trade or business that relates to the entertainment activity.

(1) *Example 1.* Taxpayer A invites, B, a business associate, to a baseball game to discuss a proposed business deal. A purchases tickets for A and B to attend the game. The baseball game is entertainment as defined in paragraph (b)(1) of this section and thus, the cost of the game tickets is an entertainment expenditure and is not deductible by A.

(2) *Example 2.* Assume the same facts as in paragraph (d)(1) of this section (*Example 1*), except that A also buys hot dogs and drinks for A and B from a concession stand. The cost of the hot dogs and drinks, which are purchased separately from the game tickets, is not an entertainment expenditure and is not subject to the section 274(a)(1) disallowance. Therefore, A may deduct 50 percent of the expenses associated with the hot dogs and drinks purchased at the game if they meet the requirements of section 162 and § 1.274–12.

(3) *Example 3.* Taxpayer C invites D, a business associate, to a basketball game. C purchases tickets for C and D to attend the game in a suite, where they have access to food and beverages. The cost of the basketball game tickets, as stated on the invoice, includes the food or beverages. The basketball game is entertainment as defined in paragraph (b)(1) of this section and, thus, the cost of the game tickets is an entertainment expenditure and is not deductible by C. The cost of the food and beverages, which are not purchased separately from the game tickets, is not stated separately on the invoice. Thus, the cost of the food and beverages is an entertainment expenditure that is subject to the section 274(a)(1) disallowance. Therefore, C may not deduct the cost of the tickets or the food and beverages associated with the basketball game.

(4) *Example 4.* Assume the same facts as in paragraph (d)(3) of this section (*Example 3*), except that the invoice for the basketball game tickets separately states the cost of the food and beverages and reflects the venue's usual selling price if purchased separately. As in paragraph (d)(3) (*Example 3*), the basketball game is entertainment as defined in paragraph (b)(1) of this section and, thus, the cost of the game tickets, other than the cost of the food and beverages, is an entertainment expenditure and is not deductible by C. However, the cost of the food and beverages, which is stated separately on the invoice for the game tickets, is not an entertainment expenditure and is not subject to the section 274(a)(1) disallowance. Therefore, C may deduct 50 percent of the expenses associated with the food and beverages provided at the game if they meet the requirements of section 162 and § 1.274–12.

(e) *Applicability date.* This section applies for taxable years that begin on or after [DATE OF PUBLICATION OF FINAL REGULATIONS IN THE **FEDERAL REGISTER**].

Par. 3. Section 1.274–12 is added to read as follows:

§ 1.274–12 Limitation on deductions for certain food or beverage expenses paid or incurred after December 31, 2017.

(a) *Food or beverage expenses*—(1) *In general.* Except as provided in this section, no deduction is allowed for the expense of any food or beverages provided by the taxpayer (or an employee of the taxpayer) to another person or persons unless—

(i) The expense is not lavish or extravagant under the circumstances;

(ii) The taxpayer, or an employee of the taxpayer, is present at the furnishing of such food or beverages; and

(iii) The food or beverages are provided to a business associate.

(2) *Only 50 percent of food or beverage expenses allowed as deduction.* Except as provided in this section, the amount allowable as a deduction for any expense for food or beverages provided by the taxpayer, or an employee of the taxpayer, to a business associate may not exceed 50 percent of the amount of the expense that otherwise would be allowable.

(3) *Examples.* The following examples illustrate the application of paragraph (a)(1) and (2) of this section. In each example, the food or beverage expenses are ordinary and necessary expenses under section 162(a) that are paid or incurred during the taxable year in carrying on a trade or business and are not lavish or extravagant under the circumstances.

(i) *Example 1.* Taxpayer A takes client B out to lunch. While eating lunch, A and B discuss A's trade or business activities. Under section 274(k) and (n) and paragraph (a) of this section, A may deduct 50 percent of the food or beverage expenses.

(ii) *Example 2.* Taxpayer C takes employee D out to lunch. While eating lunch, C and D discuss D's annual performance review. Under section 274(k) and (n) and paragraph (a) of this section, C may deduct 50 percent of the food and beverage expenses.

(4) *Special rules for travel meals*—(i) *In general.* Food or beverage expenses paid or incurred while traveling away from home in pursuit of a trade or business generally are subject to the deduction limitations in section 274(k) and (n) and paragraph (a)(1) and (2) of this section, as well as the substantiation requirements in section 274(d). In addition, travel expenses generally are subject to the limitations in section 274(m)(1), (2) and (3).

(ii) *Substantiation.* Except as provided in this section, no deduction is allowed for the expense of any food or beverages paid or incurred while traveling away from home in pursuit of a trade or business unless the taxpayer meets the substantiation requirements in section 274(d).

(iii) *Travel meal expenses of spouse, dependent, or others.* No deduction is allowed under chapter 1 of the Internal Revenue Code (Code), except under section 217 for certain members of the Armed Forces of the United States, for the expense of any food or beverages paid or incurred with respect to a spouse, dependent, or other individual accompanying the taxpayer, or an officer or employee of the taxpayer, on business travel, unless—

(A) The spouse, dependent, or other individual is an employee of the taxpayer;

(B) The travel of the spouse, dependent, or other individual is for a bona fide business purpose of the taxpayer; and

(C) The expenses would otherwise be deductible by the spouse, dependent or other individual.

(D) The following example illustrates the application of paragraph (a)(4)(iii) of this section. Taxpayer E and Taxpayer E's spouse travel from New York to Boston to attend a series of business meetings. E's spouse is not an employee of E, does not travel to Boston for a bona fide business purpose of E, and the expenses would not otherwise be deductible. While in Boston, E and E's spouse go out to dinner. Under section 274(m)(3) and paragraph (a)(4)(iii) of this section, the expenses associated with the food and beverages consumed by E's spouse are not deductible. Therefore, the cost of E's spouse's dinner is not deductible. E may deduct 50 percent of the expense associated with the food and beverages E consumed while on business travel if E meets the requirements in sections 162 and 274, including section 274(k) and (d).

(b) *Definitions.* Except as otherwise provided in this section, the following definitions apply for purposes of section 274(k) and (n), § 1.274–11(b)(1)(ii) and (d), and this section:

(1) *Food or beverages. Food or beverages* means all food and beverage

items, regardless of whether characterized as meals, snacks, or other types of food and beverages, and regardless of whether the food and beverages are treated as *de minimis* fringes under section 132(e).

(2) *Food or beverage expenses. Food or beverage expenses* mean the full cost of food or beverages, including any delivery fees, tips, and sales tax. In the case of employer-provided meals furnished at an eating facility on the employer's business premises, *food or beverage expenses* do not include expenses for the operation of the eating facility such as salaries of employees preparing and serving meals, and other overhead costs.

(3) *Business associate. Business associate* means a person with whom the taxpayer could reasonably expect to engage or deal in the active conduct of the taxpayer's trade or business such as the taxpayer's customer, client, supplier, employee, agent, partner, or professional adviser, whether established or prospective.

(4) *Independent contractor.* For purposes of the reimbursement or other expense allowance arrangements described in paragraph (c)(2)(ii) of this section, *independent contractor* means a person who is not an employee of the payor.

(5) *Client or customer.* For purposes of the reimbursement or other expense allowance arrangements described in paragraph (c)(2)(ii) of this section, *client* or *customer* means a person who receives services from an independent contractor and enters into a reimbursement or other expense allowance arrangement with the independent contractor.

(6) *Payor.* For purposes of the reimbursement or other expense allowance arrangements described in paragraph (c)(2)(ii) of this section, *payor* means a person that enters into a reimbursement or other expense allowance arrangement with an employee and may include an employer, its agent, or a third party.

(7) *Reimbursement or other expense allowance arrangement.* For purposes of the reimbursement or other expense allowance arrangements described in paragraph (c)(2)(ii) of this section, *reimbursement or other expense allowance arrangement* means—

(i) For purposes of paragraph (c)(2)(ii)(B) of this section, an arrangement under which an employee receives an advance, allowance, or reimbursement from a payor (the employer, its agent, or a third party) for expenses the employee pays or incurs; and

(ii) For purposes of paragraph (c)(2)(ii)(C) of this section, an arrangement under which an independent contractor receives an advance, allowance, or reimbursement from a client or customer for expenses the independent contractor pays or incurs if either—

(A) A written agreement between the parties expressly states that the client or customer will reimburse the independent contractor for expenses that are subject to the limitations on deductions in paragraph (a) of this section; or

(B) A written agreement between the parties expressly identifies the party subject to the limitations.

(8) *Primarily consumed.* For purposes of paragraph (c)(2)(iv) of this section, *primarily consumed* means greater than 50 percent of actual or reasonably estimated consumption.

(9) *General public.* For purposes of paragraph (c)(2)(iv) of this section, the *general public* includes, but is not limited to, customers, clients, and visitors. The *general public* does not include employees, partners or independent contractors of the taxpayer. Also, an exclusive list of guests is not the *general public.*

(c) *Exceptions*—(1) *In general.* The limitations on the deduction of food or beverage expenses in paragraph (a) of this section do not apply to any expense described in paragraph (c)(2) of this section. These expenses are deductible to the extent allowable under chapter 1 of the Code.

(2) *Exceptions*—(i) *Expenses treated as compensation*—(A) *In general.* Any expense paid or incurred by a taxpayer for food or beverages, including food or beverages provided during travel described in section 274(m)(3), if an employee is the recipient of the food or beverages, is not subject to the deduction limitations in paragraph (a) of this section to the extent that the expense is treated by the taxpayer—

(*1*) On the taxpayer's income tax return as originally filed, as compensation paid to the employee; and

(*2*) As wages to the employee for purposes of withholding under chapter 24 of the Code, relating to collection of income tax at source on wages.

(B) *Expenses includible in income of persons who are not employees.* An expense paid or incurred by a taxpayer for food or beverages, including food or beverages provided during travel described in section 274(m)(3), is not subject to the deduction limitations in paragraph (a) of this section to the extent the expenditure is includible in gross income as compensation for services rendered, or as a prize or award under section 74 by a recipient of the expense who is not an employee of the taxpayer. The preceding sentence does not apply to any amount paid or incurred by the taxpayer if the amount is required to be included, or would be so required except that the amount is less than $600, in any information return filed by such taxpayer under part III of subchapter A of chapter 61 of the Code and is not so included.

(C) *Expenses for which value is improperly included or for which amount required to be included is zero.* The exception in section 274(e)(2) and (e)(9) and paragraph (c)(2)(i) of this section does not apply to expenses paid or incurred for food or beverages for which the value that is included in gross income is less than the amount required to be included in gross income under § 1.61–21. Furthermore, if the amount required to be included in gross income under § 1.61–21 is zero, the exception in section 274(e)(2) and (e)(9) and paragraph (c)(2)(i) of this section does not apply.

(D) *Examples.* The following examples illustrate the application of paragraph (c)(2)(i) of this section. In each example, the food or beverage expenses are ordinary and necessary expenses under section 162(a) that are paid or incurred during the taxable year in carrying on a trade or business and that are not lavish or extravagant under the circumstances.

(*1*) *Example 1.* Employer F provides food and beverages to its employees without charge at a company cafeteria on its premises. The food and beverages do not meet the definition of a *de minimis* fringe under section 132(e). F treats the food and beverage expenses as compensation and wages, and determines the amount of the inclusion under § 1.61–21. Under section 274(e)(2) and paragraph (c)(2)(i) of this section, the expenses associated with the food and beverages provided to the employees are not subject to the 50 percent deduction limitations in paragraph (a) of this section. Thus, F may deduct 100 percent of the food and beverage expenses.

(*2*) *Example 2.* Employer G provides meals to its employees without charge. The meals are properly excluded from the employees' income under section 119 as meals provided for the convenience of the employer. Under § 1.61–21(b)(1), an employee must include in gross income the amount by which the fair market value of a fringe benefit exceeds the sum of the amount, if any, paid for the benefit by or on behalf of the recipient, and the amount, if any, specifically excluded from gross income by some other section of subtitle A of the Code. Because the entire value of the employees' meals is excluded from the employees' income under section 119, the fair market value of the fringe benefit does not exceed the amount excluded from gross income under subtitle A of the Code, so there is nothing to be included in the

employees' income under § 1.61–21. Thus, the exception in section 274(e)(2) and paragraph (c)(2)(i) of this section does not apply and G may only deduct 50 percent of the expenses for the food and beverages provided to employees.

(ii) *Reimbursed food or beverage expenses*—(A) *In general.* In the case of expenses for food or beverages paid or incurred by one person in connection with the performance of services for another person, whether or not the other person is an employer, under a reimbursement or other expense allowance arrangement, the deduction limitations in paragraph (a) of this section apply either to the person who makes the expenditure or to the person who actually bears the expense, but not to both. If an expense of a type described in paragraph (c)(2)(ii) of this section properly constitutes a dividend paid to a shareholder, unreasonable compensation paid to an employee, a personal expense, or other nondeductible expense, nothing in this paragraph (c)(2)(ii)(A) prevents disallowance of the deduction to the taxpayer under other provisions of the Code.

(B) *Reimbursement arrangements involving employees.* In the case of expenses paid or incurred by an employee for food or beverages in performing services as an employee under a reimbursement or other expense allowance arrangement with a payor (the employer, its agent, or a third party) the limitations on deductions in paragraph (a) of this section apply—

(*1*) To the employee to the extent the employer treats the reimbursement or other payment of the expense on the employer's income tax return as originally filed as compensation paid to the employee and as wages to the employee for purposes of withholding under chapter 24 relating to collection of income tax at source on wages; or

(*2*) To the payor to the extent the reimbursement or other payment of the expense is not treated as compensation and wages paid to the employee in the manner provided in paragraph (c)(2)(ii)(B)(*1*) of this section. However, see paragraph (c)(2)(ii)(C) of this section if the payor receives a payment from a third party that may be treated as a reimbursement arrangement under paragraph (c)(2)(ii)(C).

(C) *Reimbursement arrangements involving persons that are not employees.* In the case of expenses for food or beverages paid or incurred by an independent contractor in connection with the performance of services for a client or customer under a reimbursement or other expense allowance arrangement with the independent contractor, the limitations on deductions in paragraph (a) of this section apply to the party expressly identified in an agreement between the parties as subject to the limitations. If an agreement between the parties does not expressly identify the party subject to the limitations, then the deduction limitations in paragraph (a) of this section apply—

(*1*) To the independent contractor (which may be a payor) to the extent the independent contractor does not account to the client or customer within the meaning of section 274(d); or

(*2*) To the client or customer if the independent contractor accounts to the client or customer within the meaning of section 274(d).

(D) *Section 274(d) substantiation.* If the reimbursement or other expense allowance arrangement involves persons who are not employees and the agreement between the parties does not expressly identify the party subject to the limitations on deductions in paragraph (a) of this section, the limitations on deductions in paragraph (a) of this section apply to the independent contractor unless the independent contractor accounts to the client or customer with substantiation that satisfies the requirements of section 274(d).

(E) *Examples.* The following examples illustrate the application of paragraph (c)(2)(ii) of this section.

(*1*) *Example 1.* (*i*) Employee I performs services under an arrangement in which J, an employee leasing company, pays I a per diem allowance of $10x for each day that I performs services for J's client, K, while traveling away from home. The per diem allowance is a reimbursement of travel expenses for food or beverages that I pays in performing services as an employee. J enters into a written agreement with K under which K agrees to reimburse J for any substantiated reimbursements for travel expenses, including meal expenses, that J pays to I. The agreement does not expressly identify the party that is subject to the limitations on deductions in paragraph (a) of this section. I performs services for K while traveling away from home for 10 days and provides J with substantiation that satisfies the requirements of section 274(d) of $100x of meal expenses incurred by I while traveling away from home. J pays I $100x to reimburse those expenses pursuant to their arrangement. J delivers a copy of I's substantiation to K. K pays J $300x, which includes $200x compensation for services and $100x as reimbursement of J's payment of I's travel expenses for meals. Neither J nor K treats the $100x paid to I as compensation or wages.

(*ii*) Under paragraph (b)(7)(i) of this section, I and J have established a reimbursement or other expense allowance arrangement for purposes of paragraph (c)(2)(ii)(B) of this section. Because the reimbursement payment is not treated as compensation and wages paid to I, under section 274(e)(3)(A) and paragraph (c)(2)(ii)(B)(*1*) of this section, I is not subject to the limitations on deductions in paragraph (a) of this section. Instead, under paragraph (c)(2)(ii)(B)(*2*) of this section, J, the payor, is subject to limitations on deductions in paragraph (a) of this section unless J can meet the requirements of section 274(e)(3)(B) and paragraph (c)(2)(ii)(C) of this section.

(*iii*) Because the agreement between J and K expressly states that K will reimburse J for substantiated reimbursements for travel expenses that J pays to I, under paragraph (b)(7)(ii)(A) of this section, J and K have established a reimbursement or other expense allowance arrangement for purposes of paragraph (c)(2)(ii)(C) of this section. J accounts to K for K's reimbursement in the manner required by section 274(d) by delivering to K a copy of the substantiation J received from I. Therefore, under section 274(e)(3)(B) and paragraph (c)(2)(ii)(C)(*2*) of this section, K and not J is subject to the deduction limitations in paragraph (a) of this section.

(*2*) *Example 2.* (*i*) The facts are the same as in paragraph (c)(2)(ii)(E)(*1*) of this section (*Example 1*) except that, under the arrangements between I and J and between J and K, I provides the substantiation of the expenses directly to K, and K pays the per diem directly to I.

(*ii*) Under paragraph (b)(7)(i) of this section, I and K have established a reimbursement or other expense allowance arrangement for purposes of paragraph (c)(2)(ii)(C) of this section. Because I substantiates directly to K and the reimbursement payment was not treated as compensation and wages paid to I, under section 274(e)(3)(A) and paragraph (c)(2)(ii)(C)(*1*) of this section I is not subject to the limitations on deductions in paragraph (a) of this section. Under paragraph (c)(2)(ii)(C)(*2*) of this section, K, the payor, is subject to the limitations on deductions in paragraph (a) of this section.

(*3*) *Example 3.* (*i*) The facts are the same as in paragraph (c)(2)(ii)(E)(*1*) of this section (*Example 1*), except that the written agreement between J and K expressly provides that the limitations of this section will apply to K.

(*ii*) Under paragraph (b)(7)(ii)(B) of this section, J and K have established a reimbursement or other expense allowance arrangement for purposes of paragraph (c)(2)(ii)(C) of this section. Because the agreement provides that the 274 deduction limitations apply to K, under section 274(e)(3)(B) and paragraph (c)(2)(ii)(C) of this section, K and not J is subject to the limitations on deductions in paragraph (a) of this section.

(*4*) *Example 4.* (*i*) The facts are the same as in paragraph (c)(2)(ii)(E)(*1*) of this section (*Example 1*), except that the agreement between J and K does not provide that K will reimburse J for travel expenses.

(*ii*) The arrangement between J and K is not a reimbursement or other expense allowance arrangement within the meaning of section 274(e)(3)(B) and paragraph (b)(7)(ii) of this section. Therefore, even though J accounts to K for the expenses, J is subject to the

limitations on deductions in paragraph (a) of this section.

(iii) *Recreational expenses for employees*—(A) *In general.* Any food or beverage expense paid or incurred by a taxpayer for a recreational, social, or similar activity, primarily for the benefit of taxpayer's employees (other than employees who are highly compensated employees (within the meaning of paragraph (c)(2)(iii)(B) of this section)) is not subject to the deduction limitations in paragraph (a) of this section. This paragraph (c)(2)(iii)(A) applies to expenses paid or incurred for events such as holiday parties, annual picnics, or summer outings. This paragraph (c)(2)(iii)(A) does not apply to expenses for meals the value of which is excluded from employees' income under section 119 because the meals are provided for the convenience of the employer.

(B) *Highly compensated employees.* The exception in this paragraph (c)(2)(iii) applies only to expenses for food or beverages made primarily for the benefit of employees of the taxpayer other than employees who are officers, shareholders or other owners who own a 10-percent or greater interest in the business, or other highly compensated employees. For purposes of the preceding sentence, an employee is treated as owning any interest owned by a member of the employee's family, within the meaning of section 267(c)(4). Any expense for food or beverages that is made under circumstances which discriminate in favor of employees who are officers, shareholders or other owners, or highly compensated employees is not considered to be made primarily for the benefit of employees generally. An expense for food or beverages is not to be considered outside of the exception of this paragraph (c)(2)(iii) merely because, due to the large number of employees involved, the provision of food or beverages is intended to benefit only a limited number of employees at one time, provided the provision of food or beverages does not discriminate in favor of officers, shareholders, other owners, or highly compensated employees.

(C) *Examples.* The following examples illustrate the application of this paragraph (c)(2)(iii). In each example, the food or beverage expenses are ordinary and necessary expenses under section 162(a) that are paid or incurred during the taxable year in carrying on a trade or business and that are not lavish or extravagant under the circumstances.

(*1*) *Example 1.* Employer L invites all employees to a holiday party in a hotel ballroom that includes a buffet dinner and an open bar. Under section 274(e)(4), this paragraph (c)(2)(iii), and § 1.274–11(c), the cost of the party, including food and beverage expenses, is not subject to the deduction limitations in paragraph (a) of this section because the holiday party is a recreational, social, or similar activity primarily for the benefit of non-highly compensated employees. Thus, L may deduct 100 percent of the cost of the party.

(*2*) *Example 2.* The facts are the same as in paragraph (c)(2)(iii)(C)(*1*) of this section (*Example 1*), except that Employer L invites only highly-compensated employees to the holiday party, and the invoice provided by the hotel lists the costs for food and beverages separately from the cost of the rental of the ballroom. The costs reflect the venue's usual selling price for food or beverages. The exception in this paragraph (c)(2)(iii) does not apply because L invited only highly-compensated employees to the holiday party. However, under § 1.274–11(b)(1)(ii), the food and beverage expenses are not treated as entertainment. L may deduct 50 percent of the food and beverage costs that are separately stated on the invoice under paragraph (a)(2) of this section.

(*3*) *Example 3.* Employer M provides free coffee, soda, bottled water, chips, donuts, and other snacks in a break room available to all employees. The expenses associated with the food and beverages are subject to the deduction limitations in paragraph (a) of this section because the break room is not a recreational, social, or similar activity primarily for the benefit of the employees. Thus, the exception in section 274(e)(4) and this paragraph (c)(2)(iii) does not apply and M may only deduct 50 percent of the expenses for food and beverages provided in the break room.

(*4*) *Example 4.* Employer N has a written policy that employees in a certain medical services-related position must be available for emergency calls due to the nature of the position that requires frequent emergency response. Because these emergencies can and do occur during meal periods, N furnishes food and beverages to employees in this position without charge in a cafeteria on N's premises. N excludes food and beverage expenses from the employees' income as meals provided for the convenience of the employer excludable under section 119. Because these food and beverages are furnished for the employer's convenience, and therefore are not primarily for the benefit of the employees, the exception in section 274(e)(4) and this paragraph (c)(2)(iii) does not apply, even if some socializing related to the food and beverages provided occurs. Thus, N may only deduct 50 percent of the expenses for food and beverages provided to employees in the cafeteria.

(*5*) *Example 5.* Employer O invites an employee and a client to dinner at a restaurant. Because it is the birthday of the employee, O orders a special dessert in celebration. Because the meal is a business meal, and therefore not primarily for the benefit of the employee, the exception in section 274(e)(4) and this paragraph (c)(2)(iii) does not apply, even though an employee social activity in the form of a birthday celebration occurred during the meal. Thus, O may only deduct 50 percent of the meal expenses.

(iv) *Items available to the public*—(A) *In general.* Any expense paid or incurred by a taxpayer for food or beverages to the extent the food or beverages are made available to the general public is not subject to the deduction limitations in paragraph (a) of this section. If a taxpayer provides food or beverages to employees, this paragraph (c)(2)(iv)(A) applies to the entire amount of expenses for those food or beverages if the same types of food or beverages are provided to, and are primarily consumed by, the general public.

(B) *Examples.* The following examples illustrate the application of this paragraph (c)(2)(iv). In each example, the food and beverage expenses are ordinary and necessary expenses under section 162(a) that are paid or incurred during the taxable year in carrying on a trade or business and that are not lavish or extravagant under the circumstances.

(*1*) *Example 1.* Employer P is a real estate agent and provides refreshments at an open house for a home available for sale to the public. The refreshments are consumed by P's employees, potential buyers of the property, and other real estate agents. Under section 274(e)(7) and this paragraph (c)(2)(iv), the expenses associated with the refreshments are not subject to the deduction limitations in paragraph (a) of this section if over 50 percent of the food and beverages are primarily consumed by potential buyers and other real estate agents. If the food and beverages are not primarily consumed by the general public, only the costs attributable to the food and beverages provided to the general public are excepted under section 274(e)(7) and this paragraph (c)(2)(iv).

(*2*) *Example 2.* Employer Q is an automobile service center and provides refreshments in its waiting area. The refreshments are consumed by Q's employees and customers. Under section 274(e)(7) and this paragraph (c)(2)(iv), the expenses associated with the refreshments are not subject to the deduction limitations provided for in paragraph (a) of this section if over 50 percent of the food and beverages are primarily consumed by customers. If the food and beverages are not primarily consumed by the general public, only the costs attributable to the food and beverages provided to the general public are excepted under section 274(e)(7) and this paragraph (c)(2)(iv).

(*3*) *Example 3.* Employer R operates a summer camp open to the general public for children and provides breakfast and lunch, as part of the fee to attend camp, both to camp counselors, who are employees, and to camp attendees, who are customers. There are 20 camp counselors and 100 camp attendees. The same type of meal is available to each counselor and attendee, and attendees consume more than 50 percent of the food and beverages. Under section 274(e)(7) and

this paragraph (c)(2)(iv), the expenses associated with the food and beverages are not subject to the deduction limitations in paragraph (a) of this section, because over 50 percent of the food and beverages are primarily consumed by camp attendees. Thus, R may deduct 100 percent of the food and beverage expenses.

(*4*) *Example 4.* Employer S provides food and beverages to its employees without charge at a company cafeteria on its premises. Occasionally, customers or other visitors also eat without charge in the cafeteria. The occasional consumption of food and beverages at the company cafeteria by customers and visitors is less than 50 percent of the total amount of food and beverages consumed at the cafeteria. Therefore, only the costs attributable to the food and beverages provided to the general public are excepted under section 274(e)(7) and this paragraph (c)(2)(iv).

(v) *Goods or services sold to customers*—(A) *In general.* An expense paid or incurred for food or beverages, to the extent the food or beverages are sold to customers in a bona fide transaction for an adequate and full consideration in money or money's worth, is not subject to the deduction limitations in paragraph (a) of this section. However, *money or money's worth* does not include payment through services provided. Under this paragraph (c)(2)(v), a restaurant or catering business may deduct 100 percent of its costs for food or beverage items, purchased in connection with preparing and providing meals to its paying customers, which are also consumed at the worksite by employees who work in the employer's restaurant or catering business. In addition, for purposes of this paragraph (c)(2)(v), the term *customer* includes anyone, including an employee of the taxpayer, who is sold food or beverages in a bona fide transaction for an adequate and full consideration in money or money's worth.

(B) *Example.* The following example illustrates the application of this paragraph (c)(2)(v). Employer T operates a restaurant. T provides food and beverages to its food service employees before, during, and after their shifts for no consideration. Under section 274(e)(8) and this paragraph (c)(2)(v), the expenses associated with the food and beverages provided to the employees are not subject to the 50 percent deduction limitation in paragraph (a) of this section because the restaurant sells food and beverages to customers in a bona fide transaction for an adequate and full consideration in money or money's worth. Thus, T may deduct 100 percent of the food and beverage expenses.

(d) *Applicability date.* This section applies for taxable years that begin on or after [DATE OF PUBLICATION OF FINAL REGULATIONS IN THE **FEDERAL REGISTER**].

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2020–03723 Filed 2–21–20; 4:15 pm]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket Number USCG–2019–0951]

RIN 1625–AA08; AA00

Special Local Regulations and Safety Zones; Recurring Marine Events and Fireworks Displays and Swim Events Held in the Coast Guard Sector Northern New England Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to add, delete, and modify the special local regulations for annual recurring marine events and safety zones regulation for firework displays and swim events in Coast Guard Sector Northern New England Captain of the Port Zone. When enforced, these special local regulations and safety zones will restrict vessels from transiting regulated areas during certain annually recurring events. The proposed special local regulations and safety zones are intended to expedite public notification and ensure the protection of the maritime public and event participants from the hazards associated with certain marine events. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before March 27, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2019–0951 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 Chief Marine Science Technician Thomas Watts, Sector Northern New England Waterways Management Division, U.S. Coast Guard; telephone 207–347–5003, email *NNEWaterways@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
LNTM Local Notice To Mariners
NOE Notice of Enforcement
NPRM Notice of proposed rulemaking
NAD 83 North American Datum of 1983
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

Swim events, fireworks displays, and marine events are held on an annual recurring basis on the navigable waters within the Coast Guard Sector Northern New England Captain of the Port (COTP) Zone. The Coast Guard has established special local regulations and safety zones for some of these annual recurring events on a case by case basis to ensure the protection of the maritime public and event participants from potential hazards. In the past, the Coast Guard has not received public comments or concerns regarding the impact to waterway traffic from regulations associated with these annually recurring events. Events were either added or deleted to the table of annual events based on their likelihood to recur in subsequent years. In addition, minor changes to existing events, such as position, date, or title, were made to ensure the accuracy of event details.

The purpose of this rulemaking is to ensure accurate notification of relevant events and protect the maritime public during marine events in the Sector Northern New England COTP Zone. The Coast Guard proposes this rulemaking under its authority in 46 U.S.C. 70034 and 46 U.S.C. 70041.

III. Discussion of Proposed Rule

The proposed rule would update the terminology and tables of annual recurring events in the existing regulations for the Coast Guard Sector Northern New England COTP Zone. The tables provide the event name, sponsor, and type, as well as approximate times, dates, and locations of the events.

The Coast Guard proposes to amend 33 CFR 100.120 ''Special Local Regulations; Marine Events Held in the Coast Guard Sector Northern New England Captain of the Port Zone'' by replacing language referencing ''Patrol Commander'' to ''Designated Representative'' and adding language clarifying only event sponsors, designated participants, and official

patrol vessels will be allowed to enter regulated areas. Spectators and other vessels not registered as event participants may not enter the safety zones without the permission of the COTP or the Designated Representative. Additionally, the Coast Guard proposes to amend 33 CFR 100.120 ''Special Local Regulations; Marine Events Held in the Coast Guard Sector Northern New England Captain of the Port Zone'' by updating the details of two events, deleting two events, and adding two events to the TABLE 1 to § 100.120. This rule proposes the following updates to the TABLE 1 to § 100.120: (1) 8.1 Eggemoggin Reach Regatta regulated area will be updated to reflect only the event start location; (2) 8.7 Multiple Sclerosis Harborfest Lobster Boat/Tugboat Races location will be corrected. The events deleted from the TABLE 1 to § 100.120 will be: (1) 8.2 Southport Rowgatta Rowing and Paddling Boat Race and (2) 7.5 Mayor's Cup Regatta. The two events added to the table are the (1) 8.8 Eastport Pirates Festival Invasion of Lubec Lobster Boat Race and (2) 6.5 Portland's Tallship Parade of Ships Event.

The Coast Guard proposes to amend 33 CFR 165.171 ''Safety Zones for fireworks displays and swim events held in Coast Guard Sector Northern New England Captain of the Port Zone'' by adding language clarifying only event sponsors, designated participants, and official patrol vessels will be allowed to enter regulated areas. Spectators and other vessels not registered as event participants may not enter the safety zones without the permission of the COTP or the Designated Representative. Additionally, the Coast Guard proposes to amend 33 CFR 165.171 ''Safety Zones for fireworks displays and swim events held in Coast Guard Sector Northern New England Captain of the Port Zone'' by updating the details of one event and deleting 20 events from the TABLE 1 to § 165.171. This rule proposes the following update to the TABLE 1 to § 165.171: Corrected location for 8.2 Islesboro Crossing Swim. Events proposed for removal are obsolete events which have not been held for the past three years or which the sponsor's indicate they have no intention to continue, and events that have been determined to ''not present an extra or unusual hazard on the waterway.'' The events deleted from the TABLE 1 to § 165.171 will be: (1) 6.1 Waterfront Days Fireworks; (2) 6.2 LaKermesse Fireworks; (3) 7.1 Vinalhaven 4th of July Fireworks; (4) 7.3 The Great Race; (5) 7.4 Bangor 4th of July Fireworks; (6) Eastport 4th of July Fireworks; (7) 7.8 Ellis Short Sand Park Trustee Fireworks; (8) 7.9 Hampton Beach 4th of July Fireworks; (9) 7.12 Main Street Heritage Days 4th of July Fireworks; (10) 7.14 St. Albans Day Fireworks; (11) 7.17 Shelburne Triathlons; (12) 7.18 St. George Days Fireworks; (13) 7.20 Richmond Days Fireworks; (14) 7.24 Bucksport Festival and Fireworks; (15) 7.26 Paul Coulombe Anniversary Fireworks; (16) 8.1 Westerlund's Landing Party Fireworks; (17) 8.2 York Beach Fire Department Fireworks; (18) 8.5 Paul Columbe Party Fireworks; (19) 9.2 Eastport Pirate Festival Fireworks; (20) 9.4 Eliot Festival Day Fireworks.

The regulatory text we are proposing appears at the end of this document. Advanced public notification of specific times, dates, regulated areas, and enforcement periods for each event will be provided through appropriate means, which may include, but are not limited to, the Local Notice to Mariners, Broadcast Notice to Mariners, or a Notice of Enforcement published in the **Federal Register**. If an event does not have a date and time listed in this regulation, then the precise dates and times of the enforcement period for that event will be announced through a Local Notice to Mariners and a Notice of Enforcement in the **Federal Register**.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, duration, and time-of-day of each regulated area. We are adding two new special local regulation, updating existing regulations by removing obsolete events which have not been held for the past three years or which the sponsor's indicate they have no intention to continue, and removing events that have been determined to ''not present an extra or unusual hazard on the waterway.'' Dates and coordinates have been updated to more accurately reflect the event. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 for any Safety Zone or Special Local Regulation. Additionally, the rule would allow vessels to seek permission to enter the regulated 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, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have 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 special local regulations for various one day marine events and safety zones for fireworks displays and one day swimming events. Normally such actions are categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this 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 *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *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

33 CFR Part 100

Marine safety, Navigation (water), Reporting and record-keeping requirements, Waterways.

33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 100 and 165 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for Part 100 continues to read as follows:

Authority: 46 U.S.C. 70041

■ 2. Revise § 100.120, to read as follows:

§ 100.120 Special Local Regulations; Marine Events Held in the Coast Guard Sector Northern New England Captain of the Port Zone.

The following regulations apply to the marine events listed in the TABLE 1 to § 100.120. These regulations will be enforced for the duration of each event, on or about the dates indicated. Actual notice of the exact dates and times of the effective period of the regulations with respect to each event, the geographical area, and details concerning the nature of the event and the number of participants and type(s) of vessels involved will be published in a Local Notices to Mariners and broadcast over VHF–FM radio. First Coast Guard District Local Notice to Mariners can be found at: *http://www.navcen.uscg.gov/.* Although listed in the Code of Federal Regulations, sponsors of events listed in the TABLE 1 to § 100.120 are still required to submit marine event applications in accordance with 33 CFR 100.15.

(a) The following definitions apply to this section:

(1) *Designated Representative.* A ''Designated Representative'' is any Coast Guard Commissioned, Warrant or Petty Officer who has been designated by the Captain of the Port, Sector Northern New England (COTP), to act on his or her behalf. The Designated Representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official Patrol Vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or

local law enforcement vessels assigned or approved by the COTP.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(b) Vessels may not transit the regulated areas without the COTP or Designated Representative approval. Vessels permitted to transit must operate at a no wake speed, in a manner which will not endanger participants or other crafts in the event.

(c) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP or the Designated Representative via VHF channel 16 or (207) 741–5465 (Coast Guard Sector Northern New England Command Center) to obtain permission to do so.

(d) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, unless authorized by COTP or Designated Representative.

(e) The COTP or Designated Representative may control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(f) The COTP or Designated Representative may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

(g) For all power boat races listed, vessels not participating in this event, swimmers, and personal watercraft of any nature are prohibited from entering or moving within the regulated area unless authorized by the COTP or Designated Representative. Vessels within the regulated area must be at anchor within a designated spectator area or moored to a waterfront facility in a way that will not interfere with the progress of the event.

(h) For all regattas and boat parades listed, spectator vessels operating within the regulated area shall maintain a separation of at least 50 yards from the participants.

(i) For all rowing and paddling boat races listed, vessels not associated with the event shall maintain a separation of at least 50 yards from the participants.

(j) The specific calendar date upon which the listed event falls will be published through a Notice of Enforcement in the **Federal Register**.

TABLE 1 TO § 100.120

5.0	MAY
5.1 Tall Ships Visiting Portsmouth	• Event Type: Regatta and Boat Parade. • Date: A multiday event in May.* • Time (Approximate): 9:00 a.m. to 8:00 p.m. • Location: The regulated area includes all waters of Portsmouth Harbor, New Hampshire in the vicinity of Castle Island within the following points (NAD 83): 43° 03′11″ N, 070° 42′26″ W. 43° 03′18″ N, 070° 41′51″ W. 43° 04′42″ N, 070° 42′11″ W. 43° 04′28″ N, 070° 44′12″ W. 43° 05′36″ N, 070° 45′56″ W. 43° 05′29″ N, 070° 46′09″ W. 43° 04′19″ N, 070° 44′16″ W. 43° 04′22″ N, 070° 42′33″ W.
6.0	JUNE
6.1 Charlie Begin Memorial Lobster Boat Races	• Event Type: Power Boat Race. • Date: A one day event in June.* • Time (Approximate): 10:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Boothbay Harbor, Maine in the vicinity of John's Island within the following points (NAD 83): 43° 50′04″ N, 069° 38′37″ W. 43° 50′54″ N, 069° 38′06″ W. 43° 50′49″ N, 069° 37′50″ W. 43° 50′00″ N, 069° 38′20″ W.
6.2 Rockland Harbor Lobster Boat Races	• Event Type: Power Boat Race. • Date: A one day event in June.* • Time (Approximate): 9:00 a.m. to 5:00 p.m. • Location: The regulated area includes all waters of Rockland Harbor, Maine in the vicinity of the Rockland Breakwater Light within the following points (NAD 83): 44° 05′59″ N, 069° 04′53″ W 44° 06′43″ N, 069° 05′25″ W. 44° 06′50″ N, 069° 05′05″ W. 44° 06′05″ N, 069° 04′34″ W.
6.3 Gathering of the Fleet	• Event Type: Tall Ship Parade. • Date: A one day event in June.* • Time (Approximate): 12:00 p.m. to 5:00 p.m. • Location: The regulated area includes all waters of Boothbay Harbor, Maine in the vicinity of Tumbler's Island within the following points (NAD 83): 43° 51′02″ N, 069° 37′33″ W.

TABLE 1 TO § 100.120—Continued

	43° 50′47″ N, 069° 37′31″ W. 43° 50′23″ N, 069° 37′57″ W. 43° 50′01″ N, 069° 37′45″ W. 43° 50′01″ N, 069° 38′31″ W. 43° 50′25″ N, 069° 38′25″ W. 43° 50′49″ N, 069° 37′45″ W.
6.4 Bass Harbor Blessing of the Fleet Lobster Boat Race	• Event Type: Power Boat Race. • Date: A one day event in June.* • Time (Approximate): 10:00 a.m. to 2:00 p.m. • Location: The regulated area includes all waters of Bass Harbor, Maine in the vicinity of Lopaus Point within the following points (NAD 83): 44° 13′28″ N, 068° 21′59″ W. 44° 13′20″ N, 068° 21′40″ W. 44° 14′05″ N, 068° 20′55″ W. 44° 14′12″ N, 068° 21′14″ W.
6.5 Portland's Tallship Parade of Ships Event	• Event Type: Regatta and Boat Parade. • Date: A multiday event in June/July.* • Time (Approximate): 8:00 a.m. to 8:00 p.m. • Location: The regulated area includes all waters of Casco Bay and the Fore River in the vicinity of Portland, Maine within the following points (NAD 83): 43° 37′44.25″ N, 070°12′37.64″ W. 43° 38′28.11″ N, 070°12′37.64″ W. 43° 39′08.52″ N, 070°13′20.17″ W. 43° 39′28.58″ N, 070°13′25.24″ W. 43° 39′07.70″ N, 070°13′59.62″ W. 43° 38′55.05″ N, 070°14′41.91″ W. 43° 39′00.94″ N, 070°15′01.55″ W. 43° 39′45.05″ N, 070°15′09.11″ W. 43° 39′38.10″ N, 070°14′13.03″ W. 43° 39′04.06″ N, 070°13′29.75″ W. 43° 37′57.21″ N, 070°12′56.69″ W.
7.0	JULY
7.1 Burlington 3rd of July Air Show	• Event Type: Air Show. • Date: A one day event held near July 4th.* • Time (Approximate): 8:30 p.m. to 9:00 p.m. • Location: The regulated area includes all waters of Lake Champlain, Burlington, VT within the following points (NAD 83): 44° 28′51″ N, 073° 14′21″ W. 44° 28′57″ N, 073° 13′41″ W. 44° 28′05″ N, 073° 13′26″ W. 44° 27′59″ N, 073° 14′03″ W.
7.2 Moosabec Lobster Boat Races	• Event Type: Power Boat Race. • Date: A one day event held near July 4th.* • Time (Approximate): 10:00 a.m. to 12:30 p.m. • Location: The regulated area includes all waters of Jonesport, Maine within the following points (NAD 83): 44° 31′21″ N, 067° 36′44″ W. 44° 31′36″ N, 067° 36′47″ W. 44° 31′44″ N, 067° 35′36″ W. 44° 31′29″ N, 067° 35′33″ W.
7.3 Stonington Lobster Boat Races	• Event Type: Power Boat Race. • Date: A one day event in July.* • Time (Approximate): 8:00 a.m. to 3:30 p.m. • Location: The regulated area includes all waters of Stonington, Maine within the following points (NAD 83): 44° 09′06″ N, 068° 39′08″ W. 44° 08′60″ N, 068° 40′05″ W. 44° 09′06″ N, 068° 40′05″ W. 44° 09′12″ N, 068° 39′08″ W.
7.4 The Challenge Race	• Event Type: Rowing and Paddling Boat Race. • Date: A one day event in July.* • Time (Approximate): 11:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Lake Champlain in the vicinity of Button Bay State Park within the following points (NAD 83): 44° 12′25″ N, 073° 22′32″ W.

TABLE 1 TO § 100.120—Continued

	44° 12′00″ N, 073° 21′42″ W. 44° 12′19″ N, 073° 21′25″ W. 44° 13′16″ N, 073° 21′36″ W.
7.5 Friendship Lobster Boat Races	• Event Type: Power Boat Race. • Date: A one day event in July.* • Time (Approximate): 9:30 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Friendship Harbor, Maine within the following points (NAD 83): 43° 57′51″ N, 069° 20′46″ W. 43° 58′14″ N, 069° 19′53″ W. 43° 58′19″ N, 069° 20′01″ W. 43° 58′00″ N, 069° 20′46″ W.
7.6 Harpswell Lobster Boat Races	• Event Type: Power Boat Race. • Date: A one day event during in July.* • Time (Approximate): 9:30 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Potts Harbor, Maine within the following points (NAD 83): 43° 44′14″ N, 070° 02′14″ W. 43° 44′31″ N, 070° 01′47″ W. 43° 44′27″ N, 070° 01′40″ W. 43° 44′10″ N, 070° 02′08″ W.
8.0	AUGUST
8.1 Eggemoggin Reach Regatta	• Event Type: Wooden Boat Parade. • Date: A one day event on a Saturday between the 15th of July and the 15th of August.* • Time (Approximate): 11:00 a.m. to 7:00 p.m. • Location: The regulated area includes all waters of Eggemoggin Reach, Maine within the following points (NAD 83): 44° 14′22″ N, 068° 36′26″ W. 44° 13′58″ N, 068° 35′16″ W. 44° 14′24″ N, 068° 34′24″ W. 44° 14′50″ N, 068° 35′04″ W. 44° 14′54″ N, 068° 35′38″ W. 44° 14′57″ N, 068° 34′24″ W.
8.2 Winter Harbor Lobster Boat Races	• Event Type: Power Boat Race. • Date: A one day event in August.* • Time (Approximate): 9:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Winter Harbor, Maine within the following points (NAD 83): 44° 22′06″ N, 068° 05′13″ W. 44° 23′06″ N, 068° 05′08″ W. 44° 23′04″ N, 068° 04′37″ W. 44° 22′05″ N, 068° 04′44″ W.
8.3 Lake Champlain Dragon Boat Festival	• Event Type: Rowing and Paddling Boat Race. • Date: A multiday day event in August.* • Time (Approximate): 7:00 a.m. to 5:00 p.m. • Location: The regulated area includes all waters of Burlington Bay within the following points (NAD 83): 44° 28′49″ N, 073° 13′22″ W. 44° 28′41″ N, 073° 13′36″ W. 44° 28′28″ N, 073° 13′31″ W. 44° 28′38″ N, 073° 13′18″ W.
8.4 Merritt Brackett Lobster Boat Races	• Event Type: Power Boat Race. • Date: A one day event in August.* • Time (Approximate): 10:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Pemaquid Harbor, Maine within the following points (NAD 83): 43° 52′16″ N, 069° 32′10″ W. 43° 52′41″ N, 069° 31′43″ W. 43° 52′35″ N, 069° 31′29″ W. 43° 52′09″ N, 069° 31′56″ W.
8.5 Multiple Sclerosis Regatta	• Event Type: Regatta and Sailboat Race. • Date: A one day event in August.* • Time (Approximate): 10:00 a.m. to 4:00 p.m. • Location: The regulated area for the start of the race includes all waters of Casco Bay, Maine in the vicinity of Peaks Island within the following points (NAD 83):

TABLE 1 TO § 100.120—Continued

	43° 40′25″ N, 070° 14′21″ W. 43° 40′36″ N, 070° 13′56″ W. 43° 39′58″ N, 070° 13′21″ W. 43° 39′46″ N, 070° 13′51″ W.
8.6 Multiple Sclerosis Harborfest Lobster Boat/Tugboat Races	• Event Type: Power Boat Race. • Date: A one day event in August.* • Time (Approximate): 10:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Maine State Pier within the following points (NAD 83): 43° 40′09″ N, 070° 13′41″ W. 43° 40′03″ N, 070° 13′31″ W. 43° 39′37″ N, 070° 14′01″ W. 43° 39′42″ N, 070° 14′11″ W.
8.7 Long Island Lobster Boat Race	• Event Type: Power Boat Race. • Date: A one day event in August.* • Time (Approximate): 10:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Casco Bay, Maine in the vicinity of Great Ledge Cove and Dorseys Cove off the north west coast of Long Island, Maine within the following points (NAD 83): 43° 41′59″ N, 070° 08′59″ W. 43° 42′04″ N, 070° 09′10″ W. 43° 41′41″ N, 070° 09′38″ W. 43° 41′36″ N, 070° 09′30″ W.
8.8 Eastport Pirates Festival Invasion of Lubec Lobster Boat Race	• Event Type: Power Boat Race. • Date: A one day event in August.* • Time (Approximate): 10:00 a.m. to 3:00 p.m. • Location: The regulated area includes all waters of Johnson Bay, Maine within the following points (NAD 83): 43° 41′59″ N, 070° 08′59″ W. 43° 42′04″ N, 070° 09′10″ W. 43° 41′41″ N, 070° 09′38″ W. 43° 41′36″ N, 070° 09′30″ W.

* Date subject to change. Exact date will be posted in Notice of Enforcement and Local Notice to Mariners.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 3. 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.

■ 4. Revise § 165.171, to read as follows:

§ 165.171 Safety Zones for fireworks displays and swim events held in Coast Guard Sector Northern New England Captain of the Port Zone.

(a) *Regulations.* The general regulations contained in § 165.23 as well as the following regulations apply to the fireworks displays and swim events listed in Table 1 to § 165.171. These regulations will be enforced for the duration of each event. Notifications will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners well in advance of the events. If the event does not have a date listed, then exact dates and times of the enforcement period will be announced through a Notice of Enforcement in the **Federal Register**. Mariners should consult the **Federal Register** or their Local Notice to Mariners to remain apprised of schedule or event changes. First Coast Guard District Local Notice to Mariners can be found at *http://www.navcen.uscg.gov/.* Although listed in the Code of Federal Regulations, sponsors of events listed the Table 1 to § 165.171 are still required to submit marine event applications in accordance with 33 CFR 100.15.

(b) *Definitions.* The following definitions apply to this section:

(1) *Designated representative.* A ''Designated Representative'' is any Coast Guard Commissioned, Warrant or Petty Officer designated by the Captain of the Port, Sector Northern New England (COTP), to act on his or her behalf. The Designated Representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official patrol vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(c) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by COTP or Designated Representative.

(d) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP or the Designated Representative via VHF channel 16 or (207) 741–5465 (Coast Guard Sector Northern New England Command Center) to obtain permission to do so.

(e) Upon being hailed by a U.S. Coast Guard vessel or the Designated Representative, by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(f) The COTP or Designated Representative may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

(g) The regulated area for all fireworks displays listed in the Table 1 to § 165.171 is that area of navigable waters within a 200 yard radius of the launch platform or launch site for each fireworks display, unless otherwise noted in the Table 1 to § 165.171 or modified in USCG First District Local Notice to Mariners at: *http://www.navcen.uscg.gov/.*

(h) For all swim events listed in the Table 1 to § 165.171, vessels not associated with the event shall maintain a separation of at least 200 feet from the participants.

(i) The specific calendar date upon which the listed event falls will be published Notice of Enforcement in the **Federal Register**.

TABLE 1 TO § 165.171

6.0	JUNE
6.1 Windjammer Days Fireworks	• Event Type: Fireworks Display. • Date: One night event in June.* • Time (Approximate): 8:00 p.m. to 10:30 p.m. • Location: In the vicinity of McFarland Island, Boothbay Harbor, Maine in approximate position: 43° 50′38″ N, 069° 37′57″ W (NAD 83).
7.0	JULY
7.1 Burlington Independence Day Fireworks	• Event Type: Firework Display. • Date: One night event in July.* • Time (Approximate): 9:00 p.m. to 11:00 p.m. • Location: From a barge in the vicinity of Burlington Harbor, Burlington, Vermont in approximate position: 44° 28′31″ N, 073° 13′31″ W (NAD 83).
7.2 Camden 4th of July Fireworks	• Event Type: Fireworks Display. • Date: One night event in July.* • Time (Approximate): 8:00 p.m. to 10:00 p.m. • Location: In the vicinity of Camden Harbor, Maine in approximate position: 44° 12′32″ N, 069° 02′58″ W (NAD 83).
7.3 Bar Harbor 4th of July Fireworks	• Event Type: Fireworks Display. • Date: One night event in July.* • Time (Approximate): 8:00 p.m. to 10:30 p.m. • Location: In the vicinity of Bar Harbor Town Pier, Bar Harbor, Maine in approximate position: 44° 23′31″ N, 068° 12′15″ W (NAD 83).
7.4 Boothbay Harbor 4th of July Fireworks	• Event Type: Fireworks Display. • Date: One night event in July.* • Time (Approximate): 8:00 p.m. to 10:30 p.m. • Location: In the vicinity of McFarland Island, Boothbay Harbor, Maine in approximate position: 43° 50′38″ N, 069° 37′57″ W (NAD 83).
7.5 Moosabec 4th of July Committee Fireworks	• Event Type: Fireworks Display. • Date: One night event in July.* • Time (Approximate): 8:00 p.m. to 10:30 p.m. • Location: In the vicinity of Beals Island, Jonesport, Maine in approximate position: 44° 31′18″ N, 067° 36′43″ W (NAD 83).
7.6 Lubec 4th of July Fireworks	• Event Type: Fireworks Display. • Date: One night event in July.* • Time (Approximate): 8:00 p.m. to 10:30 p.m. • Location: In the vicinity of the Lubec Public Boat Launch in approximate position: 44° 51′52″ N, 066° 59′06″ W (NAD 83).
7.7 Portland Harbor 4th of July Fireworks	• Event Type: Fireworks Display. • Date: One night event in July.* • Time (Approximate): 8:30 p.m. to 10:30 p.m. • Location: In the vicinity of East End Beach, Portland, Maine in approximate position: 43° 40′15″ N, 070° 14′42″ W (NAD 83).
7.8 Stonington 4th of July Fireworks	• Event Type: Fireworks Display. • Date: One night event in July.* • Time (Approximate): 8:00 p.m. to 10:30 p.m.

TABLE 1 TO § 165.171—Continued

	• Location: In the vicinity of Two Bush Island, Stonington, Maine in approximate position: 44° 08′57″ N, 068° 39′54″ W (NAD 83).
7.9 Southwest Harbor 4th of July Fireworks	• Event Type: Fireworks Display. • Date: One night event in July.* • Time (Approximate): 8:00 p.m. to 10:30 p.m. • Location: Southwest Harbor, Maine in approximate position: 44° 16′25″ N, 068° 19′21″ W (NAD 83).
7.10 Tri for a Cure Swim Clinics and Triathlon	• Event Type: Swim Event. • Date: A multi-day event held throughout July.* • Time (Approximate): 8:30 a.m. to 11:30 a.m. • Location: The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Spring Point Light within the following points (NAD 83): 43° 39′01″ N, 070° 13′32″ W. 43° 39′07″ N, 070° 13′29″ W. 43° 39′06″ N, 070° 13′41″ W. 43° 39′01″ N, 070° 13′36″ W.
7.11 Colchester Triathlon	• Event Type: Swim Event. • Date: A one day event in July.* • Time (Approximate): 7:00 a.m. to 11:00 a.m. • Location: The regulated area includes all waters of Malletts Bay on Lake Champlain, Vermont within the following points (NAD 83): 44° 32′57″ N, 073° 12′38″ W. 44° 32′46″ N, 073° 13′00″ W. 44° 33′24″ N, 073° 11′43″ W. 44° 33′14″ N, 073° 11′35″ W.
7.12 Peaks to Portland Swim	• Event Type: Swim Event. • Date: A one day event in July.* • Time (Approximate): 5:00 a.m. to 1:00 p.m. • Location: The regulated area includes all waters of Portland Harbor between Peaks Island and East End Beach in Portland, Maine within the following points (NAD 83): 43° 39′20″ N, 070° 11′58″ W. 43° 39′45″ N, 070° 13′19″ W. 43° 40′11″ N, 070° 14′13″ W. 43° 40′08″ N, 070° 14′29″ W. 43° 40′00″ N, 070° 14′23″ W. 43° 39′34″ N, 070° 13′31″ W. 43° 39′13″ N, 070° 11′59″ W.
7.13 Friendship Days Fireworks	• Event Type: Fireworks Display. • Date: A one day event in July.* • Time (Approximate): 8:00 p.m. to 10:30 p.m. • Location: In the vicinity of the Town Pier, Friendship Harbor, Maine at position: 43° 58′23″ N, 069° 20′12″ W (NAD83).
7.14 Nubble Light Swim Challenge	• Event Type: Swim Event. • Date: A one day event in July.* • Time (Approximate): 9:00 a.m. to 12:30 p.m. • Location: The regulated area includes all waters around Cape Neddick, Maine and within the following coordinates (NAD83): 43° 10′28″ N, 070° 36′26″ W. 43° 10′34″ N, 070° 36′06″ W. 43° 10′30″ N, 070° 35′45″ W. 43° 10′17″ N, 070° 35′24″ W. 43° 09′54″ N, 070° 35′18″ W. 43° 09′42″ N, 070° 35′37″ W. 43° 09′51″ N, 070° 37′05″ W.
7.15 Castine 4th of July Fireworks	• Event Type: Fireworks Display. • Date: One night event in July.* • Time (Approximate): 9:00 p.m. to 10:30 p.m. • Location: In the vicinity of the town dock in the Castine Harbor, Castine, Maine in approximate position: 44°23′10″ N, 068°47′28″ W (NAD 83).
8.0	AUGUST
8.1 North Hero Air Show	• Event Type: Air Show.

TABLE 1 TO § 165.171—Continued

	• Date: A one day event in August.* • Time (Approximate): 10:00 a.m. to 5:00 p.m. • Location: In the vicinity of Shore Acres Dock, North Hero, Vermont in approximate position (NAD83): 44° 48′24″ N, 073° 17′02″ W. 44° 48′22″ N, 073° 16′46″ W. 44° 47′53″ N, 073° 16′54″ W. 44° 47′54″ N, 073° 17′09″ W.
8.2 Islesboro Crossing Swim	• Event Type: Swim Event. • Date: A one day event in August.* • Time: (Approximate): 6:00 a.m. to 11:00 a.m. • Location: The regulated area includes all waters of West Penobscot Bay from Ducktrap Beach, Lincolnville, ME to Grindel Point, Islesboro, ME, within the following points (NAD83): 44° 17′44″ N, 069° 00′11″ W. 44° 16′58″ N, 068° 56′35″ W. 44° 17′31″ N, 068° 56′40″ W.
8.3 Casco Bay Island Swim/Run	• Event Type: Swim/Run Event. • Date: A one day event in August.* • Time (Approximate): 7:30 a.m. to 1:00 p.m. • Location: All waters of Casco Bay, Maine in the vicinity of Casco Bay Island archipelago and within the following coordinates (NAD 83): 43° 42′47″ N, 070° 07′07″ W. 43° 38′09″ N, 070° 11′57″ W. 43° 34′57″ N, 070° 12′55″ W. 43° 41′31″ N, 070° 11′37″ W. 43° 43′25″ N, 070° 08′25″ W.
8.4 Port Mile Swim	• Event Type: Swim Event. • Date: A one day event August.* • Time (Approximate): 7:00 a.m. to 9:00 a.m. • Location: All waters of Casco Bay, Maine in the vicinity of East End Beach within the following points (NAD 83): 43° 40′09″ N, 070° 14′27″ W. 43° 40′05″ N, 070° 14′01″ W. 43° 40′21″ N, 070° 14′09″ W.
8.5 Ironman 70.3 Maine	• Event Type: Swim Event. • Date: A one day event August.* • Time (Approximate): 6:00 a.m. to 08:30 a.m. • Location: All waters of Saco Bay, Maine in the vicinity of Old Orchard Beach within the following points (NAD 83): 43° 30′54″ N, 070° 22′24″ W. 43° 31′14″ N, 070° 22′08″ W. 43° 30′39″ N, 070° 21′46″ W. 43° 31′00″ N, 070° 21′30″ W.
8.6 Lake Champlain Swimming Race	• Event Type: Swim Event. • Date: A one day event in August. • Time (Approximate): 9:00 a.m. to 3 p.m. • Location: Essex Beggs Point Park, Essex, NY, to Charlotte Beach, Charlotte, VT (NAD83). 44° 18′32″ N, 073° 20′52″ W. 44° 20′03″ N, 073° 16′53″ W.
9.0	SEPTEMBER
9.1 Camden Windjammer Festival Fireworks	• Event Type: Fireworks Display. • Date: A one night event in September.* • Time (Approximate): 8:00 p.m. to 9:30 p.m. • Location: From a barge in the vicinity of Northeast Point, Camden Harbor, Maine in approximate position: 44° 12′18″ N, 069° 03′11″ W (NAD 83).
9.2 The Lobsterman Triathlon	• Event Type: Swim Event. • Date: A one day event in September.* • Time (Approximate): 8:00 a.m. to 11:00 a.m. • Location: The regulated area includes all waters in the vicinity of Winslow Park in South Freeport, Maine within the following points (NAD 83): 43° 47′59″ N, 070° 06′56″ W. 43° 47′44″ N, 070° 06′56″ W. 43° 47′44″ N, 070° 07′27″ W.

TABLE 1 TO § 165.171—Continued

	43° 47′57″ N, 070° 07′27″ W.

* Date subject to change. Exact date will be posted in Notice of Enforcement and Local Notice to Mariners.

Dated: 14 February 2020.

B.J. LeFebvre,

Captain, U.S. Coast Guard, Captain of the Port, Sector Northern New England.

[FR Doc. 2020–03467 Filed 2–25–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 254

RIN 0596–AD41

Conveyance of Small Tracts

AGENCY: Forest Service, USDA.

ACTION: Proposed rule; request for comment.

SUMMARY: The United States Department of Agriculture (USDA), Forest Service is revising regulations to implement certain changes to the Small Tracts Act, enacted in the Agriculture Improvement Act of 2018, also known as the 2018 Farm Bill. These statutory changes create a new category of lands eligible for conveyance outside of the National Forest System under the Small Tracts Act for parcels of 40 acres or less that are physically isolated, inaccessible, or have lost National Forest System character. The statutory changes also create a new category of lands eligible for conveyance involving parcels of ten acres or less that are not eligible for conveyance under previous eligibility conditions and are encroached on by a permanent habitable improvement for which there is no evidence that the encroachment was intentional or negligent. These amendments to the Small Tracts Act are expected to provide the Forest Service with more flexibility for resolving property conflicts with private landowners, reduce the time and expense arising from a protracted boundary dispute, and alleviate management burden and expense to the Forest Service.

DATES: Comments must be received in writing by April 27, 2020.

ADDRESSES: Written comments concerning this notice should be addressed to Greg Smith, USDA, Forest Service, 201 14th Street SW, Washington, DC 20250. Comments also may be submitted by following the instructions at the Federal eRulemaking portal at *http://www.regulations.gov.* If comments are sent by email, the public is requested not to send duplicate comments via regular mail. All comments, including names and addresses when provided, are placed in the record and made available for public inspection and copying. The public may inspect comments received at 201 14th Street SW, Washington, DC 20250. Visitors are encouraged to call ahead to 202–205–3563 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Brad Tait, by phone at 971–806–2199, or via email at *bradley.tait@usda.gov.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

Public Law 97–465, commonly known as the Small Tracts Act (16 U.S.C. 521c–521i), was enacted in 1983 to help the Forest Service resolve land disputes and boundary mangement problems for parcels that generally were small in scale (less than ten acres) with land values that did not exceed $150,000. Eligible lands for sale, exchange, or interchange included National Forest System lands encumbered by an encroachment like a shed, house, or fence; roads or road rights-of-way in excess of Forest Service transportation needs; and ''mineral survey fractions,'' small parcels of National Forest System lands interspersed with or adjacent to lands transferred out of Federal ownership under the mining laws.

Discussion of Amendments to the Small Tracts Act

The Small Tracts Act was amended by Section 8621 of the Agriculture Improvement Act of 2018, also known as the 2018 Farm Bill (Pub. L. 115–334). The Agriculture Improvement Act of 2018 changes to the Small Tracts Act are being implemented in two phases. The first phase, implementing statutory revisions that are self-executing, was accomplished by revisions to 36 CFR part 254 by final rule without notice and comment on February 13, 2020 (85 FR 8180). The second phase, implementing changes that may entail agency discretion, would be accomplished by this proposed rule, for which notice and comment are warranted.

The Agriculture Improvement Act of 2018 added two new paragraphs to the Small Tracts Act Section 3 (16 U.S.C. 521e) to resolve by conveyance certain encroachment, trespass, and boundary management problems: Paragraph (4) (16 U.S.C. 521e(4)), adding a limited conveyance authority for parcels of 40 acres or less that are determined by the Secretary to be physically isolated from other Federal lands, to be inaccessible, or to have lost National Forest character; and paragraph (5) (16 U.S.C. 521e(5)), addressing encroachments by permanent habitable improvements on parcels of 10 acres or less. This proposed rule would implement paragraph (4) by adding a new 36 CFR 254.37, and would implement paragraph (5) by adding a new paragraph (b) to 36 CFR 254.32.

Rulemaking is required for these specific amendments because Section 6 of the Small Tracts Act (codified at 16 U.S.C. 521(h)) provides that ''[t]he Secretary shall issue regulations to carry out the provisions of this Act, including specification of . . . criteria which shall be used in making the determination as to what constitutes the public interest.'' The public interest determination in § 254.36 will apply to the new paragraph 254.32(b) and new § 254.37 created by this proposed rule. Rulemaking, and particularly the solicitation of public comments, is further warranted because both amendments introduce new options to the Forest Service that rely on agency discretion for resolving eligible encroachments.

The final rule published on February 13, 2020 (85 FR 8180), added a new paragraph (c) to 36 CFR 254.32. As noted above, this proposed rule would revise 36 CFR 254.32 to add a new paragraph (b); it would accordingly redesignate existing paragraph (b) as paragraph (c), which would in turn redesignate paragraph (c) added by the final rule as paragraph (d). The final rule also added 36 CFR 254.38. This proposed rule would revise the citations to other rule provisions in 36 CFR 254.38(a) from 36 CFR 254.32(c) to 36 CFR 254.32(d), consistent with the revisions to § 254.32 that would be made by this proposed rule, and would revise 36 CFR 254.38(b) to add a subparagraph (3).

Regulatory Certifications

Executive Order 12866

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order 13771

The proposed rule has been reviewed in accordance with E.O. 13771 on reducing regulation and controlling regulatory costs, and is considered an E.O. ''deregulatory'' action.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Regulatory Flexibility Act Analysis

The Agency has considered the proposed rule under the requirements of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This proposed rule would not have any direct effect on small entities as defined by the Regulatory Flexibility Act. The proposed rule would not impose recordkeeping requirements on small entities; would not affect their competitive position in relation to large entities; and would not affect their cash flow, liquidity, or ability to remain in the market. Therefore, the Forest Service has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

Federalism

The Agency has considered this proposed rule under the requirements of E.O. 13132 *Federalism.* The Agency concluded that the proposed rule conforms with the federalism principles set out in this Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, nor on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency concludes that this proposed rule does not have federalism implications.

Consultation With Tribal Governments

Tribal consultation is not required for the revisions to the Small Tracts Act regulations to be effected in this proposed rule. Tribal consultation on individual proposed projects and local notification requirements to Tribes and other individuals for land adjustment activities will occur as required.

No Takings Implications

The Agency has analyzed this proposed rule in accordance with the principles and criteria found in E.O. 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights,* and has determined that the rule does not pose the risk of taking of protected private property.

Controlling Paperwork Burdens on the Public

This proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or are not already approved for use, and therefore imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), and its implementing regulations at 5 CFR part 1320, do not apply.

National Environmental Policy Act

Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from documentation in an environmental assessment or impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' The Agency has concluded that these proposed rules fall within this category of actions and that no extraordinary circumstances exist which would require preparation of an environment assessment or environmental impact statement.

Energy Effects

This proposed rule has been reviewed under E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.* It has been determined that this proposed rule does not constitute a significant energy action as defined in E.O. 13211.

Civil Justice Reform

The Agency has analyzed this rule in accordance with the principles and criteria of E.O. 12988, *Civil Justice Reform.* The Agency has not identified any State or local laws or regulations that conflict with this regulation or that would impede full implementation of this rule. Nevertheless, in the event that such conflicts were to be identified, the proposed rule, if implemented, would preempt the State or local laws or regulations found to be in conflict. However, in that case, (1) no retroactive effect would be given to this proposed rule; and (2) the USDA would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the agency has assessed the effects of this proposed rule on State, local, and Tribal governments and the private sector. This proposed rule does not compel the expenditure of $100 million or more by any State, local, or Tribal governments or anyone in the private sector. Therefore, statements as described under section 202 and 205 of the Act are not required.

List of Subjects in 36 CFR Part 254

Community facilities, National forests.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to revise part 254 of title 36 of the Code of Federal Regulations as follows:

PART 254—LANDOWNERSHIP ADJUSTMENT

Subpart C—Conveyance of Small Tracts

■ 1. The authority citation for part 254, subpart C continues to read:

Authority: Pub. L. 97–465; 96 Stat. 2535.

■ 2. Amend § 254.31 by adding, in alphabetical order, the definition of ''Permanent Habitable Improvement'' to read as follows:

§ 254.31 Definitions.

* * * * *

Permanent Habitable Improvement means a dwelling, improvement, house, shed, hunting blind, or other structure presently being used as a residence or domicile for a lasting or indefinite period of time.

* * * * *

■ 3. Revise § 254.32 to read as follows:

§ 254.32 Encroachments and other improvements.

(a) This subpart allows conveyance of parcels of 10 acres or less, which will resolve encroachments by persons on NFS lands:

(1) To whom no advance notice was given that the improvements encroached or would encroach, and

(2) Who in good faith relied on an erroneous survey, title search, or other land description which did not reveal such encroachment.

(b) This subpart also allows conveyance of parcels of 10 acres or less that are not eligible for conveyance under paragraph (a) of this section but are encroached on by a permanent habitable improvement for which there is no evidence that the encroachment was intentional or negligent.

(c) Forest Service officials shall consider the following factors when determining whether to convey lands upon which encroachments exist under paragraphs (a) and (b) of this section:

(1) The location of the property boundaries based on historical location and continued acceptance and maintenance,

(2) Factual evidence of claim of title or color of title,

(3) Notice given to persons encroaching on National Forest System lands,

(4) Degree of development in the encroached upon area, and

(5) Creation of an uneconomic remnant.

(d) This subpart also allows conveyance of parcels that are used as a cemetery (including a parcel of not more than one acre adjacent to the parcel used as a cemetery), a landfill, or a sewage treatment plant under a special use authorization issued or otherwise authorized by a Forest Service official.

■ 4. Add § 254.37 to read as follows:

§ 254.37 Conveyance of parcels 40 acres or less that no longer meet National Forest System objectives.

This subpart allows conveyance of parcels of 40 acres or less that are determined by Forest Service officials to:

(a) Be physically isolated from other Federal land; or

(b) Be inaccessible; or

(c) Have lost National Forest character.

■ 5. Amend § 254.38 by revising paragraph (a) and adding paragraph (b)(3) to read as follows:

§ 254.38 Disposition of proceeds.

(a) The net proceeds derived from any sale or exchange of parcels in § 254.32(b) and (d) and § 254.37 shall be deposited in the fund commonly known as the ''Sisk Act'' account.

(b) * * *

(3) Reimbursement for costs incurred in preparing a sale conducted under § 254.37 if the sale is a competitive sale.

Dated: February 14, 2020.

James E. Hubbard,

Undersecretary, Natural Resources and Environment.

[FR Doc. 2020–03639 Filed 2–25–20; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2018–0746; FRL–10005–80–OAR]

RIN 2060–AT85

National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review; Reopening of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; reopen comment period.

SUMMARY: On December 17, 2019, the Environmental Protection Agency (EPA) proposed a rule titled ''National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review.'' The EPA is reopening the comment period on the proposed rule that originally closed on February 18, 2020. The comment period will reopen until March 19, 2020, to allow additional time for stakeholders to review and comment on the proposal.

DATES: The public comment period for the proposed rule published in the **Federal Register** on December 17, 2019 (84 FR 69182), is being reopened. Written comments must be received on or before March 19, 2020.

ADDRESSES:

Comments. Submit your 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 through 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. Do not submit information that you consider to be Confidential Business Information (CBI) or otherwise protected through *https://www.regulations.gov/* or email. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA's Docket Center homepage at *https://www.epa.gov/dockets.*

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 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.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Tegan Lavoie, Sector Policies and Programs Division (E143–01), 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 assessment methodology, contact 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 information about the applicability of the NESHAP to a particular entity, contact 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: To allow for additional time for stakeholders to provide comments, the EPA has decided to reopen the public comment period until March 19, 2020.

Dated: February 20, 2020.

Panagiotis Tsirigotis,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 2020–03768 Filed 2–25–20; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 85, No. 38
Wednesday, February 26, 2020

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 20, 2020.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by March 27, 2020 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725–17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Business-Cooperative Service

Title: 7 CFR 4280–A, Rural Economic Development Loan and Grant Program.

OMB Control Number: 0570–0035.

Summary of Collection: The information collected is necessary to implement Section 313(b) (2) of the Rural Electrification Act of 1936 (7 U.S.C. 940(c)) that established a loan and grant program. Rural Business Service (RBS) mission is to improve the quality of life in rural America by financing community facilities and businesses, providing technical assistance and creating effective strategies for rural development. Under this program, zero interest loans and grants are provided to electric and telecommunications utilities that have borrowed funds from RUS. The purpose of the program is to encourage these electric and telecommunications utilities to promote rural economic development and job creation projects such as business start-up costs, business expansion, community development, and business incubator projects.

Need and Use of the Information: Various forms and narrative requirements will be used to collect the necessary information. RBS needs this collected information to select the projects it believes will provide the most long-term economic benefit to rural areas. The selection process is competitive and RBS has generally received more applications than it could fund. RBS also needs to make sure the funds are used for the intended purpose, and in the case of the loan, the funds will be repaid. RBS must determine that loans made from revolving loan funds established with grants are used for eligible purposes.

Description of Respondents: Not-for-profit Institutions; Business or other for-profit.

Number of Respondents: 120.

Frequency of Responses: Reporting: On Occasion, Annually.

Total Burden Hours: 4,781.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–03773 Filed 2–25–20; 8:45 am]
BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2020–0001]

Availability of an Environmental Assessment for Field Testing of a Vaccine for Use Against Bursal Disease and Marek's Disease

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment concerning authorization to ship for the purpose of field testing, and then to field test, an unlicensed Bursal Disease-Marek's Disease Vaccine, Serotype 3, Live Marek's Disease Vector. Based on the environmental assessment, risk analysis, and other relevant data, we have reached a preliminary determination that field testing this veterinary vaccine will not have a significant impact on the quality of the human environment. We are making these documents available to the public for review and comment.

DATES: We will consider all comments that we receive on or before March 27, 2020.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0001*.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2020–0001, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0001* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading

room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information regarding the environmental assessment or the risk analysis, or to request a copy of the environmental assessment or the risk analysis with confidential business information removed, contact Dr. Barbara J. Sheppard, Senior Staff Veterinary Medical Officer, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, 1920 Dayton Avenue, Ames, IA; phone (515) 337–6100, fax (301) 337–6120.

The alternative contact is Dr. Mathew Erdman, Senior Staff Veterinary Medical Officer, Center for Veterinary Biologics, Policy, Evaluation, and Licensing VS, APHIS, 1920 Dayton Avenue, P.O. Box 844, Ames, IA 50010; phone (515) 337–6100, fax (515) 337–6120.

SUPPLEMENTARY INFORMATION:

Background

Under the Virus-Serum-Toxin Act (21 U.S.C. 151 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) is authorized to promulgate regulations designed to ensure that veterinary biological products are pure, safe, potent, and efficacious before a veterinary biological product license may be issued. Veterinary biological products include viruses, serums, toxins, and analogous products of natural or synthetic origin, such as vaccines, antitoxins, or the immunizing components of microorganisms intended for the diagnosis, treatment, or prevention of diseases in domestic animals.

APHIS issues licenses to qualified establishments that produce veterinary biological products and issues permits to importers of such products. APHIS also enforces requirements concerning production, packaging, labeling, and shipping of these products and sets standards for the testing of these products. Regulations concerning veterinary biological products are contained in 9 CFR parts 101 to 124.

A field test is generally necessary to satisfy prelicensing requirements for veterinary biological products. Prior to conducting a field test on an unlicensed product, an applicant must obtain approval from APHIS, as well as obtain APHIS' authorization to ship the product for field testing.

To determine whether to authorize shipment and grant approval for the field testing of an unlicensed veterinary biological product, APHIS considers the potential effects of this product on the safety of animals, public health, and the environment. Based upon a risk analysis and other relevant data, APHIS has prepared an environmental assessment (EA) concerning the field testing of the following unlicensed veterinary biological product:

Requester: Zoetis Inc.

Product: Bursal Disease-Marek's Disease Vaccine, Serotype 3, Live Marek's Disease Vector.

Possible Field Test Locations: Alabama, Arkansas, Delaware, Georgia, Maryland, North Carolina, South Carolina, and Virginia, among others.

The above-mentioned vaccine consists of a live Marek's disease, serotype 3, turkey herpesvirus vector containing a gene from an infectious bursal disease virus. The vaccine has been shown to be effective for the vaccination of 18- to 19-day-old embryonated chicken eggs or healthy 1-day-old chickens against infectious bursal disease and Marek's disease.

APHIS' review and analysis of the potential environmental impacts associated with the proposed field tests are documented in detail in an EA entitled ''Environmental Assessment For Field Testing of a Bursal Disease—Marek's Disease Vaccine, Serotype 3, Live Marek's Disease Vector'' (December 2019). We are making this EA available to the public for review and comment. We will consider all comments that we receive on or before the date listed under the **DATES** section at the beginning of this notice.

The EA may be viewed on the *Regulations.gov* website or in our reading room (see **ADDRESSES** above for a link to *Regulations.gov* and information on the location and hours of the reading room). You may request paper copies of the EA by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the title of the EA when requesting copies.

The EA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Unless substantial issues with adverse environmental impacts are raised in response to this notice, APHIS intends to issue a finding of no significant impact (FONSI) based on the EA and authorize shipment of the above product for the initiation of field tests following the close of the comment period for this notice.

Because the issues raised by field testing and by issuance of a license are identical, APHIS has concluded that the EA that is generated for field testing would also be applicable to the proposed licensing action. Provided that the field test data support the conclusions of the original EA and the issuance of a FONSI, APHIS does not intend to issue a separate EA and FONSI to support the issuance of the associated product license, and would determine that an environmental impact statement need not be prepared. APHIS intends to issue a veterinary biological product license for this vaccine following completion of the field test provided no adverse impacts on the human environment are identified and provided the product meets all other requirements for licensing.

Authority: 21 U.S.C. 151–159; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this *21st* day of *February 2020.*

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–03830 Filed 2–25–20; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

U.S. Codex Office

Codex Alimentarius Commission: Meeting of the Codex Committee on Pesticide Residues

AGENCY: U.S. Codex Office, USDA.

ACTION: Notice of public meeting cancellation.

SUMMARY: On February 3, 2020, the U.S Codex Office, USDA published a notice that announced a public meeting on February 27, 2020 from 1:00–3:00 p.m. EST at the United States Environmental Protection Agency. The objective of the public meeting was to provide information and receive public comments on agenda items and draft United States (U.S.) positions to be discussed at the 52nd Session of the Codex Committee on Pesticide Residues (CCPR) of the Codex Alimentarius Commission, in Guangzhou, People's Republic of China, originally planned for March 30-April 4, 2020. The U.S. Codex Office is publishing this notice to announce that the 52nd Session of the CCPR has been postponed due to the outbreak of the Coronavirus (COVID–19) and that the public meeting to provide information and receive public

comments will be rescheduled at a later date. Please note that the documents related to the 52nd Session of the CCPR remain accessible via the internet at the following address: *www.codexalimentarius.org/meetings-reports/en.*

FOR FURTHER INFORMATION CONTACT: Marie Maratos, U.S. Codex Office, 1400 Independence Avenue SW, Room 4861, South Agriculture Building, Washington, DC 20250. Phone: (202) 690–4795, Fax: (202) 720–3157, Email: *Marie.Maratos@usda.gov.*

SUPPLEMENTARY INFORMATION:

Due to circumstances beyond the control of the USDA, the 52nd Session of the CCPR, which is hosted by the People's Republic of China, has been postponed due to the Coronavirus (COVID–19). The USDA is publishing this notice to announce that the public meeting in advance of the 52nd Session of CCPR has been cancelled and will be rescheduled at a later date. The rescheduled public meeting will be announced in the **Federal Register**.

Done at Washington, DC, on February 20, 2020.

Mary Lowe,

U.S. Manager for Codex Alimentarius.

[FR Doc. 2020–03824 Filed 2–25–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

U.S. Codex Office

Codex Alimentarius Commission: Meeting of the Codex Committee on Contaminants in Foods

AGENCY: U.S. Codex Office, Department of Agriculture.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The U.S Codex Office is sponsoring a public meeting on March 23, 2020. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States (U.S.) positions to be discussed at the 14th Session of the Codex Committee on Contaminants in Foods (CCCF) of the Codex Alimentarius Commission, in Utrecht, the Netherlands, April 20–24, 2020. The U.S. Manager for Codex Alimentarius and the Under Secretary, Office of Trade and Foreign Agricultural Affairs, recognize the importance of providing interested parties the opportunity to obtain background information on the 14th Session of the CCCF and to address items on the agenda.

DATES: The public meeting is scheduled for March 23, 2020, from 1:00 p.m. to 4:00 p.m. EST.

ADDRESSES: The public meeting will take place in Meeting Room 1A–001 at the Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration, 5001 Campus Drive, HFS–009, College Park, MD 20740–3835. Documents related to the 14th Session of the CCCF will be accessible via the internet at the following address: *http://www.codexalimentarius.org/meetings-reports/en.* Dr. Lauren Posnick Robin, U.S. Delegate to the 14th Session of the CCCF, invites U.S. interested parties to submit their comments electronically to the following email address: *henry.kim@fda.hhs.gov.*

Call-In-Number: If you wish to participate in the public meeting for the 14th Session of the CCCF by conference call, please register in advance by emailing *henry.kim@fda.hhs.gov.* To call in, you may use the call-in-number: 1–877–465–7975 and participant code 909 104 288. You may also join by Webex, using the link: Join Webex meeting; meeting number/access code: 909 104 288; and meeting password: mFuGm4Uv.

Registration: Attendees may register to attend the public meeting by emailing *henry.kim@fda.hhs.gov* by March 16, 2020. Early registration is encouraged because it will expedite entry into the building. The meeting will take place in a Federal building. Attendees should bring photo identification and plan for adequate time to pass through the security screening systems. Attendees who are not able to attend the meeting in person, but who wish to participate, may do so by phone or Web, as discussed above.

FOR FURTHER INFORMATION CONTACT: Henry Kim, Ph.D., FDA, at *henry.kim@fda.hhs.gov,* or the U.S. Codex office at *uscodex@usda.gov,* (202) 205–7760.

SUPPLEMENTARY INFORMATION:

Background

Codex was established in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure fair practices in the food trade.

The CCCF is responsible for

(a) Establishing or endorsing permitted maximum levels and where necessary, revising existing guideline levels, for contaminants and naturally occurring toxicants in food and feed;

(b) Preparing priority lists of contaminants and naturally occurring toxicants for risk assessment by the joint FAO/WHO Expert Committee on Food Additives (JEFCA).

(c) Considering and elaborating methods of analysis and sampling for the determination of contaminants and naturally occurring toxicants in food and feed;

(d) Considering and elaborating standards or codes of practice for related subjects; and

(e) Considering other matters assigned to it by the Commission in relation to contaminants and naturally occurring toxicants in food and feed.

The Committee is chaired by the Netherlands.

Issues To Be Discussed at the Public Meeting

The following items on the Agenda for the 14th Session of the CCCF will be discussed during the public meeting:

- Matters referred to CCCF by the Codex Alimentarius Commission and/or its subsidiary bodies
- Matters of interest arising from FAO and WHO (including JECFA)
- Matters of interest arising from other international organizations
- Draft maximum levels (MLs) for cadmium for chocolates containing or declaring <30% total cocoa solids on a dry matter basis
- Proposed draft MLs for cadmium in chocolate and chocolate products containing or declaring ≥30% to <50% total cocoa solids on a dry matter basis; and cocoa powder (100% total cocoa solids on a dry matter basis)
- Proposed draft Code of Practice (COP) for the prevention and reduction of cadmium contamination in cocoa beans
- Proposed draft MLs for lead in selected commodities for inclusion in the GSCTFF (CXC 193–1995)
- Proposed draft revision of the Code of Practice for the prevention and reduction of lead contamination in foods (CXC 56–2004)
- Proposed draft MLs for total aflatoxins in certain cereals and cereal-based products including foods for infants and young children
- MLs for methylmercury in additional fish species
- MLs for HCN in cassava and cassava-based products and COP for the prevention and reduction of mycotoxin contamination in cassava and cassava-based products
- MLs for cadmium and lead in quinoa

- Radioactivity in feed and food (including drinking water) in normal circumstances
- General guidance on data analysis for ML development and for improved data collection
- Approach to identify the need for revision of standards and related text developed by CCCF
- Forward work-plan for CCCF
  - Review of staple food-contaminant combinations for future work of CCCF
  - Project plan for the evaluation of implementation of COPs of CCCF
- Priority list of contaminants and naturally occurring toxicants proposed for evaluation by JECFA
- Other business and future work

Public Meeting

At the public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to Henry Kim at *henry.kim@fda.hhs.gov.*

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, the U.S. Codex Office will announce this **Federal Register** publication on-line through the USDA Codex web page located at: *http://www.usda.gov/codex,* a link that also offers an email subscription service providing access to information related to Codex. Customers can add or delete their subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How to File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative. Send your completed complaint form or letter to USDA by mail, fax, or email.

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410.

Fax: (202) 690–7442, Email: *program.intake@usda.gov.*

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, on February 20, 2020.

Mary Lowe,

U.S. Manager for Codex Alimentarius.

[FR Doc. 2020–03823 Filed 2–25–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Colorado Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of planning meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that a meeting of the Colorado Advisory Committee to the Commission will convene by conference call at 12:00 p.m. (MST) on Friday, March 6, 2020. The purpose of the meeting is to discuss next steps for its next civil rights project.

DATES: Friday, March 6, 2020, at 12:00 p.m. (MST).

Public Call-In Information: Conference call number: 1–800–367–2403 and conference call ID: 4470089.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor, *ebohor@usccr.gov* or by phone at 202–381–8915.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call number: 1–800–367–2403 and conference call ID: 4470089.

Please be advised that, before being placed into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number provided.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call number: 1–800–367–2403 and conference call 4470089.

Members of the public are invited to make statements during the open comment period of the meeting or email written comments. Written comments may be emailed to Evelyn Bohor at *ebohor@usccr.gov* approximately 30 days after each scheduled meeting. Persons who desire additional information may also contact Evelyn Bohor at (202) 381–8915.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://gsageo.force.com/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzksAAA;* click the ''Meeting Details'' and ''Documents'' links. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact Evelyn Bohor at the above phone number or email address.

Agenda: Friday, March 6, 2020; 12:00 p.m. (MST)

I. Roll Call
II. Project Planning
III. Other Business
IV. Open Comment
V. Adjournment

Dated: February 21, 2020

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–03876 Filed 2–25–20; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–32–2020]

Foreign-Trade Zone 27—Boston, Massachusetts, Application for Subzone, Waters Technologies Corporation, Milford, Massachusetts

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Massachusetts Port Authority, grantee of FTZ 27, requesting subzone status for the facility of Waters Technologies Corporation, located in Milford, Massachusetts. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on February 18, 2020.

The proposed subzone (44.66 acres) is located at 34 Maple Street and 5 Technology Drive, Milford. A notification of proposed production activity has been submitted and is being processed under 15 CFR 400.37 (Doc. B–76–2019). The proposed subzone would be subject to the existing 129-acre activation limit of FTZ 27.

In accordance with the Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is April 6, 2020. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to April 21, 2020.

A copy of the application will be available for public inspection in the ''Reading Room'' section of the Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: February 18, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–03816 Filed 2–25–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–67–2019]

Foreign-Trade Zone (FTZ) 26—Atlanta, Georgia, Authorization of Production Activity, Kubota North America Corporation (Agricultural and Specialty Vehicles), Jefferson and Gainesville, Georgia

On October 18, 2019, Kubota North America Corporation submitted a notification of proposed production activity to the FTZ Board for its facilities within FTZ 26, in Jefferson and Gainesville, Georgia.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (84 FR 57844–57845, October 29, 2019). On February 18, 2020, the applicant was notified of the FTZ Board's decision that no further review of the proposed activity is warranted at this time. The FTZ Board authorized the production activity described in the notification, subject to the FTZ Act and the Board's regulations, including Section 400.14. Bonnet bands must be admitted in privileged foreign status (19 CFR 146.41).

Dated: February 18, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–03813 Filed 2–25–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Minnesota, et al.; Notice of Decision on Application for Duty-Free Entry of Scientific Instruments

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Ave. NW, Washington, DC.

Docket Number: 19–012. Applicant: University of Minnesota, 116 Union Street SE, Minneapolis, MN 55455. Instrument: Photomultiplier tube. Manufacturer: Hainan Zhanchuange Photonics Technology, China. Intended Use: See notice at 85 FR 3892, January 23, 2020. Comments: None received. Decision: Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of order. Reasons: The instrument will be used to study the properties of neutrino oscillation. Neutrinos are very hard to detect and require several thousand tonnes of target material to have any chance of seeing the neutrino interactions. The CHIPS detector is a pilot project which aims to reduce the cost of neutrino experimentation by around a factor of fifty. This is done by reducing the structural engineering and installing the detector in a lake, where students can exploit the buoyancy of the used materials. Photomultipliers are highly sensitive light detectors able to detect light at the single photon level; these will be installed in a large 25 meter diameter cylindrical detector filled with water. This experiment is built employing several physics graduate students and provides work experience for many physics and engineering undergraduates.

Docket Number: 19–013. Applicant: University of Minnesota, 116 Union Street SE, Minneapolis, MN 55455. Instrument: Photomultiplier tube. Manufacturer: Hainan Zhanchuange Photonics Technology, China. Intended Use: See notice at 85 FR 3892, January 23, 2020. Comments: None received. Decision: Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of order. Reasons: The instrument will be used to study the properties of neutrino oscillation. Neutrinos are very hard to detect and require several thousand tonnes of target material to have any chance of seeing the neutrino interactions. The CHIPS detector is a pilot project for which aims to reduce the cost of neutrino experimentation by around a factor of fifty. This is done by reducing the structural engineering and installing the detector in a lake, where students can exploit the buoyancy of the used materials. Photomultipliers are highly sensitive light detectors able to detect light at the single photon level; these will be installed in a large 25 meter diameter cylindrical detector filled with water. This experiment is built employing several physics graduate students and provides work experience for many physics and engineering undergraduates.

Dated: February 20, 2020.

Gregory W. Campbell,

Director, Subsidies Enforcement, Enforcement and Compliance.

[FR Doc. 2020–03814 Filed 2–25–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–845]

Certain Hot-Rolled Steel Flat Products From Brazil: 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 (AD) order on certain hot-rolled steel flat products from Brazil for the period of review (POR) October 1, 2018 through September 30, 2019,

based on the timely withdrawal of the request for review.

DATES: Applicable February 26, 2020.

FOR FURTHER INFORMATION CONTACT: William Langley, 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) 482–3861.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2019, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on certain hot-rolled steel flat products (hot-rolled steel) from Brazil for the POR of October 1, 2018 through September 30, 2019.[1] United States Steel Corporation, Steel Dynamics, Inc., and SSAB Enterprises, LLC (collectively, the domestic interested parties) timely filed a request for administrative review of the following Brazilian exporters/producers of hot-rolled steel: AG Royce Metal Marketing; Aperam South America; Companhia Siderurgica Nacional; Companhia Siderurgica Suape; Cummins Inc.; Erico Incorporated; Gautier Steel Limited; Gerdau Acominas S.A.; Mahle Engine Components USA Inc.; Mahle Metal Leve S.A.; Marcegaglia do Brasil; Modine do Brasil Sistemas Termicos; Nvent do Brasil Eletrometalurgica Ltda.; Nvent Erico; Optimus Steel Inc.; Ternium Brasil Ltda.; Ternium Mexico S.A. de C.V.; and Usinas Siderurgicas de Minas Gerais S.A. (Usiminas), in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b).[2]

On December 11, 2019, pursuant to these requests and in accordance with 19 CFR 351.221(c)(1)(i), Commerce published a notice initiating an administrative review of the antidumping order on hot-rolled steel from Brazil with respect to all 18 companies for which a review was requested.[3] On February 10, 2020, the domestic interested parties withdrew their request for an administrative review with respect to all of the companies for which they had requested a review.[4]

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party or parties that requested a review withdraws the request within 90 days of the publication date of the notice of initiation of the requested review. The domestic interested parties withdrew their request for review of all of the Brazilian producers/exporters of hot-rolled steel for which they had requested an administrative review, within 90 days of the publication date of the notice of initiation. No other parties requested an administrative review of the order. Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review in its entirety.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of hot-rolled steel from Brazil. Antidumping duties shall be assessed at rates equal to the cash deposit 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 the date of publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.42(f)(2) to file a certificate regarding the reimbursement of AD 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 AD duties occurred and the subsequent assessment of doubled AD duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to all 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. Timely written notification of the return/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.

This notice is issues and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: February 20, 2020,

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–03815 Filed 2–25–20; 8:45 am]

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[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 84 FR 52068 (October 1, 2019).

[2] *See* domestic interested parties' letter, ''Hot-Rolled Steel Flat Products from Brazil: Request for Administrative Review of Antidumping Duty Order,'' dated October 31, 2019.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 67712 (December 11, 2019).

[4] *See* domestic interested parties' letter, ''Hot-Rolled Steel Flat Products from Brazil: Withdrawal of Request for Administrative Review of Antidumping Duty Order,'' dated February 10, 2020.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–052]

Certain Hardwood Plywood Products From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and/or exporters of certain hardwood plywood products (hardwood plywood) from the People's Republic of China (China) during the period of review (POR) April 25, 2017 through December 31, 2018.

DATES: Applicable February 26, 2020.

FOR FURTHER INFORMATION CONTACT: Annathea Cook, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0250.

SUPPLEMENTARY INFORMATION:

Background

On October 11, 2019, Commerce published the *Preliminary Results* of this administrative review.[1] No party commented on the *Preliminary Results.* Accordingly, Commerce has not modified its analysis from the *Preliminary Results,* and no decision memorandum accompanies this **Federal Register** notice. Commerce conducted this review in accordance with section

[1] *See Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2017–2018,* 84 FR 54844 (October 11, 2019) (*Preliminary Results*).

751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise subject to this order is hardwood and decorative plywood, and certain veneered panels.[2] For the purposes of this proceeding, hardwood and decorative plywood are described as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers of plies of wood veneers and a core, with the face and/or back veneer made of nonconiferous wood (hardwood) or bamboo. For a complete description of the scope of the order, *see* the Preliminary Decision Memorandum.[3]

Methodology

For each of the subsidy programs we found to be countervailable, we determined that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[4]

In making these findings, Commerce relied on facts available and, because we found that two companies selected as mandatory respondents for individual examination (Jiangsu High Hope Arser Co., Ltd. (High Hope) and Zhejiang Dehua TB Import & Export Co., Ltd (Zhejiang Dehua)), as well as the Government of China, did not act to the best of their abilities to respond to Commerce's requests for information, we drew an adverse inference, where appropriate, in selecting from among the facts otherwise available.

As no party submitted comments on the methodology used in calculating the adverse facts available subsidy rates assigned in the *Preliminary Results,* Commerce has made no adjustments to its determination that High Hope and Zhejiang Dehua did not cooperate to the best of their abilities to comply with Commerce's request for information. Accordingly, we continue to determine that it is appropriate to apply facts otherwise available with adverse inferences, in accordance with sections 776(a) and (b) of the Act. For details regarding the issues raised in this proceeding, including Commerce's determination to apply adverse facts available to High Hope and Zhejiang Dehua, *see* the Preliminary Decision Memorandum.[5]

Additionally, due to the absence of reviewable entries, in our *Preliminary Determination,* we preliminarily rescinded this review with respect to the following companies: Happy Wood Industrial Group Co., Ltd; Jiangsu Sunwell Cabinetry Co., Ltd.; Linyi Bomei Furniture Co., Ltd.; Pingyi Jinniu Wood Co., Ltd.; Qingdao Top P&Q International Corp.; SAICG International Trading Co., Ltd.; Shandong Huaxin Jiasheng Wood Co., Ltd.; Shandong Jinhua International Trading Co., Ltd.; and Xuzhou Amish Import & Export Co., Ltd.[6] There is no additional record evidence that calls into question the preliminary decision to rescind this review for the above-referenced companies. Accordingly, we continue to find that it is appropriate to rescind this review with respect to each of these companies.

Final Results

The final net countervailable subsidy rates are as follows:

Exporter/producer	Net subsidy rate *ad valorem* (percent)
Zhejiang Dehua TB Import & Export Co., Ltd	194.90
Jiangsu High Hope Arser Co., Ltd	194.90

Disclosure

We described the subsidy rate calculations, which were based on adverse facts available, in the Preliminary Decision Memorandum.[7] As noted above, there are no changes to our calculations. Thus, no additional disclosure is necessary for this final determination.

Assessment Rates

Consistent with section 751(a)(1) of the Act, and 19 CFR 351.212(b)(2), Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries. Commerce intends to issue appropriate assessment instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

Pursuant to section 751(a)(2)(C) of the Act, Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amount indicated above on shipments of subject merchandise from the above-named companies entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. For all non-reviewed firms, we will instruct CBP to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the 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 the terms of an APO is a violation subject to sanction.

Notification to Interested Parties

These final results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 10, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–03786 Filed 2–25–20; 8:45 am]

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[2] *See Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order,* 83 FR 513 (January 4, 2018).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review: Certain Hardwood Plywood Products from the People's Republic of China; 2017–2018,'' dated October 3, 2019 (Preliminary Decision Memorandum).

[4] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution, section 771(5)(E) of the Act regarding benefit, and section 771(5A) of the Act regarding specificity.

[5] *See* Preliminary Decision Memorandum.

[6] *Id.*

[7] *See* Preliminary Decision Memorandum at 13–17.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XR091]

Marine Mammals; File No. 23273

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Michelle Shero, Ph.D., Woods Hole Oceanographic Institution, 266 Woods

Hole Road, Woods Hole, MA 02543, has applied in due form for a permit to conduct research on Weddell seals (*Leptonychotes weddellii*).

DATES: Written, telefaxed, or email comments must be received on or before March 27, 2020.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 23273 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov*. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Sara Young or Carrie Hubard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant requests a permit to take Weddell seals to assess the nature and underlying mechanisms that contribute to the significant heterogeneity observed in reproductive rates and animal fitness that exist within wild animal populations. This project will take a two-stage approach to understanding the causes of observed differences in reproductive output by comparing high- and low-quality females' energy dynamics, aerobic capacity and dive behavior, and fertility (genetics). To achieve project goals, a cohort of 26 female-pup pairs (13 high-quality, 13 low-quality) in Erebus Bay, Antarctica will undergo health assessments across the austral summer. Dive recorders will also be deployed during this time, and instruments will be recovered after the winter (gestational) foraging period. An estimated 52 animals may be taken (although additional animals may sampled if animals do not return to the expected location for recapture) by capture and restraint for drug administration, biological sampling, blood sampling, instrumentation, marking, measuring, ultrasound, and weighing. Up to 36,100 Weddell seals may also be taken by harassment through counting surveys, collection of molt, scat, spew, urine, and unmanned aircraft systems for photogrammetry. Samples collected during research and salvaged from carcasses may be imported or exported. Up to five mortalities of Weddell seal females and five Weddell seal pups are requested annually, not to exceed 15 mortalities across the duration of the permit. Up to 20 crabeater seals (*Lobodon carcinophagus*) may also be incidentally harassed during research activities.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: February 21, 2020.

Julia Marie Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–03846 Filed 2–25–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA054]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Tilefish Monitoring Committee will hold a meeting.

DATES: The meeting will be held on Tuesday, March 24, 2020, beginning at 9 a.m. and conclude by 1 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held via webinar with a telephone-only connection option.

Council Address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331 or on their website at *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is for the Tilefish Monitoring Committee to recommended annual catch limits, trip limits, discards and other management measures for the blueline and golden tilefish fisheries to the Scientific and Statistical Committee.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: February 21, 2020.

Tracey L. Thompson,

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

[FR Doc. 2020–03852 Filed 2–25–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2020–0010; OMB Control Number 0704–0477]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS); Contractor Qualifications

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed revision of an approved information collection requirement.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, DoD announces the proposed revision and extension of

a public information collection requirement and seeks public comment on the provisions thereof. *DoD invites comments on:* Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; the accuracy of the estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use through May 31, 2020. DoD proposes that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD will consider all comments received by April 27, 2020.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0477, using any of the following methods:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

○ *Email: osd.dfars@mail.mil.* Include OMB Control Number 0704–0477 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Kimberley Bass, OUSD(A&S)DPAP(DARS), 3060 Defense Pentagon, Room 3B941, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberley Bass, at 571–372–6174.

SUPPLEMENTARY INFORMATION: *Title, Associated Form, and OMB Number:* Defense Federal Acquisition Regulation Supplement (DFARS) Part 209, Contractor Qualifications, and related provision at 252.209; OMB Control Number 0704–0477.

Needs and Uses: The information collection under OMB Control Number 0704–0477 pertains to the requirement for offerors to submit a mitigation plan when there is an organizational conflict of interest that can be resolved through mitigation in order to address organizational conflicts of interest in major defense acquisition programs. DFARS 252.209–7008, Notice of Prohibition Relating to Organizational Conflict of Interest—Major Defense Acquisition Program requires an offeror to submit a mitigation plan if requesting an exemption from the statutory limitation on future contracting.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Number of Respondents: 20.

Responses per Respondent: Approximately 3.

Annual Responses: 60.

Average Burden per Response: 40 hours.

Annual Burden Hours: 2,400.

Frequency: On occasion.

Summary of Information Collection

This information collection includes requirements relating to DFARS subpart 209.5, Organizational and Consultant Conflicts of Interest, and the related provision at DFARS 252.209–7008, Notice of Prohibition Relegating to Organizational Conflict of Interest—Major Defense Acquisition Program. DFARS subpart 209.5 implements section 207 of the Weapons system Acquisition Reform Act of 2009 (Pub. L. 111–23). The provision at DFARS 252.209–7008, paragraph (d), requires an offeror to submit a mitigation plan if requesting an exemption from the statutory limitation on future contracting.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2020–03890 Filed 2–25–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Uniform Formulary Beneficiary Advisory Panel; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Uniform Formulary Beneficiary Advisory Panel (UFBAP) will take place.

DATES: Open to the public Wednesday, April 1, 2020, from 9:00 a.m. to 12:00 p.m.

ADDRESSES: The address of the open meeting is the Naval Heritage Center Theater, 701 Pennsylvania Avenue NW, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Colonel Paul J. Hoerner, U.S. Air Force, 703–681–2890 (Voice), None (Facsimile), *dha.ncr.j-6.mbx.baprequests@mail.mil* (Email). Mailing address is 7700 Arlington Boulevard, Suite 5101, Falls Church, VA 22042–5101. Website: *https://health.mil/bap.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

The UFBAP will review and comment on recommendations made to the Director of the Defense Health Agency, by the Pharmacy and Therapeutics Committee, regarding the Uniform Formulary.

Purpose of the Meeting: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the UFBAP will take place.

Agenda: Wednesday, April 1, 2020, from 9:00 am to 12:00 pm

1. Sign-In
2. Welcome and Opening Remarks
3. Scheduled Therapeutic Class Reviews (Comments will follow each agenda item)
   a. Pain Agents—Non-Steroidal Anti-Inflammatory Drug (NSAID)
   b. Pain Agents—Topical Pain
4. Newly Approved Drugs Review
5. Pertinent Utilization Management Issues
6. UFBAP Discussions and Vote

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, this meeting is open to the public, subject to the availability of space. Seating is limited and will be provided to the first 220 people. All persons must sign in legibly.

Written Statements: Pursuant to 41 CFR 102–3.140, and section 10(a)(3) of FACA, interested persons or organizations may submit written statements to the UFBAP about its mission and/or the agenda to be addressed in this public meeting. Written statements should be submitted to the UFBAP's Designated Federal Officer (DFO). The DFO's contact information can be found in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Written comments or statements must be received by the UFBAP's DFO at least five (5) business days prior to the meeting so they may

be made available to the UFBAP for its consideration prior to the meeting. The DFO will review all submitted written statements and provide copies to all UFBAP members.

Dated: February 20, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03788 Filed 2–25–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2019–OS–0133]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel & Readiness, DoD.

ACTION: 30-day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 27, 2020.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION: *Title; Associated Form; and OMB Number:* Data for Payment of Retired Personnel to Include Eligible Family Members; DD Form 2656, DD Form 2656–1, DD Form 2656–2, DD Form 2656–5, DD Form 2656–6, DD Form 2656–7, DD Form 2656–8, DD Form 2656–10; OMB Control Number 0704–0569.

Type of Request: Renewal.

Needs and Uses: DD Forms 2656 ''Data for Payment of Retired Pay,'' 2656–1 ''Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage,'' 2656–2 ''Survivor Benefit Plan (SBP) Termination Request,'' 2656–5 ''Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate,'' 2656–6 ''Survivor Benefit Plan Election Change Certificate,'' 2656–7 ''Verification for Survivor Annuity,'' 2656–8 ''Survivor Benefit Plan (SBP) Automatic Coverage Fact Sheet,'' 2656–10 ''Survivor Benefit Plan (SBP) Former Spouse Request for Deemed Election,'' are used by the Department of Defense to collect information regarding a uniformed service member's military retired pay and his or her election to participate in and designate beneficiaries under the Survivor Benefit Plan (SBP or RCSBP), as well as elections of the eligible family member(s) or Insurable Interest Beneficiary to receive coverage under Survivor Benefit Plan (SBP or RCSBP).

Affected Public: Individuals and Houses.

Frequency: As required.

DD Form 2656 ''Data for Payment of Retired Personnel'':

Number of Respondents: 66,800.

Responses per Respondent: 1.

Annual Responses: 66,800.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 16,700.

DD Form 2656–1 ''Survivor Benefit Plan Election Statement for Former Spouse Coverage'':

Number of Respondents: 9,500.

Responses per Respondent: 1.

Annual Responses: 9,500.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 2,375.

DD Form 2656–2 ''Survivor Benefit Plan Termination Request'':

Number of Respondents: 7,500.

Responses per Respondent: 1.

Annual Responses: 7,500.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 1,875.

DD Form 2656–5 ''Reserve Component Survivor Benefit Plan Election Certificate'':

Number of Respondents: 5,900.

Responses per Respondent: 1.

Annual Responses: 5,900.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 1,475.

DD Form 2656–6 ''Survivor Benefit Plan Election Change Certificate'':

Number of Respondents: 16,900.

Responses per Respondent: 1.

Annual Responses: 16,900.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 4,225.

DD Form 2656–7 ''Verification for Survivor Annuity'':

Number of Respondents: 9,600.

Responses per Respondent: 1.

Annual Responses: 9,600.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 2,400.

DD Form 2656–8 ''Survivor Benefit Plan—Automatic Coverage Fact Sheet'':

Number of Respondents: 5,500.

Responses per Respondent: 1.

Annual Responses: 5,500.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 1,375.

DD Form 2656–10 ''Survivor Benefit Plan/Reserve Component Benefit Plan Request for Deemed Election'':

Number of Respondents: 6,250.

Responses per Respondent: 1.

Annual Responses: 6,250.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 1,562.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: February 21, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03857 Filed 2–25–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Policy Board; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Policy, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Policy Board (DPB) will take place.

DATES: Closed to the public Tuesday, March 3, 2020 from 8:00 a.m. to 5:00 p.m. and Wednesday, March 4, 2020 from 8:00 a.m. to 12:15 p.m.

ADDRESSES: The closed meeting will be held at The Pentagon, 2000 Defense Pentagon, Washington, DC 20301–2000.

FOR FURTHER INFORMATION CONTACT: Ms. Monica Bacheler, (703) 571–9234 (Voice), 703–697–8606 (Facsimile), *monica.t.bacheler.civ@mail.mil* (Email). Mailing address is 2000 Defense Pentagon, Washington, DC 20301–2000.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Department of Defense (DoD) and the Designated Federal Officer, the Defense Policy Board was unable to provide public notification required by 41 CFR 102–3.150(a) concerning the meeting on March 3 through 4, 2020 of the Defense Policy Board. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C., App.), the Government in the Sunshine Act (''the Sunshine Act'') (5 U.S.C. 552b), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: To obtain, review, and evaluate classified information related to the DPB's mission to advise on (a) issues central to strategic DoD planning; (b) policy implications of U.S. force structure and force modernization and on DoD's ability to execute U.S. defense strategy; (c) U.S. regional defense policies; and (d) other research and analysis of topics raised by the Secretary of Defense, the Deputy Secretary of Defense, or the Under Secretary of Defense for Policy.

Agenda: On March 3–4, 2020 the DPB will have classified discussions on national security implications related to Sino-Russian alignment. Topics and speakers include (1) an intel community baseline from National Intelligence Officers for Military Issues, East Asia, and Russia and Eurasia; (2) policy perspectives from the Office of the Deputy Assistant Secretary of Defense for China and the Deputy Assistant Secretary of Defense for Russia, Ukraine, and Eurasia offices within the Office of the Secretary of Defense for Policy; (3) perspectives from the Russia Strategic Initiative and the China Strategic Focus Group; (4) perspectives from Mr. Jim Dobbins, RAND and Mr. Richard Weitz, the Hudson Institute; (5) insights from the Office of the Director for Net Assessment; (6) representatives from the United States Departments of Commerce and Treasury; (7) Defense Policy Board member deliberations on Sino-Russia; and (8) a Defense Policy Board member outbrief to the Secretary of Defense on their recommendations regarding Sino-Russian alignment.

Meeting Accessibility: In accordance with section 10(d) of the FACA and 41 CFR 102–3.155, the DoD has determined that this meeting shall be closed to the public. The Under Secretary of Defense (Policy), in consultation with the DoD FACA Attorney, has determined in writing that this meeting be closed to the public because the discussions fall under the purview of Section 552b(c)(1) of the Sunshine Act and are so inextricably intertwined with unclassified material that they cannot reasonably be segregated into separate discussions without disclosing classified material.

Written Statements: In accordance with Section 10(a)(3) of the FACA and 41 CFR 102–3.105(j) and 102–3.140(c), the public or interested organizations may submit written statements to the membership of the DPB at any time regarding its mission or in response to the stated agenda of a planned meeting. Written statements should be submitted to the DPB's Designated Federal Officer (DFO), which is listed in this notice or can be obtained from the GSA's FACA Database—*http://www.facadatabase.gov/.* Written statements that do not pertain to a scheduled meeting of the DPB may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than two business days prior to the meeting in question. The DFO will review all submitted written statements and provide copies to all members.

Dated: February 20, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03798 Filed 2–25–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2019–OS–0123]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 27, 2020.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: *Angela James, 571–372–7574, or whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Automated Repatriation Reporting System; DD Form 2585; OMB Control Number 0704–0334.

Type of Request: Extension.

Number of Respondents: 100.

Responses per Respondent: 1.

Annual Responses: 100.

Average Burden per Response: 20 Minutes.

Annual Burden Hours: 33 Hours.

Needs and Uses: The information collection requirement is necessary for personnel accountability of all evacuees, regardless of nationality, who are processed through designated Repatriation Centers throughout the United States. The information obtained from DD Form 2585 is entered into an automated system; a series of reports is accessible to DoD Components, Federal and State agencies and the Red Cross, as required.

Affected Public: Individuals or Households.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: February 21, 2020.

Aaron T. Siegel,

Alternate OSD **Federal Register** *Liaison Officer, Department of Defense.*

[FR Doc. 2020–03855 Filed 2–25–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Guidance Portal

AGENCY: Office of the General Counsel, Department of Education.

ACTION: Notice.

SUMMARY: Through this notice, the Department announces the existence and location of its guidance portal. This guidance portal is meant to make it easy for the public and our stakeholders to locate the Department's guidance documents through the links within the guidance portal.

FOR FURTHER INFORMATION CONTACT: Levon Schlichter, U.S. Department of Education, Office of the General Counsel, 400 Maryland Ave. SW, room 6E235, Washington, DC 20202. Telephone: (202) 453–6387. Email: *Levon.Schlichter@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Pursuant to Executive Order 13891 and the Office of Management and Budget's implementing guidance at *https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf,* the Department publishes this notice of the existence of its guidance portal at *https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html.* The Department initially developed this guidance portal in July 2019 to implement recommendation number two from the House Oversight and Government Reform Committee's Majority Staff Report recommendation.[1] As mentioned within the guidance portal, guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract. In accordance with E.O. 13891, the Department will not retain in effect any guidance document without including it in this guidance portal, nor shall the Department, in the future, issue a guidance document without including it in this guidance portal.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* Braille, large print, audiotape, or compact disc) on request to the 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.

Reed D. Rubinstein,

Principal Deputy General Counsel. delegated the Authority and Duties of the General Counsel.

[FR Doc. 2020–03811 Filed 2–25–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2019–ICCD–0151]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; GEPA Section 427 Guidance for All Grant Applications

AGENCY: Office of the Secretary (OS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before March 27, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0151. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave., SW, LBJ, Room 6W–208B, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Alfreida Pettiford, 202–245–6110.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: GEPA Section 427 Guidance for All Grant Applications.

OMB Control Number: 1894–0005.

[1] *https://republicans-oversight.house.gov/report/committee-report-scrutinizes-federal-regulatory-guidance-practices/.*

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 13,497.

Total Estimated Number of Annual Burden Hours: 20,219.

Abstract: On October 20, 1994, the Improving America's Schools Act, Public Law 103–382 (The Act), became law. The Act added a provision to the General Education Provisions Act (GEPA). Section 427 of GEPA requires an applicant for assistance under Department programs to develop and describe in the grant application the steps it proposes to take to ensure equitable access to, and equitable participation in, its proposed project for students, teachers, and other program beneficiaries with special needs. The current GEPA Section 427 guidance for discretionary grant applications and formula grant applications has approval through April 30, 2020. The Department is requesting an extension of this approval.

Dated: February 20, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2020–03800 Filed 2–25–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0158]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Student Assistance General Provisions—Satisfactory Academic Progress Policy

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before March 27, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0158. 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 Beth Grebeldinger, 202–377–4018.

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: Student Assistance General Provisions—Satisfactory Academic Progress Policy.

OMB Control Number: 1845–0108.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Individuals or Households; Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 33,524,675.

Total Estimated Number of Annual Burden Hours: 1,468,591.

Abstract: The Department of Education (the Department) is making this request is for an extension of the current approval of the policies and procedures for determining satisfactory academic progress (SAP) as required in Section 484 of the Higher Education Act of 1965, as amended (HEA). These regulations identify the policies and procedures to ensure that students are making satisfactory academic progress in their program at a pace and a level to receive or continue to receive Title IV, HEA program funds. If there is lapse in progress, the policy must identify how the student will be notified and what steps are available to a student not making satisfactory academic progress toward the completion of their program, and under what conditions a student who is not making satisfactory academic progress may continue to receive Title IV, HEA program funds.

Dated: February 21, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2020–03874 Filed 2–25–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2020–SCC–0039]

Agency Information Collection Activities; Comment Request; Impact Evaluation To Inform the Teacher and School Leader Incentive Program

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before April 27, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2020–SCC–0039. 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–208B, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Thomas Wei, 646–428–3892.

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: Impact Evaluation to Inform the Teacher and School Leader Incentive Program.

OMB Control Number: 1850–0950.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 1,995.

Total Estimated Number of Annual Burden Hours: 802.

Abstract: This study will meet the Congressional mandate to evaluate the Teacher and School Leader Incentive Program (TSL) by including two evaluation components: (1) Descriptive study of Teacher and School Leader Incentive Program (TSL) grantees', and (2) Implementation, impact, and cost-effectiveness study of designating one or more ''teacher leaders'' as coaches in schools. It will provide updated information about the TSL program to help ED understand which strategies grantees are using and how effective a commonly-used strategy—designating teacher leaders to provide coaching to other teachers—is in improving educator effectiveness and ultimately student achievement.

Dated: February 20, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2020–03808 Filed 2–25–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2020–SCC–0038]

Agency Information Collection Activities; Comment Request; High School and Beyond 2020 (HS&B:20) Base-Year Full-Scale Study Data Collection

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before April 27, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2020–SCC–0038. 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–208B, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kashka Kubzdela, 202–245–6347 or email *NCES.Information.Collections@ed.gov.*

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: High School and Beyond 2020 (HS&B:20) Base-Year Full-Scale Study Data Collection.

OMB Control Number: 1850–0944.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 120,761.

Total Estimated Number of Annual Burden Hours: 49,477.

Abstract: The High School and Beyond 2020 study (HS&B:20) will be the sixth in a series of longitudinal studies at the high school level conducted by the National Center for Education Statistics (NCES), within the Institute of Education Sciences (IES) of the U.S. Department of Education. HS&B:20 will follow a nationally-representative sample of ninth grade students from the start of high school in the fall of 2020 to the spring of 2024 when most will be in twelfth grade. The study sample will be freshened in 2024 to create a nationally representative sample of twelfth-graders. A high school transcript collection and additional follow-up data collections beyond high school are also planned. The NCES secondary longitudinal studies examine issues such as students' readiness for high school; the risk factors associated with dropping out of high school; high school completion; the transition into postsecondary education and access/choice of institution; the shift from school to work; and the pipeline into science, technology, engineering, and mathematics (STEM). They inform education policy by tracking long-term trends and elucidating relationships among student, family, and school characteristics and experiences. HS&B:20 will follow the Middle Grades Longitudinal Study of 2017/18 (MGLS:2017) which followed the Early Childhood Longitudinal Study, Kindergarten Class of 2010–11 (ECLS–K:2011), thereby allowing for the study of all transitions from elementary school through high school and into higher education and/or the workforce. HS&B:20 will include surveys of students, parents, students' math teachers, counselors, and administrators, plus a student assessment in mathematics and reading and a brief hearing and vision test. In preparation for the HS&B:20 base-year full scale study, scheduled to take place in the fall of 2020, the request to conduct the HS&B:20 base year field test data collection and the base year full scale sampling and state, school district, school, and parent recruitment activities was approved in December 2018, with the latest update approved in December 2019 (OMB# 1850–0944 v.1–5). This request is to conduct the base-year full scale study data collection, scheduled to begin in August 2020. A new draft of Appendix B that will contain a Spanish translation of the Student Questionnaire will be added by April 20, 2020.

Dated: February 20, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2020–03799 Filed 2–25–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Investigation and Record Requests

AGENCY: Office of the General Counsel, Department of Education.

ACTION: Notice.

SUMMARY: The Department publishes letters, dated February 11, 2020, notifying Yale University and Harvard University of investigations related to the universities' reports of defined gifts and contracts, including restricted and conditional gifts or contracts, from or with a statutorily defined foreign source.

FOR FURTHER INFORMATION CONTACT: Patrick Shaheen, U.S. Department of Education, Office of the General Counsel, 400 Maryland Avenue SW, room 6E300, Washington, DC 20202. Telephone: (202) 453–6339. Email: *Patrick.Shaheen@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Department publishes these letters, dated February 11, 2020, notifying Yale University and Harvard University of investigations related to the universities' reports of defined gifts and contracts, including restricted and conditional gifts or contracts, from or with a statutorily defined foreign source. The letter to Yale University is in Appendix A of this notice. The letter to Harvard University is in Appendix B of this notice.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* Braille, large print, audiotape, or compact disc) on request to the 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.

Reed D. Rubinstein,

Principal Deputy General Counsel Delegated the Authority and Duties of the General Counsel.

Appendix A—Letter to Yale University

February 11, 2020

Dr. Peter Salovey, President, Yale University, 3 Prospect Street, New Haven, CT 06511

Re: Notice of 20 U.S.C. 1011f Investigation and Record Request/Yale University

Dear President Salovey:

Section 117 of the Higher Education Act of 1965, 20 U.S.C. 1011f, requires Yale University to report statutorily defined gifts, contracts, and/or restricted and conditional gifts or contracts from or with a statutorily defined foreign source, to the U.S. Department of Education. These reports are posted at *https://studentaid.ed.gov/sa/about/data-center/school/foreign-gifts.*

It appears Yale University failed to report a single foreign source gift or contract in 2014, 2015, 2016, and 2017. However, Yale University says it ''has a considerable presence abroad, represented by sites in dozens of cities and countries . . . [some] operated by Yale or a closely affiliated entity'', claims ''considerable success'' in setting up ''jointly run laboratories with Chinese universities . . . funded by Chinese granting agencies . . .'', and has solicited and received directed foreign contributions advancing specific religious and ideological priorities. *See https://world.yale.edu/sites/default/files/files/International_Affairs_Report_Final.pdf; see also https://web.archive.org/web/20180321012214/http://www.thenation.com/article/why-are-us-colleges-collaborating-with-saudi-arabia/.*

Section 117(f), 20 U.S.C. 1011f(f), provides that whenever it appears an institution has failed to comply with the law, the Secretary of Education may request the Attorney General commence an enforcement action to compel compliance and to recover the full costs to the United States of obtaining compliance, including all associated costs of investigation and enforcement. The Department is now concerned Yale University's reporting may not fully capture all gifts, contracts, and/or restricted and conditional gifts or contracts from or with all foreign sources. To meet our statutory duty to verify compliance prior to any potential referral for enforcement action, the Department has opened an administrative investigation of Yale University and requests that you produce the following within sixty days:

1. A list of all foreign sites ''operated by Yale or a closely affiliated entity'' as described at *https://world.yale.edu/sites/*

default/files/files/International_Affairs_Report_Final.pdf. For each such foreign site, please: (a) Specify the location; (b) specify the operating ''entity'' (*e.g.,* the name of the ''closely affiliated entity'') and describe in detail its financial and legal relationship with ''Yale''; (c) report the ''foreign site's'' annual budget; (d) list the name and address of every non-tuition revenue source in excess of $250,000 to each such ''foreign site'' during each relevant calendar year; (e) produce true copies of all gifts, contracts, and/or restricted or conditional gifts or contracts relevant to each such foreign site during each relevant calendar year; and (f) for each such foreign site, produce all records of, regarding, referencing, or relating to (i) governance, accounting, auditing, and reporting standards, (ii) Section 117 compliance, and (iii) conditions on curriculum and/or academic freedom. The time frame for this request is August 1, 2013 to the present.

2. Please (a) list all gifts, contracts, and/or restricted or conditional gifts or contracts from or with a foreign source to or for the substantial benefit of the Paul Tsai China Center at Yale Law School, the Jackson Institute for Global Affairs a/k/a the Yale Jackson School of Global Affairs, and the ''Kerry Initiative''; (b) provide the name and address of the foreign source for each such gift, contract, and/or restricted or conditional gift or contract; and (c) produce a true copy thereof. The time frame for this request is August 1, 2013 to the present.
3. All records of, regarding, or referencing gifts, contracts, and/or restricted or conditional gifts or contracts from or with a foreign source to the Institution. This includes, but is not limited to, true copies of pledge, donation, contribution, and/or contracts and agreements. The time frame for this request is August 1, 2013 to the present.
4. A list of all gifts, contracts, and/or restricted or conditional gifts or contracts from or with a foreign source that were not contemporaneously reported to the U.S. Department of Education by the Institution between August 1, 2013 and August 1, 2019. For each such gift, contract, and/or restricted or conditional gift or contract, please (a) list the name and address of the foreign source; (b) explain in a detailed narrative why the Institution failed to report such gift, contract, and/or restricted or conditional gift or contract; and (c) produce a true copy thereof.
5. All records of, regarding, or referencing gifts, contracts, and/or restricted or conditional gifts or contracts from or with: (i) The government of Saudi Arabia, Saudi nationals, and their agents; (ii) the government of People's Republic of China, the Central Committee of the CPC, Huawei Technologies Co. Ltd., Huawei Technologies USA, Inc., ZTE Corp, Yenching Academy, Yale-NUS College, the National University of Singapore, and their agents; and (iii) the government of Qatar, the Qatar Foundation for Education, Science and Community Development *aka* the Qatar Foundation *aka* the Qatar National Research Fund, Qatari nationals, and their agents. The time frame for this request is June 1, 2014, to the present.
6. All records of, regarding or referencing: (i) The ''Thousand Talents Program'' and/or its agents; (ii) ''Hanban'' or the Office of Chinese Language Council International and/or its agents; and (iii) any university, school, or other education or research entity domiciled in or organized under the laws of China, Qatar, Russia, Saudi Arabia, and/or their agents. The time frame for this request is January 1, 2012 to the present.
7. A list of each program, activity, and/or person at the Institution (*e.g.,* an Islamic law program, a Confucius Institute, a research scientist funded in whole or substantial part by a foreign corporation, a foreign graduate student studying physics under a scholarship or other contractual arrangement with a foreign government, a fellow in a cultural studies program created by endowment or other gift by a foreign national) that is in whole or in substantial part directly funded or supported by and/or employed due to a gift, contract, and/or restricted or conditional gift or contract with or from a foreign source. The relevant foreign source, dates of support or benefit, and amount of support or benefit should be specified for each listed program, activity, and/or person. The time frame for this request is August 1, 2013 to the present.
8. All records of, regarding, or referencing conditions imposed or influence on any of the Institution's curriculum, programs, or activities by any foreign source of a gift, contract, and/or restricted or conditional gift or contract. The time frame for this request is August 1, 2013 to the present.
9. A detailed narrative explaining, and all records of, regarding, or referencing, the Institution's actions taken and/or the institutional controls established to determine and/or verify: (a) Whether and how the Institution determines a given person is a foreign source under each of 20 U.S.C. 1011f(h)(2)'s four enumerated categories; and (b) whether and how the Institution complies with Executive Order 13224 with respect to every gift, contract, and/or restricted or conditional gift or contract that it solicits, receives, or signs. The time frame for this request is August 1, 2013 to the present.
10. A list of all gifts, contracts, and/or restricted or conditional gifts or contracts from or with a person who is a ''foreign source'' as defined at 20 U.S.C. 1011f(h)(2)(D). For each such gift, contract, and/or restricted or conditional gift or contract please: (a) List the name and address of the 20 U.S.C. 1011f(h)(2)(D) foreign source; (b) list the name and address of the foreign source's principal; and (c) provide true copies thereof. The time frame for this request is August 1, 2013 to the present.
11. All records of, regarding, or referencing the Institution's audit and accounting practices and/or other institutional controls used to: (a) Capture, track, report, and verify gifts, contracts, and/or restricted or conditional gifts or contracts from or with a foreign source; and (b) ensure (i) substantial compliance with the Single Audit Act, OMB Circular A–133, and 34 CFR 75.730 with respect to foreign funds, foreign campuses, and other covered foreign facilities and (ii) that all financial records are kept in a manner facilitating an effective audit. The time frame for this request is August 1, 2013 to the present.
12. The name and address of each person responsible for the Institution's 20 U.S.C. 1011f reporting and compliance. The time frame for this request is August 1, 2013 to the present.
13. All records of, regarding, or referencing the Institution's compliance obligations or duties with and/or under 20 U.S.C. 1011f(a), (b), (c), and (e). The time frame for this request is August 1, 2013 to the present.
14. All records of, regarding, or referencing the Institution's solicitation of gifts, contracts, and/or restricted or conditional gifts or contracts with or from a foreign source. The time frame for this request is January 1, 2015 to the present.
15. All records of, regarding, or referencing communications between the Institution and a foreign source listed as or resident or domiciled in a nation requiring cooperation with an international boycott under 26 U.S.C. 999(a)(3), or that is an agent thereof. For each gift, contract, and/or restricted or conditional gift or contract from or with such a foreign source please: (a) List the name and address of the foreign source; (b) identify the subsection of 20 U.S.C. 1011f(h)(2) applicable to such foreign source; and (c) produce true copies thereof. The time frame for this request is August 1, 2013, to the present.
16. All IRS Form 990s and schedules, including Schedules F and R, for tax years 2014, 2015, 2016, 2017, and 2018.
17. A verified statement by a duly authorized Yale University official: (a) Affirming that the Institution solicits and accepts gifts from, contracts with, and/or comingles or intermingles funds from foreign sources with funds from domestic sources, *only* in material compliance with all applicable federal laws, regulations, and executive orders and generally accepted and applicable accounting standards; (b) affirming that for the calendar years 2013, 2014, 2015, 2016, 2017, 2018, and 2019 (each a ''reporting year'') the Institution's Section 117 reports were accurate, complete and timely filed; (c) describing for each reporting year the specific accounting and institutional controls in place to ensure all statutorily-defined foreign source gifts, contracts, and/or restricted or conditional gifts or contracts were (i) appropriately kept separate and auditable, and (ii) recognized, tracked, controlled and accounted for in the

Institution's Section 117 reports and federally-required audits; (d) affirming (i) that the Institution has materially complied with the Single Audit Act, OMB Circular A–133, and 34 CFR 75.730 with respect to foreign funds, foreign campuses, and other covered foreign facilities for each reporting year, and (ii) that all relevant financial records are kept in a manner facilitating an effective audit and that foreign funds are not intermingled or comingled with domestic funds; and (e) describing the records reviewed and individuals consulted in preparing the requested statement. If the Institution is unable to make the affirmation requested in subparts (a), (b), or (d) above, then please provide, in detailed narrative form, an explanation for such failure.

As used in this Notice of Investigation and Information Request:

''Agent'' has its plain and ordinary meaning and includes, solely by way of example and not limitation, the U.S.-domiciled donor advised funds and foundations of a foreign source.

''Contract'' has the meaning given at 20 U.S.C. 1011f(h)(1).

''Foreign source'' has the meaning given at 20 U.S.C. 1011f(h)(2).

''Gift'' has the meaning given at 20 U.S.C. 1011f(h)(3).

''Institution'' has the meaning given at 20 U.S.C. 1011f(h)(4) and includes all campuses. Section 117 requires that when an institution receives the benefit of a gift from or a contract with a foreign source in the applicable amount, even if by an agent (*e.g.,* employee) and through an intermediary (*e.g.,* non-profit organization), it must disclose the gift or contract to the Department. Where a legal entity (*e.g.,* centers, boards, foundations, research groups, partnerships, or non-profit organizations, whether or not organized under the laws of the United States and including, by way of example and not limitation, the Yale-NUS College, the Yale-China Association, the China-Yale Advanced University Leadership Program, the Yale Asia Development Council, the Yale Center Beijing, and the Paul Mellon Centre in London, England) operates substantially for the benefit or under the auspices of an institution, there is a rebuttable presumption that when that legal entity receives money or enters into a contract with a foreign source, it is for the benefit of the institution, and, thus, must be disclosed.

''Record'' means all recorded information, regardless of form or characteristics, made or received by you, and including metadata, such as email and other electronic communication, word processing documents, PDF documents, animations (including PowerPoint™ and other similar programs) spreadsheets, databases, calendars, telephone logs, contact manager information, internet usage files, network access information, writings, drawings, graphs, charts, photographs, sound recordings, images, financial statements, checks, wire transfers, accounts, ledgers, facsimiles, texts, animations, voicemail files, data generated by calendaring, task management and personal information management (PIM) software (such as Microsoft Outlook), data created with the use of personal data assistants (PDAs), data created with the use of document management software, data created with the use of paper and electronic mail logging and routing software, and other data or data compilations, stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form. The term ''recorded information'' also includes all traditional forms of records, regardless of physical form or characteristics.

''Restricted or conditional gift or contract'' has the meaning given at 20 U.S.C. 1011f(h)(5).

Your record and data preservation obligations are more particularly described at Exhibit A. If you claim attorney-client or attorney-work product privilege for a given record, then you must prepare and submit a privilege log expressly identifying each such record and describing it so the Department may assess your claim's validity. Please note no other privileges apply here. Finally, this investigation will be directed by the Department's Office of the General Counsel with support from Federal Student Aid. To arrange transmission of the requested information, or should you have any other questions, please contact:

Patrick Shaheen, Office of the General Counsel, U.S. Department of Education, 400 Maryland Ave. SW, Room 6E300, Washington, DC 20202, *Patrick.Shaheen@ed.gov.*

Sincerely,
Reed D. Rubinstein,
Principal Deputy General Counsel delegated the Authority and Duties of the General Counsel

Appendix B—Letter to Harvard University

February 11, 2020
Lawrence S. Bacow, President,
Harvard University,
Massachusetts Hall,
Cambridge, MA 02138.

Re: Notice of 20 U.S.C. 1011f Investigation and Record Request/Harvard University

Dear President Bacow:

Section 117 of the Higher Education Act of 1965, 20 U.S.C. 1011f, requires institutions including Harvard University to report all gifts, contracts and/or restricted and conditional gifts or contracts from or with a foreign source to the U.S. Department of Education, and to make those reports available to the public. These reports are posted at *https://studentaid.ed.gov/sa/about/data-center/school/foreign-gifts.*

Section 117(f), 20 U.S.C. 1011f(f), provides that whenever it appears an institution has failed to comply with the law, the Secretary of Education may request the Attorney General commence an enforcement action to compel compliance and to recover the full costs to the United States of obtaining compliance, including all associated costs of investigation and enforcement. The Department is aware of information suggesting Harvard University lacks appropriate institutional controls and, as a result, its statutory Section 117 reporting may not include and/or fully capture all reportable gifts, contracts, and/or restricted and conditional gifts or contracts from or with foreign sources. *See, e.g., https://www.justice.gov/usao-ma/pr/harvard-university-professor-and-two-chinese-nationals-charged-three-separate-china; see also https://www.harvard.edu/president/news/2019/message-to-community-regarding-jeffrey-epstein.* To obtain the information required to meet our statutory enforcement duty, the Department has opened an administrative investigation of Harvard and now requests that your institution produce the following within sixty days:

18. All records of, regarding, or referencing gifts, contracts, and/or restricted or conditional gifts or contracts from or with a foreign source. For each such gift, contract, and/or restricted or conditional gift or contract, please: (a) List the name and address of the foreign source; (b) identify the subsection of 20 U.S.C. 1011f(h)(2) applicable to such foreign source; and (c) produce true copies thereof. The time frame for this request is August 1, 2013 to the present.
19. All records of, regarding, or referencing gifts, contracts, and/or restricted or conditional gifts or contracts from or with (i) the government of the People's Republic of China, Huawei Technologies Co. Ltd., Huawei Technologies USA, Inc., ZTE Corp, and their respective agents; (ii) the government of Qatar, the Qatar Foundation for Education, Science and Community Development *aka* the Qatar Foundation *aka* the Qatar National Research Fund, Qatari nationals, and their respective agents; (iii) the government of Russia, the Skolkovo Foundation, Kaspersky Lab and Kaspersky Lab US, Russian nationals, and their respective agents; (iv) the government of Saudi Arabia, Saudi nationals, and their respective agents; and (v) the government of the Islamic Republic of Iran, the Alavi Foundation, Iranian nationals, and their agents. For each such gift, contract, and/or restricted or conditional gift or contract, please: (a) List the name and address of the foreign source; (b) identify the subsection of 20 U.S.C. 1011f(h)(2) applicable to such foreign source; and (c) produce true copies thereof. The time frame for this request is August 1, 2013 to the present.
20. All records regarding or referencing: (i) The ''Thousand Talents Program'' and/or its agents; (ii) ''Hanban'' or the Office of Chinese Language Council International and/or its agents; (iii) Wuhan University of Technology and/or its agents; (iv) the ''Wuhan University of Technology-Harvard Joint Nano Key Laboratory'' and/or its agents; and (v) any university, school, or other education or research entity domiciled in or organized under the laws of China, Qatar, or Russia and/or their agents. The time frame for this request is January 1, 2012 to the present.

21. All records of, regarding, or referencing conditions imposed or influence on any of the Institution's curriculum, programs, or activities by any foreign source. The time frame for this request is August 1, 2013 to the present.
22. All records of, regarding, or referencing the Institution's solicitation of gifts, contracts, and/or restricted or conditional gifts or contracts with or from a foreign source. The time frame for this request is August 1, 2013 to the present.
23. The name and address of each person responsible for the Institution's 20 U.S.C. 1011f reporting and compliance. The time frame for this request is August 1, 2013 to the present.
24. All records of, regarding, or referencing the Institution's compliance obligations or duties with and/or under 20 U.S.C. 1011f. The time frame for this request is August 1, 2013 to the present.
25. A detailed narrative explaining, and all records of, regarding, or referencing, the Institution's actions taken and/or the institutional controls established to determine and/or verify: (a) Whether and how the Institution determines a given person is a foreign source under each of 20 U.S.C. 1011f(h)(2)'s four enumerated categories; and (b) whether and how the Institution complies with Executive Order 13224 with respect to every gift, contract, and/or restricted or conditional gift or contract that it solicits, receives, or signs. The time frame for this request is August 1, 2013 to the present.
26. A list of all gifts, contracts, and/or restricted or conditional gifts or contracts from or with a person who is a ''foreign source'' as defined at 20 U.S.C. 1011f(h)(2)(D). For each such gift, contract, and/or restricted or conditional gift or contract please: (a) List the name and address of the 20 U.S.C. 1011f(h)(2)(D) foreign source; (b) list the name and address of the foreign source's principal; and (c) provide true copies thereof. The time frame for this request is August 1, 2013 to the present.
27. All records of, regarding, or referencing communications between the Institution and a foreign source listed as or resident or domiciled in a nation requiring cooperation with an international boycott under 26 U.S.C. 999(a)(3), or that is an agent thereof. For each gift, contract, and/or restricted or conditional gift or contract from or with such a foreign source please: (a) List the name and address of the foreign source; (b) identify the subsection of 20 U.S.C. 1011f(h)(2) applicable to such foreign source; and (c) produce true copies thereof. The time frame for this request is August 1, 2013, to the present.
28. A list of each program, activity, and/or employee, faculty member, or student directly funded or supported by a gift, contract, and/or restricted or conditional gift or contract with or from a foreign source to the Institution. The relevant foreign source, dates of funding or support, and amount and/or nature of support or benefit should be specified for each listed program, activity, and/or person. The time frame for this request is August 1, 2013 to the present.
29. All records of, regarding, or referencing the Institution's audit and accounting practices and/or other institutional controls used to: (a) Capture, track, report, and verify gifts, contracts, and/or restricted or conditional gifts or contracts from or with a foreign source; and/or (b) ensure (i) that there is substantial compliance with the Single Audit Act, OMB Circular A–133, and 34 CFR 75.730 with respect to foreign funds, foreign campuses, and other covered foreign facilities, and (ii) that all financial records are kept in a manner facilitating an effective audit. The time frame for this request is August 1, 2013 to the present.
30. All IRS Form 990s and schedules, including Schedules F and R, for tax years 2014, 2015, 2016, 2017, and 2018.
31. A verified statement by a duly authorized Harvard University official: (a) Affirming that the Institution solicits and accepts gifts from, contracts with, and/or comingles or intermingles funds from foreign sources with funds from domestic sources, only in material compliance with all applicable federal laws, regulations, and executive orders and generally accepted and applicable accounting standards; (b) affirming that for the calendar years 2013, 2014, 2015, 2016, 2017, 2018, and 2019 (each a ''reporting year'') the Institution's Section 117 reports were accurate, complete and timely filed; (c) describing for each reporting year the specific accounting and institutional controls in place to ensure all gifts, contracts, and/or restricted or conditional gifts or contracts from or with a foreign source were (i) appropriately kept separate and auditable, and (ii) recognized, tracked, controlled, and accounted for in the Institution's Section 117 reports and federally-required audits; (d) affirming (i) that the Institution has materially complied with the Single Audit Act, OMB Circular A–133, and 34 CFR 75.730 with respect to foreign funds, foreign campuses, and other covered facilities for each reporting year, and (ii) that all relevant financial records are kept in a manner facilitating an effective audit and that foreign funds are not intermingled or comingled with domestic funds; and (e) describing the records reviewed and individuals consulted in preparing the requested statement. If the Institution is unable to make the affirmation requested in subparts (a), (b), or (d) above, then please provide, in detailed narrative form, an explanation for such failure.

As used in this Notice of Investigation and Information Request:

''Agent'' has its ordinary meaning and includes, solely by way of example and not limitation, the U.S.-domiciled donor advised funds and foundations of a foreign source.

''Contract'' has the meaning given at 20 U.S.C. 1011f(h)(1).

''Foreign source'' has the meaning given at 20 U.S.C. 1011f(h)(2).

''Gift'' has the meaning given at 20 U.S.C. 1011f(h)(3).

''Institution'' has the meaning given at 20 U.S.C. 1011f(h)(4) and includes all campuses. Section 117 requires that when an institution receives the benefit of a gift from or a contract with a foreign source in the applicable amount, even if by an agent (*e.g.,* employee) and through an intermediary (*e.g.,* non-profit organization), it must disclose the gift or contract to the Department. Where a legal entity (*e.g.,* centers, boards, foundations, research groups, partnerships, or non-profit organizations, whether or not organized under the laws of the United States and including, by way of example and not limitation, the ''Harvard Management Company'', ''Harvard China Fund'', the ''Harvard Center Shanghai'', the ''Lieber Research Group at Harvard'', the ''Harvard Foundation for Intercultural and Race Relations'', and the ''Harvard Kennedy School of Government'') operates substantially for the benefit or under the auspices of an institution, there is a rebuttable presumption that when that legal entity receives money or enters into a contract with a foreign source, it is for the benefit of the institution, and, thus, must be disclosed.

''Record'' means all recorded information, regardless of form or characteristics, made or received by you, and including metadata, such as email and other electronic communication, word processing documents, PDF documents, animations (including PowerPoint™ and other similar programs) spreadsheets, databases, calendars, telephone logs, contact manager information, internet usage files, network access information, writings, drawings, graphs, charts, photographs, sound recordings, images, financial statements, checks, wire transfers, accounts, ledgers, facsimiles, texts, animations, voicemail files, data generated by calendaring, task management and personal information management (PIM) software (such as Microsoft Outlook), data created with the use of personal data assistants (PDAs), data created with the use of document management software, data created with the use of paper and electronic mail logging and routing software, and other data or data compilations, stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form. The term ''recorded information'' also includes all traditional forms of records, regardless of physical form or characteristics.

''Restricted or conditional gift or contract'' has the meaning given at 20 U.S.C. 1011f(h)(5).

Your record and data preservation obligations are more particularly described at Exhibit A. If you claim attorney-client or attorney-work product privilege for a given record, then you must prepare and submit a privilege log expressly identifying each such record and describing it so the Department may assess your claim's validity. Please note no other privileges apply here. Finally, this

investigation will be directed by the Department's Office of the General Counsel with support from Federal Student Aid. To arrange transmission of the requested information, or should you have any other questions, please contact:

Patrick Shaheen, Office of the General Counsel, U.S. Department of Education, 400 Maryland Ave. SW, Room 6E300, Washington, DC 20202, *Patrick.Shaheen@ed.gov.*

Sincerely,
Reed D. Rubinstein,
Principal Deputy General Counsel delegated the Authority and Duties of the General Counsel.

[FR Doc. 2020–03812 Filed 2–25–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0159]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; National Professional Development Program: Grantee Performance Report

AGENCY: Office of English Language Acquisition (OELA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before March 27, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0159. 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 Francisco Javier Lopez, 202–401–1433.

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: National Professional Development Program: Grantee Performance Report.

OMB Control Number: 1885–0555.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 138.

Total Estimated Number of Annual Burden Hours: 6,900.

Abstract: The NPD Program provides grants for eligible entities to implement professional development activities intended to improve instruction for English Learners (ELs) and assists education personnel working with ELs to meet high professional standards. Information in the NPD grantee performance report is being collected in compliance with the authorized by section 3131(c)(1)(C) of the Elementary and Secondary Education Act of 1965 as amended by the Every Student Succeeds Act, and in accordance with the Government Performance Results Act (GPRA) of 1993, Section 4 (1115), and the Education Department General Administrative Regulations (EDGAR), 34 CFR 75.253. Grantees are required to report targets and their progress toward meeting the objectives and goals established for each ED grant program. This information collection serves two purposes; the data are necessary to assess the performance of the NPD program on measures and also, budget information and data on project-specific performance measures are collected from NPD grantees for project monitoring and for the purpose of determining continuation funding.

Dated: February 21, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2020–03885 Filed 2–25–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, March 18, 2020; 1:00 p.m.–5:15 p.m.

ADDRESSES: The Lodge at Santa Fe, 720 North St. Francis Drive, Santa Fe, New Mexico 87501.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 94 Cities of Gold Road, Santa Fe, NM 87506. Phone (505) 995–0393; Fax (505) 989–1752 or Email: *Menice.Santistevan@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

- Call to Order
- Welcome and Introductions

- Approval of Agenda
- Approval of February 26, 2020 Meeting Minutes
- Old Business
  - Report from NNMCAB Chair
  - Other Items
- New Business
- Update from Secretary of New Mexico Environment Department
- Break
- Update on Waste Isolation Pilot Plant
- Public Comment Period
- Update from EM Los Alamos Field Office
- Update from NNMCAB Deputy Designated Federal Officer and Executive Director
- Wrap-Up Comments from NNMCAB Members
- Adjourn

Public Participation: The meeting is open to the public. The EM SSAB, Northern New Mexico, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or telephone number listed above. Minutes and other Board documents are on the internet at: *https://www.energy.gov/em/nnmcab/meeting-materials.*

Signed in Washington, DC on February 21, 2020.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2020–03853 Filed 2–25–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, March 18, 2020; 4:00 p.m.

ADDRESSES: Frank H. Rogers Science and Technology Building, 755 East Flamingo, Las Vegas, Nevada 89119.

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, Board Administrator, 100 North City Parkway, Suite 1750, Las Vegas, Nevada 89106. Phone: (702) 523–0894; Fax (702) 724–0981 or Email: *nssab@emcbc.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

1. Briefing and Recommendation Development for Fiscal Year 2022 Baseline Prioritization—Work Plan Item #2
2. Follow-up to Waste Verification Strategy—Work Plan Item #1
3. Overview of DOE Office of Legacy Management

Public Participation: The meeting is open to the public. The EM SSAB, Nevada, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Barbara Ulmer at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Barbara Ulmer at the telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments can do so during the 15 minutes allotted for public comments.

Minutes: Minutes will be available by writing to Barbara Ulmer at the address listed above or at the following website: *http://www.nnss.gov/NSSAB/pages/MM_FY20.html.*

Signed in Washington, DC on February 21, 2020.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2020–03854 Filed 2–25–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–14–000]

Mountain Valley Pipeline, LLC.; Notice of Availability of the Final Environmental Impact Statement for the Proposed Southgate Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission), with the participation of the cooperating agencies listed below, has prepared a final environmental impact statement (EIS) for the Southgate Project (Project) proposed by Mountain Valley Pipeline, LLC. (Mountain Valley) in the above-referenced docket. Mountain Valley requests authorization to construct and operate about 75.1 miles of natural gas transmission pipeline, one new compressor station, and accompanying facilities that would provide about 375 million cubic feet per day of available capacity for transport from the City of Chatham, in Pittsylvania County, Virginia to a delivery point with Dominion Energy North Carolina (DENC), formerly PSNC,[1] near the City of Graham in Alamance County, North Carolina.

The final EIS assesses the potential environmental effects of the construction and operation of the Southgate Project in accordance with the requirements of the National Environmental Policy Act (NEPA). As described in the final EIS, the FERC staff concludes that approval of the Project would result in some adverse environmental impacts; however, these impacts would be reduced to less-than-significant levels because of the impact avoidance, minimization, and mitigation measures proposed by Mountain Valley and those recommended by staff in the EIS.

[1] Following a January 2, 2019 merger, Dominion Energy, Inc. acquired PSNC and changed the company name to Dominion Energy North Carolina.

The United States Army Corps of Engineers (COE) and the U.S. Department of the Interior Fish and Wildlife Service (FWS) participated as cooperating agencies in preparation of this EIS. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis. The cooperating agencies provided input into the analyses, conclusions, and recommendations presented in the EIS. Following issuance of the final EIS, the cooperating agencies will issue subsequent decisions, determinations, permits, or authorizations for the Project in accordance with each individual agency's regulatory requirements.

The COE would use this EIS in their regulatory process, and to satisfy compliance with NEPA and other related federal environmental laws (*e.g.,* the National Historic Preservation Act).

The EIS addresses the potential environmental effects of the construction and operation of the following project facilities:

- About 75.1 miles of new 24-inch and 16-inch diameter natural gas pipeline located in Pittsylvania County, Virginia, and Rockingham and Alamance Counties, North Carolina;
- one new 28,915 horsepower compressor station (Lambert Compressor Station) in Pittsylvania County, Virginia;
- four interconnects or tie-ins with facilities operated by Mountain Valley, East Tennessee Gas, and DENC; and
- ancillary facilities including pig launchers and receivers, mainline block valves (MLV), and cathodic protection beds.

The Commission mailed a copy of the *Notice of Availability* of the final EIS to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Indian Tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the area of the Project. The final EIS is available in hard copy at libraries in the area of the Project and in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the Environmental Documents page (*https://www.ferc.gov/industries/gas/enviro/eis.asp*). In addition, the final EIS may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://www.ferc.gov/docs-filing/elibrary.asp*), click on General Search, and enter the docket number in the Docket Number field, excluding the last three digits (*i.e.,* CP19–14). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Questions?

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: February 14, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–03790 Filed 2–25–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL20–22–000;QF94–155–012]

LSP-Whitewater Limited Partnership; Notice of Request for Waiver

Take notice that on February 13, 2020, pursuant to section 292.205(c) of the Federal Energy Regulatory Commission's (Commission) regulations, implementing the Public Utility Regulatory Policies Act of 1978, as amended 18 CFR 292.205(c) (2019), LSP-Whitewater Limited Partnership submitted a request for limited waiver of the operating standard set forth in section 292.205(a)(1) of the Commission's regulations for its topping-cycle cogeneration facility located in Whitewater, Wisconsin, as more fully explained in its request.

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.

Comment Date: 5:00 p.m. Eastern time on March 16, 2020.

Dated: February 14, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–03792 Filed 2–25–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–969–000]

Energia Sierra Juarez U.S. Transmission, 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 Energia Sierra Juarez U.S. Transmission, 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 March 5, 2020.

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: February 14, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–03793 Filed 2–25–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–27–000]

North Baja Pipeline, LLC; Notice of Schedule for Environmental Review of the North Baja Xpress Project

On December 16, 2019, North Baja Pipeline, LLC (North Baja) filed an application in Docket No. CP20–27–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities. The proposed project is known as the North Baja Xpress Project (Project), and includes North Baja's installation of additional compression facilities and other modifications on its system to create 495 million cubic feet per day of incremental firm delivery to the U.S./Mexico border.

On December 31, 2019, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA—July 17, 2020
90-day Federal Authorization Decision Deadline—October 15, 2020

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

North Baja would construct one new 31,900 ISO horsepower compressor unit and restage two existing 7,700 horsepower compressor units at its existing Ehrenberg Compressor Station in La Paz County, Arizona, as well as install additional flow measurement facilities and piping modifications at its existing El Paso and Ogilby Meter Stations in La Paz County, Arizona and Imperial County, California, respectively.

Background

On January 31, 2020, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed North Baja Xpress Project and Request for Comments on Environmental Issues* (NOI). The NOI was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. All substantive comments will be addressed in the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (*www.ferc.gov*). Using the eLibrary link, select General Search from the eLibrary menu, enter the selected date range and Docket Number excluding the last three digits (*i.e.,* CP20–27), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: February 14, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–03791 Filed 2–25–20; 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: EC20–37–000.

Applicants: Nevada Power Company, Sierra Pacific Power Company.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act, et al. of Nevada Power Company, et al.

Filed Date: 2/13/20.

Accession Number: 20200213–5200.

Comments Due: 5 p.m. ET 3/5/20.

Docket Numbers: EC20–38–000.

Applicants: Astoria Energy LLC, Astoria Energy II LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Astoria Energy LLC, et al.

Filed Date: 2/14/20.

Accession Number: 20200214–5141.

Comments Due: 5 p.m. ET 3/6/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1651–004.
Applicants: Golden State Water Company.
Description: Amendment to June 29, 2019 Updated Market Power Analysis for the Southwest Region of Golden State Water Company.
Filed Date: 2/13/20.
Accession Number: 20200213–5192.
Comments Due: 5 p.m. ET 3/5/20.
Docket Numbers: ER19–1507–005.
Applicants: Duke Energy Carolinas, LLC.
Description: Compliance filing: Joint OATT Further Compliance Filing for Order No. 845 to be effective 5/22/2019.
Filed Date: 2/14/20.
Accession Number: 20200214–5064.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–396–001.
Applicants: Evergy Kansas Central, Inc.
Description: Tariff Amendment: Response to Letter Requesting Additional Information to be effective 6/28/2018.*Filed Date:* 2/13/20.
Accession Number: 20200213–5166.
Comments Due: 5 p.m. ET 3/5/20.
Docket Numbers: ER20–1003–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA No. 5564 and Original ICSA, SA No. 5565; Queue No. AA2–161 to be effective 1/16/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5038.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1004–000.
Applicants: ORNI 37 LLC.
Description: Request for Limited Waiver, et al. of ORNI 37 LLC.
Filed Date: 2/13/20.
Accession Number: 20200213–5193.
Comments Due: 5 p.m. ET 3/5/20.
Docket Numbers: ER20–1005–000.
Applicants: Thunder Spirit Wind, LLC.
Description: Tariff Cancellation: Cancellation of Market-Based Rate Tariff to be effective 2/15/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5073.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1006–000.
Applicants: DATC Path 15, LLC.
Description: § 205(d) Rate Filing: Revised Appendix I 2020 June to be effective 6/13/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5077.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1007–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2020–02–14_SA 3082 Madison Gas and Electric-SMMPA 1st Rev GIA (J614) to be effective 1/30/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5088.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1009–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Revisions to the Tariff and OA re Enhancements to PJM's FTR Auction Process to be effective 4/15/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5104.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1010–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA SA No. 5527; Non-Queue No. NQ165 to be effective 1/15/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5106.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1011–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 1131, Non-Queue #NQ122 to be effective 6/2/2015.
Filed Date: 2/14/20.
Accession Number: 20200214–5108.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1012–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: Amended GIA Windpower Partners 1993, LLC, Renwind Project SA No. 375 to be effective 2/15/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5121.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1013–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Cancellation: Notice of Cancellation of ISA, Service Agreement No. 3645, Queue No. Y1–077 to be effective 12/18/2019.
Filed Date: 2/14/20.
Accession Number: 20200214–5172.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1014–000.
Applicants: Cove Mountain Solar, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authority to be effective 4/9/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5173.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1015–000.
Applicants: Cove Mountain Solar 2, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authority to be effective 4/9/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5177.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1016–000.
Applicants: Cove Mountain Solar, LLC.
Description: § 205(d) Rate Filing: Filing of Shared Facilities Common Ownership Agreement and Request for Waivers to be effective 4/9/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5180.
Comments Due: 5 p.m. ET 3/6/20.
Docket Numbers: ER20–1017–000.
Applicants: Cove Mountain Solar 2, LLC.
Description: Initial rate filing: Filing of Shared Facilities Common Ownership Agreement and Request for Waivers to be effective 4/9/2020.
Filed Date: 2/14/20.
Accession Number: 20200214–5181.
Comments Due: 5 p.m. ET 3/6/20.

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: February 14, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–03796 Filed 2–25–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM16–17–000]

Data Collection for Analytics and Surveillance and Market-Based Rate Purposes; Notice of Technical Workshop

On January 22, 2020, the Federal Energy Regulatory Commission (Commission) issued a notice that Commission staff will hold a technical workshop on the relational database

being built in accordance with Order No. 860 (MBR Database).[1] The meeting will take place on February 27, 2020, from 9:00 a.m. to 2:30 p.m.[2] (EST) in the Commission Meeting Room, at 888 First Street NE, Washington, DC 20426. All interested persons are invited to attend. For those unable to attend in person, access to the meeting will be available via webcast.

Commission staff is hereby supplementing the January 22, 2020 notice with the agenda for discussion. During the meeting Commission staff will provide an overview of the MBR Database, discuss how the MBR Database will fit into the market-based rate program; and answer questions presented live or via email to *mbrdatabase@ferc.gov.*

Please note that matters pending before the Commission and subject to ex parte limitations cannot be discussed at this meeting. An agenda of the meeting is attached.

Due to the nature of the discussion, those interested in participating are encouraged to attend in person. All interested persons (whether attending in person or via webcast) are asked to register at *https://www.ferc.gov/whats-new/registration/02-27-20-form.asp.* There is no registration fee. Anyone with internet access can listen to the meeting by navigating to *www.ferc.gov*'s Calendar of Events, locating the MBR Data Technical Workshop, and clicking on the link to the webcast. The webcast will allow persons to listen to the technical conference and email questions during the meeting to *mbrdatabase@ferc.gov.*

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov,* call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY), or send a fax to 202–208–2106 with the required accommodations.

For more information about the technical workshop, please contact Ryan Stertz at 202–502–6473, or send an email to *mbrdatabase@ferc.gov.* For logistics, contact Sarah McKinley at 202–502–8368 or *sarah.mckinley@ferc.gov.*

[1] *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes,* Order No. 860, 168 FERC 61,039 (2019).

[2] Please note that the technical workshop was originally scheduled to end at 12:30 p.m.

Dated: February 14, 2020.

Kimberly D. Bose,

Secretary.

Agenda

MBR Database Technical Workshop, Commission Meeting Room, February 27, 2020

9:00–9:10 a.m. *Welcome and Introductions*
9:10–9:35 a.m. *Purpose of Database*
9:35–10:15 a.m. *Overview of MBR Portal and Features*
10:15–11:15 a.m. *Data Dictionary Walk-Through*
11:15–11:45 a.m. *Making submissions into the MBR database*
11:45–12:00 p.m. *Market-Based Rate Filing Process*
12:00–12:30 p.m. *Break*
12:30–2:30 p.m. *Question and Answer session*

[FR Doc. 2020–03794 Filed 2–25–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD10–12–011]

Increasing Market and Planning Efficiency and Enhancing Resilience Through Improved Software; Notice of Technical Conference: Increasing Real-Time and Day-Ahead Market Efficiency and Enhancing Resilience Through Improved Software

Take notice that Commission staff will convene a technical conference on June 23, 24, and 25, 2020 to discuss opportunities for increasing real-time and day-ahead market efficiency and enhancing the resilience of the bulk power system through improved software. A detailed agenda with the list of and times for the selected speakers will be published on the Commission's website [1] after May 22, 2020.

Staff has held similar conferences in this proceeding in the past years, focused on enhancing market and planning efficiency and the resilience of the bulk power system. As in past conferences, this conference will bring together experts from diverse backgrounds and experiences, including electric system operators, software developers, and those from government, research centers and academia for the purposes of stimulating discussion, sharing information, and identifying fruitful avenues for research concerning the technical aspects of improved software for increasing efficiency and resilience of the bulk power system.

This conference is intended to build on those previous discussions. Staff will be facilitating discussions to explore research and operational advances with respect to market modeling that appear to have significant promise for potential efficiency or resilience improvements. Broadly, such topics fall into the following categories:

(1) Improvements to the representation of physical constraints that are either not currently modeled or currently modeled using mathematical approximations (*e.g.,* voltage and reactive power constraints, stability constraints, fuel delivery constraints, and constraints related to contingencies);

(2) Consideration of uncertainty to better maximize economic efficiency (expected market surplus) and better understand events that could impact resilience of the bulk power system, *e.g.,* stochastic modeling, or other improved modeling approaches to energy and reserve dispatch and system planning that efficiently manage uncertainty;

(3) Software related to grid-enhancing technologies, such as those described in the notices for Docket No. AD19–19, Grid-enhancing Technologies, and Docket No. AD19–15, Managing Transmission Line Ratings, including optimal transmission switching, dynamic line ratings, distributed energy resources, and software for forecasting and enhancing visibility into changing system conditions.

(4) Improvements to the ability to identify and use flexibility in the existing systems in ways that improve bulk power system resilience and economic efficiency, *e.g.,* transmission constraint relaxation practices, and ramp management;

(5) Improvements to the duality interpretations of the economic dispatch model, with the goal of enabling the calculation of prices which represent better equilibrium and incentives for efficient entry and exit;

(6) Limitations of current electricity market software due to its interaction with hardware, for example, parallel computing and better cache management;

(7) Other improvements in algorithms, model formulations, or hardware that may allow for increases in market efficiency and enhanced bulk power system resilience.

Within these or related topics, we encourage presentations that discuss best modeling practices, existing modeling practices that need improvement, any advances made, or related perspectives on increasing

[1] *http://www.ferc.gov/industries/electric/indus-act/market-planning.asp.*

market efficiency and resilience through improved power systems modeling.

The technical conference will be held at the Federal Energy Regulatory Commission headquarters, 888 First Street NE, Washington, DC 20426. All interested participants are invited to attend, and participants with ideas for relevant presentations are invited to nominate themselves to speak at the conference.

Speaker nominations must be submitted on or before April 17, 2020 through the Commission's website [2] by providing the proposed speaker's contact information along with a title, abstract, and list of contributing authors for the proposed presentation. Proposed presentations should be related to the topics discussed above. Speakers and presentations will be selected to ensure relevant topics and to accommodate time constraints.

Although registration is not required for general attendance by United States citizens, we encourage those planning to attend the conference to register through the Commission's website.[3] We will provide nametags for those who register on or before June 5, 2020.

We strongly encourage attendees who are not citizens of the United States to register for the conference by April 24, 2020, in order to avoid any delay associated with being processed by FERC security.

The Commission will accept comments following the conference, with a deadline of July 31, 2020.

There is an ''eSubscription'' link on the Commission's 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.

WebEx streaming of this conference will be available. Off-site participants interested in listening via teleconference or listening and viewing the presentations through WebEx must register at by 5:00 p.m. EST on June 12, 2020. WebEx and teleconferencing may not be available to those who do not register.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 502–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

For further information about these conferences, please contact:

Sarah McKinley (Logistical Information), Office of External Affairs, (202) 502–8004, *Sarah.McKinley@ferc.gov*

Alexander Smith (Technical Information), Office of Energy Policy and Innovation, (202) 502–6601, *Alexander.Smith@ferc.gov*

Dated: February 14, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–03795 Filed 2–25–20; 8:45 am]

BILLING CODE 6717–01–P

[2] *https://www.ferc.gov/whats-new/registration/real-market-6-23-20-speaker-form.asp.*

[3] The registration form is located at *https://www.ferc.gov/whats-new/registration/real-market-6-23-20-form.asp.*

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2019–0450; FRL–10004–82]

Final Designation of Low-Priority Substances Under the Toxic Substances Control Act (TSCA); Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: As required by the Frank R. Lautenberg Chemical Safety for the 21st Century Act amendments to the Toxic Substances Control Act (TSCA) and implementing regulations, EPA is designating 20 chemical substances as Low-Priority Substances for which risk evaluation is not warranted at this time. This document provides the final designation for each of the chemical substances and instructions on how to access the chemical-specific information, analysis and basis used by EPA to make the final designation for each chemical substance.

FOR FURTHER INFORMATION CONTACT: *For technical information about Low-Priority Substances contact:* Lauren Sweet, Chemistry, Economics and Sustainable Strategies Division, Office of Pollution Prevention and Toxics, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency (7406M), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–0376; email address: *sweet.lauren@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

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

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to entities that currently or may manufacture (including import) a chemical substance regulated under TSCA (*e.g.,* entities identified under North American Industrial Classification System (NAICS) codes 325 and 324110). The action may also be of interest to chemical processors, distributors in commerce, and users; non-profit organizations in the environmental and public health sectors; state and local government agencies; and members of the public. Because interest in this notice may be broad, the Agency has not attempted to describe all the specific entities and corresponding NAICS codes for entities that may be interested in or affected by this action.

B. What action is the Agency taking?

EPA is designating 20 chemical substances as Low-Priority Substances pursuant to section 6(b) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605(b). This document includes the final designation for each of the chemical substances and instructions on how to access the chemical-specific information, analysis and basis used by EPA to make the final designation for each chemical substance.

C. Why is the Agency taking this action?

As required by TSCA section 6(b)(2)(B), EPA is designating 20 chemical substances as Low-Priority Substances. EPA initiated the prioritization process required by TSCA section 6(b) on March 21, 2019 (Ref. 1) and published screening reviews supporting their proposed designation as Low-Priority Substances on August 15, 2019 (Ref. 2).

D. What is the Agency's authority for taking this action?

This document is issued pursuant to TSCA section 6(b).

E. What are the estimated incremental impacts of this action?

This document identifies 20 chemical substances as Low-Priority Substances. This document does not establish any requirements on persons or entities outside of the Agency. No incremental impacts are therefore anticipated, and

consequently EPA did not estimate potential incremental impacts for this action.

II. Background

TSCA section 6(b), as amended in 2016 by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Pub. L. 114–182), requires EPA to prioritize chemical substances for designation as a High-Priority Substance or a Low-Priority Substance. In accordance with TSCA section 6(b) and 40 CFR 702.7, on March 21, 2019 (Ref. 1), EPA initiated the prioritization process for 20 chemical substances identified as candidates for Low-Priority Substance designation and sought public comment on the identified candidates. On August 15, 2019 (Ref. 2), EPA proposed 20 chemical substances as Low-Priority Substances and sought additional public comment on these proposals.

Under TSCA section 6(b)(1)(B) and implementing regulations (40 CFR 702.3), a Low-Priority Substance is defined as a chemical substance that the Administrator concludes, based on information sufficient to establish, without consideration of costs or other non-risk factors, does not meet the standard for a High-Priority Substance. A High-Priority Substance is defined as a chemical substance that the Administrator concludes, without consideration of costs or other non-risk factors, may present an unreasonable risk of injury to health or the environment because of a potential hazard and a potential route of exposure under the conditions of use, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant by the Administrator. Designation of a chemical substance as a Low-Priority Substance indicates a risk evaluation is not warranted at that time (TSCA Section 6(b)(1)(A) and 40 CFR 702.15).

This document is intended to fulfill the requirement in TSCA section 6(b)(2)(B) that the Administrator finalize the designation of 20 chemical substances as Low-Priority Substances. The prioritization rule states at 40 CFR 702.11 that EPA will publish such designations in the **Federal Register.**

As described in the proposal notice (Ref. 2), EPA used reasonably available information to screen each candidate chemical substance against the following criteria and considerations (40 CFR 702.9(a)) and thereby inform the proposed designation:

- The chemical substance's hazard and exposure potential;
- The chemical substance's persistence and bioaccumulation;
- Potentially exposed or susceptible subpopulations;
- Storage of the chemical substance near significant sources of drinking water;
- The chemical substance's conditions of use or significant changes in conditions of use;
- The chemical substance's production volume or significant changes in production volume; and
- Other risk-based criteria that EPA determines to be relevant to the designation of the chemical substance's priority for risk evaluation.

For the final priority designation, EPA considered comments and information submitted by the public during two public comment periods (after initiation and after proposed designation) and incorporated them as appropriate in finalizing the 20 chemical substances designated as Low-Priority Substances, as outlined in the statute (TSCA section 6(b)(1)(A)) and implementing regulations (40 CFR 702.11(a)) and consistent with the scientific standards of TSCA section 26(h) and (i). In addition, as required by TSCA section 6(b)(1)(B)(ii) and 40 CFR 702.11(b), EPA did not consider cost or other non-risk factors in making a priority designation.

III. Information and Comments Received

A. Initiation

The initiation of the prioritization process (Ref. 1) included a 90-day comment period during which interested persons were able to submit relevant information on those chemical substances identified as candidates for Low-Priority Substance designation.

During the 90-day comment period, commenters submitted information on four chemical substances identified as candidates for Low-Priority designation:

- *Propanol, [(1-methyl-1,2-ethanediyl)bis(oxy)]bis- (CAS RN 24800–44–0) (Ref. 3)*
- *Propanol, 1(or 2)-(2-methoxymethylethoxy)-, acetate (CAS RN 88917–22–0) (Ref. 4)*
- *Propanol, [2-(2-butoxymethylethoxy)methylethoxy]- (CAS RN 55934–93–5) (Ref. 5)*
- *Propanol, oxybis- (CAS RN 25265–71–8) (Ref. 6)*

EPA incorporated the chemical-specific information submitted during the initiation public comment period in the screening reviews published at proposal.

EPA also received general prioritization comments during the initiation public comment period, as summarized below. A high-level synopsis of comments received during the initiation stage, and Agency responses to those comments, follows. Additional information is included in the Agency's full response to general comments document (Ref. 7) and in its full response to chemical-specific comments document (Ref. 8).

The following provides an overview of public comments received during initiation and EPA's responses.

1. Agency Approach and Rationale

Comment: Several commenters requested that EPA clearly explain its approach to applying the statutory considerations and criteria of TSCA section 6(b)(1)(A) during the screening review of the candidate chemical substances, as well as its rationale for proposed priority designations. Specific concerns included how EPA would address instances where new data for some Work Plan chemicals identified as high- or low-priority chemicals might not satisfy the Section 6 statutory criteria for prioritization, and that ''EPA should establish a risk-based screening process and criteria'' and ''should not decouple the hazard and exposure elements from the risk equation and transform them into independent considerations.''

Response: As required by Congress and codified in the regulations from the ''Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act'' Rule (Ref. 9), there are two comment opportunities during the prioritization process, in accordance with applicable statutory and regulatory requirements. EPA considered the information submitted as part of its proposed and final designations.

For prioritization, EPA considered sources of information consistent with the scientific standards in TSCA section 26(h), including the sources listed in EPA's ''Approach Document for Screening Hazard Information for Low-Priority Substances under TSCA'' (Ref. 10) (also referred to as ''Approach Document'').

In response to commenter's specific concerns regarding implementation of the statutory considerations and criteria of TSCA section 6(b)(1)(A), EPA notes that the Agency developed a screening review document for each candidate chemical substance at proposal to identify the information, analysis and basis used to support the proposed designation as a low-priority substance. These documents are available in the respective dockets of each chemical substance with a proposed designation as a Low-Priority Substance (Ref. 2). Each document includes an overview of the requirements in TSCA section

6(b)(1)(A) and in the regulation addressing the ''screening review criteria'' and considerations for proposed priority designations (40 CFR 702.9). Those documents describe how EPA considered each of the applicable statutory and regulatory requirements and criteria, including those related to hazard, exposure, the ''conditions of use or significant changes in conditions of use,'' and ''potentially exposed or susceptible subpopulations,'' to support the proposed designation.

TSCA section 6(b)(1)(A) requires EPA to determine whether a chemical may present unreasonable risk ''because of a potential hazard and a potential route of exposure,'' indicating that hazard and exposure potential are considerations for the risk-based priority designations.

2. Potentially Exposed or Susceptible Subpopulations

Comment: One commenter urged EPA to identify relevant potentially exposed or susceptible subpopulations (PESS), including infants, children, pregnant women, workers, the elderly, and ''people living in proximity to sources of contamination,'' as well as to consider environmental justice concerns in the prioritization process.

Response: EPA explained in the response to comments on the prioritization rule (Ref. 11) that EPA has, in practice, evaluated risks across populations, with particular attention to workers, pregnant women, children, infants and the elderly, among others. The Agency will continue to use and refine its processes for prioritization to determine risks to potentially exposed or susceptible subpopulations.

In the screening reviews conducted for prioritization, EPA considered reasonably available information to identify the relevant potentially exposed or susceptible subpopulations, such as children, workers or consumers. EPA used human health hazard information, the conditions of use, and exposure potential to identify potentially exposed or susceptible subpopulations. These data provide an indication about whether children or other susceptible subpopulations may be potentially exposed to the reported chemical.

3. Future Prioritization Efforts

Comment: Some commenters offered thoughts on future prioritization efforts, including urging EPA to allow data to drive the priority designation and to not predetermine an outcome for the candidates as High- or Low-Priority Substances.

Response: EPA agrees that priority designation should be driven by data as explained in the Approach Document (Ref. 10). Similar to the process to designate the first 20 Low-Priority Substances, in the future, EPA intends to use reasonably available information in proposed designation documents to explain why it chose to initiate the process for the particular chemical substance (*e.g.,* whether EPA viewed this as a potential candidate for high- or low-priority) (''Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act'' rule (Ref. 9 at 33759)). In addition, the two 90-day comment periods provided an opportunity for any interested person to submit additional information before EPA finalized a designation for a candidate chemical substance.

4. Stakeholder Engagement and Transparency

Comment: Several commenters supported stakeholder engagement and transparency during the prioritization process, including maintaining an open and transparent process that ''encourages submission of the most relevant information,'' providing ''greater transparency and clarity'' and ''more information to ascertain what information [EPA] already has and what information is needed,'' and stating that ''transparency and information exchange is critical to the success of future prioritization efforts.'' Other commenters indicated shortcomings with the transparency of the process and/or provided recommendations for improvements, including placing all the ''reasonably available information'' in the dockets for public review, increasing transparency about the information received during the initiation of public comment period and indicating if EPA used that information to screen the chemical against the criteria for proposing a priority designation, so that members of the public can comment on such information during the proposed designation comment period.

Response: EPA appreciates the feedback regarding engaging with stakeholders and transparency. Regarding the process and criteria used, as described in Unit III.A of the Initiation of Prioritization Under the Toxic Substances Control Act (Ref. 1), EPA used the Safer Chemical Ingredients List (SCIL) as a starting point for narrowing down potential candidates for Low-Priority Substances, but performed an independent review of the reasonably available information to screen each candidate chemical substance against all of the statutory criteria and considerations under TSCA section 6(b)(1)(A) and 40 CFR 702.9. This information was included in the screening reviews for each chemical substance. In addition, the two 90-day comment periods provided an opportunity for any interested person to submit additional information before EPA finalized a designation for a candidate chemical substance.

Leading up to the nine- to twelve-month statutory window for prioritization, EPA worked diligently to gather stakeholder input on the process for identifying candidates for initiation of prioritization. On December 11, 2017, EPA held a public meeting to discuss possible approaches for identifying potential candidate chemicals for EPA's prioritization process under TSCA (82 FR 51415). EPA described and took comment on a number of possible approaches that could guide the Agency in identification of potential candidate chemicals for prioritization. EPA considered that input and on October 5, 2018, published notice of its release of ''A Working Approach for Identifying Potential Candidate Chemicals for Prioritization'' and opened a docket for comment (83 FR 50366). When prioritization was actually initiated under the statutory timeline, EPA provided an opportunity for the public to provide information for the chemical substances by publishing the notice initiating the prioritization process (Ref. 1). In the notice with the proposed priority designation (Ref. 2), EPA developed a screening review document for each candidate chemical substance to identify the information, analysis and basis used to support the proposed Low-Priority Substance designation. These documents include linked citations to the Health and Environmental Research Online (HERO) database (Ref. 12) for all references used in the literature review for each of these chemical substances. Those references are accessible to the public via links provided in the HERO database.

5. Designation Terminology

Comment: One commenter called for greater clarity in the definitions of High- and Low-Priority Substances, beyond the statutory definitions.

Response: In a previous response to public comment, the Agency articulated its rationale for not elaborating on or modifying statutory standards for High-Priority and Low-Priority Substances: ''EPA did not establish the standard for a High-Priority designation; Congress did in the definitions of High- (and Low-) Priority Substances . . . The statutory standard for High-Priority designations—that the chemical 'may present an unreasonable risk' based on a 'potential hazard and a potential route of exposure'—is the only place where

such a standard appears in TSCA.'' (Ref. 11). EPA believes it is appropriate to rely on the statutory standards for designating High-Priority and Low-Priority Substances, without introducing new binding language. Yet to help explain the context, purpose, and timing of this effort, EPA wishes to offer some of the Agency's views from its experience in this initial round of prioritization.

Every chemical substance may present risks of one sort or another. A spill of fresh water into a marine environment may present risks to aquatic life, and excessive consumption of water may present a risk of water intoxication to humans. People encounter chemicals in their daily lives that may present some risk. Notably, EPA's role in prioritization and risk evaluation under section 6 of TSCA is to scrutinize chemical substances for *unreasonable* risks. It would be inappropriate for every potential risk—even those from water—to be considered an unreasonable risk and even more inappropriate to think that the statutory text contemplates that the presence of potential risks forecloses a designation as a Low-Priority Substance. Rather, the statutory use of the term 'unreasonable' necessarily leaves some ambiguity for the Agency to resolve in exercising its technical and policy discretion in each decision it makes under the prioritization process. A determination of whether or not a chemical may present unreasonable risk is made on a case-by-case, chemical-specific basis.

In the final prioritization and risk evaluation rules, EPA retained its discretion by not promulgating a definition of unreasonable risk (82 FR 33726; Ref. 9). Indeed, in the risk evaluation rule's preamble, EPA discussed a non-exhaustive list of factors that the Agency may weigh in considering unreasonable risk: ''To account for the number of different risk characterization approaches and for changing science, EPA will not include any specific definition in this final rule. To make a risk determination, EPA may weigh a variety of factors in determining unreasonable risk. The Administrator will consider relevant factors including, but not limited to: The effects of the chemical substance on health and human exposure to such substance under the conditions of use (including cancer and non-cancer risks); the effects of the chemical substance on the environment and environmental exposure under the conditions of use; the population exposed (including any susceptible populations), the severity of hazard (the nature of the hazard, the irreversibility of hazard), and uncertainties'' (82 FR 33726 at 33735). In recently issued draft risk evaluations, EPA further elaborated: ''EPA also takes into consideration the Agency's confidence in the data used in the risk estimate. This includes an evaluation of the strengths, limitations and uncertainties associated with the information used to inform the risk estimate and the risk characterization.''

The statute tasks the Agency with first teasing apart and designating High-Priority Substances for risk evaluation from Low-Priority Substances that will not proceed to risk evaluation—at least not at the current time based upon EPA's review of reasonably available information. For High-Priority Substances, EPA must proceed to risk evaluation and, upon any determination of unreasonable risk, to risk management.

The statutory framework is thus clear that prioritization is not meant to be a risk evaluation. Nor can it be with the timeline provided under TSCA. The statute required that EPA designate 20 High-Priority Substances and 20 Low-Priority Substances within three and a half years of enactment (TSCA section 6(b)(2)(B)). Yet EPA first had to undertake a notice-and-comment rulemaking to lay out the process for this prioritization process (TSCA section 6(b)(1)(A)). The statute further specified the prioritization timeline: It must include multiple stages (initiation plus opportunity for public comment, with opportunity for extension; proposal plus opportunity for public comment; and final designation), and it must last no longer than one year but no shorter than nine months (TSCA section 6(b)(1)(C)). Between the statutory window of no more than one year for the entire prioritization process, the statutory requirement for EPA to designate 20 Low-Priority Substances by December 2019, and the plain statutory text explaining that EPA is to use a ''screening process'' to designate ''low-priority'' substances ''for which risk evaluations are not warranted at the time,'' the statute is clear that EPA need not perform nearly as exhaustive a review of a chemical substance as a risk evaluation before designating the chemical substance as a Low-Priority Substance.

Moreover, Congress chose not to define ''screening process'' in the statute, leaving EPA the discretion to create a risk-based screening process according to the considerations expressed in section 6(b)(1)(A). EPA created a transparent literature review method for the purposes of prioritization and screening review under this section. The Approach Document (Ref. 10) includes a description of elements for weight of the scientific evidence and explains how these can be applied in a manner appropriate to screening-level review and Low-Priority Substance designations. The Approach Document (Ref. 10) explains the methods used to ensure comprehensive, objective, transparent and consistent review of reasonably available information.

EPA included exposure and potential changes in exposure through considerations such as conditions of use (including all known, intended or reasonably foreseen uses), significant changes in the conditions of use, production volume, and significant changes in the production volume. The selection of chemical substances with consistently low-hazard characteristics means that an increase in the frequency or magnitude of exposure would not significantly change the outcome of a screening-level review. In compliance with section 26, EPA considered the reasonably available information, including studies and data, on each proposed Low-Priority Substance relevant to the screening criteria and used such information in a manner consistent with best available science. EPA notes the following text from the Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act: ''The screening review is not a risk evaluation, but rather a review of reasonably available information on the chemical substance that relates to the screening criteria. EPA expects to review all sources of relevant information, consistent with the scientific standards in 15 U.S.C. 2625(h), while conducting the screening review'' (Ref. 9 at 33759).

EPA also kept in mind the nine- to twelve-month deadline to complete the prioritization process, while accommodating and incorporating the statutorily-required cumulative six months of public comment. Congress recognized the important of public input and EPA has considered and incorporated, as appropriate, the comments that were received. The statutory provisions at TSCA sections 6(b)(1)(A) and 6(b)(1)(B)(ii) direct EPA to undertake a limited screening process and to render priority determinations based on sufficient supporting information. Congress's requirement for EPA to designate twenty chemical substances as Low-Priority Substances within three and a half years after the Lautenberg amendments to TSCA, within the nine- to twelve-month process prescribed by the statute, and

only after first proposing and then promulgating a rule to lay out the process for prioritization, indicates that Congress expected the identification of such chemical substances to be a manageable exercise for the Agency. Low-priority designations are not determinations that these chemical substances do not present any risks, rather that EPA, through the prioritization process, has determined that sufficient information supports the determination that these chemical substances do not meet the standard provided in TSCA section 6(b)(1)(B)(i) to designate these chemical substances as High-Priority Substances.

Still, the final, yet not permanent, nature of the Low-Priority Substance designation gives EPA the authority to revisit a Low-Priority Substance designation given the ever-changing reality of scientific discovery. EPA notes the following text from the Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act: ''Designation of a chemical substance as a Low-Priority Substance under § 702.11 means that a risk evaluation of the chemical substance is not warranted at the time, but does not preclude EPA from later revising the designation pursuant to § 702.13, if warranted'' (40 CFR 702.15; Ref. 9). EPA further notes the following text from Senate Report 114–67—Frank R. Lautenberg Chemical Safety for the 21st Century Act: ''By including these mandatory criteria in the statute, it is the Committee's intent to require EPA to ensure that important, broad science-based considerations, classifications and designations drive the prioritization screening process, without locking EPA into specific designations based upon ever-changing science'' (Ref. 12). EPA's prioritization rule expressly recognizes that EPA may revise a Low-Priority Substance designation based on reasonably available information (40 CFR 702.13).

6. Timeframe for Providing Chemical Substance Information

Comment: Commenters described the challenges to collecting, identifying, assessing, and submitting chemical-specific data in the 90-day comment period following the initiation of the prioritization process, including challenges gathering information that resides with international downstream suppliers, limitations of available data gathering tools, and time and resource requirements, including a call for additional time during the comment period.

Response: EPA understands such challenges and has been committed to giving the public and interested stakeholders as many opportunities as possible, under the timing requirements of the statute, to provide relevant chemical substance information and comment on key aspects of the prioritization process in general, as well as for each chemical substance. The prioritization process was designed, by law, to take no fewer than nine months, and no more than twelve months—a timeframe set by Congress to allow interested stakeholders to provide the Agency with relevant, necessary information. EPA does not have the discretion to adjust the timeframe set by Congress. Within the nine- to twelve-month timeframe, there are two three-month comment periods (following initiation and proposed designation for the substances), for a total of six months for public comment during the prioritization process.

Comment: A commenter stated that EPA ''could use its authority under TSCA 4(a)(1)(A)(i) [to require the development of new information before initiating prioritization] and that it could also use its authority under 4(a)(1)(A)(ii) for chemicals that meet the statutory criteria of being produced and potentially released in substantial quantities or if there is potentially significant exposure,'' while noting the ''difficulty in making a may present unreasonable risk finding as required under 4(a)(1)(A)(i) was among the motivations for amending TSCA, and this difficulty would still need to be overcome.'' The commenter then stated that ''timing requirements might indeed be difficult to meet in some cases, [but] such difficulty does not remove the clear requirement under 4(a)(2)(B)(i) to make a priority designation within 90 days of receipt of any information requested.''

Response: EPA appreciates the comment regarding the Agency's data collection authority. EPA identified sufficient information to complete the prioritization screening review and make final priority designations.

7. Confidential Business Information

Comment: One commenter urged EPA to implement the requirements of TSCA section 14 when prioritizing chemical substances, urging adherence to the requirements for disclosure of certain information by the Agency and the timing for confidentiality claims and substantiations.

Response: EPA generally makes the information it uses for decision making publicly available, consistent with the requirements of TSCA section 14. EPA considered all reasonably available information, including CBI, to perform the screening review for Low-Priority Substances. All reasonably available information used in the screening review was publicly available for the 20 Low-Priority Substances designated at this time.

8. Low-Priority Substance Designations

Comment: One commenter raised concerns that ''EPA must be in possession of data for all relevant health and ecological endpoints developed using adequate test methodologies'' to support a Low-Priority Substance designation. The commenter encouraged EPA to provide a description of ''endpoints and related testing methodologies on which it will rely in the upcoming **Federal Register** notice proposing specific substances for low-priority listing.''

Response: Each chemical substance's screening review provides the endpoints and methodology used to screen the chemical substance. The data quality criteria used to screen reasonably available hazard information is provided in the Approach Document (Ref. 10). As previously explained, EPA based its selection of candidate chemicals on the best available science, consistent with TSCA section 26(h), and selected candidates with robust data sets for consideration of hazard and exposure potential. Before initiating the prioritization process, EPA reviewed the reasonably available hazard and exposure-related information and determined whether there was sufficient information to complete the prioritization process within the statutory deadlines.

Comment: One commenter urged EPA to ''provide a focused and robust message on low priority designations which clearly identify low priority chemicals as such, so that they do not occupy a place of uncertainty and are not associated with statements of implied risk'' and ''to continue to make low priority designations.''

Response: In the preamble of the prioritization rule (Ref. 9), EPA clarified the messaging associated with Low-Priority Substance designations by stating ''final designation of a chemical substance as a Low-Priority Substance is a final agency action that means that a risk evaluation of the chemical substance is not warranted at the time.'' In regard to continuing to make Low-Priority Substance designations, EPA appreciates the commenter's viewpoint. Each chemical's screening review contains the reasonably available information sufficient to make the final designation of the chemical substance as a Low-Priority Substance, which is a final agency action that means that a

risk evaluation of the chemical substance is not warranted at this time.

B. Screening Review and Proposed Priority Designation

The proposed designation stage of the prioritization process (Ref. 2) included a 90-day comment period during which interested persons were able to submit relevant information on those chemical substances proposed for Low-Priority Substance designation. All hazard and fate information for these proposed Low-Priority Substances was collected and evaluated in accordance with the methodology laid out in the Approach Document (Ref. 10). Information gathered according to this Approach Document was included in each chemical substance's screening review. EPA considered the information submitted during the screening review and the proposed priority designation public comment period for specific chemical substances, as appropriate, in finalizing the Low-Priority Substance designation. During the public comment period for the proposed designation stage, EPA received 11 submissions from eight different entities, including environmental and health advocacy groups, a trade association, an academic institution, and anonymous commenters. A high-level synopsis of comments received during the proposed designation stage, and Agency responses to those comments, follows. Additional information is included in the Agency's full response to general comments document (Ref. 7) and in its full response to chemical-specific comments document (Ref. 8).

The following provides an overview of public comments received during the proposal and EPA's responses.

1. Overall Strategy for Data Search, Screening, and Evaluation

Comment: Several commenters stated EPA failed to exercise its information collection authorities to gather all reasonably available information when designating chemicals as Low-Priority Substances. Some commenters wrote that EPA failed to develop test data to fill gaps in the existing data, despite having testing authority to do so. These commenters stated that because TSCA section 6(b)(2)(B) requires that EPA designate 20 High-Priority Substances and 20 Low-Priority Substances within three and a half years of enactment, testing that could have taken up to those three and a half years should or could be reasonably available information. Other commenters stated that EPA's strategies for data search, screening relevance, and evaluating data quality were sound and appropriate to ensure the relevance and quality of sufficient, reasonably available information to support designation of Low-Priority Substances.

Response: EPA found it had sufficient information to support the Low-Priority Substance designations and did not need to exercise its information gathering authorities. As explained further in section 1(a) of the full response to general comments document (Ref. 7), the timeframe for initiation, proposal, and public comment, did not allow for requiring, conducting, and documenting toxicological studies. More information on the Agency's rationale and response can be found in the full response to general comments document (Ref. 7).

Comment: A few commenters generally stated that EPA changed the ''weight of the scientific evidence'' definition to a new definition that is inconsistent with the definition in EPA's risk evaluation regulations and currently accepted scientific standards. These commenters also disagreed with EPA's use of weight of evidence to make a low-concern finding for specific endpoints. Other commenters supported EPA's strategies for evaluating data and stated they were sound, relevant, and sufficient to support designation of Low-Priority Substances.

Response: The risk evaluation definition of ''weight of the scientific evidence'' is beyond the scope of prioritization. EPA ensured elements of weight of scientific evidence appropriate to screening-level review and Low-Priority Substance designation were incorporated in the screening-level reviews. The document ''A Working Approach for Identifying Potential Candidate Chemicals for Prioritization'' (Ref. 13) explains the methods used to ensure comprehensive, objective, transparent and consistent review of all reasonably available information for the Low-Priority Substances.

Comment: Several commenters suggested that the range of studies considered by EPA should have been more inclusive. In particular, one commenter recommended additional sources of information within U.S. government agencies and programs, and a few commenters stated that EPA's review should not have excluded foreign language studies.

Response: EPA considered all reasonably available information and relied on the data quality criteria outlined in the Approach Document (Ref. 10) to ensure sufficient information to support a Low-Priority Substance designation.

Comment: One commenter pointed out a lack of clarity in the way EPA cited sources obtained from the European Chemicals Agency (ECHA) database. The commenter further stated that EPA needs to review and consider the full study reports corresponding to the summaries obtained from the ECHA database.

Response: EPA has updated the citations in the screening reviews to ''Reported to the ECHA database'' to reflect that ECHA is not the author of these studies. EPA found that the information in study summaries provided sufficient information to determine whether it met EPA's data quality metrics (Ref. 10). Where summaries provided insufficient information, EPA did not use that study.

2. Additional Endpoints EPA Should Have Considered

Comment: Several commenters suggested additional endpoints that EPA should have considered during the prioritization process: Physical hazards, immunotoxicity, respiratory sensitization, endocrine effects, and developmental neurotoxicity.

One commenter recommended that EPA should consider physical hazards, such as flammability, self-ignition, and explosive properties, when determining whether a substance meets the requirements for low-priority designation. The commenter wrote that TSCA does not define ''hazard,'' so the ordinary meaning of ''a danger or risk'' should be applied. The commenter pointed to the dossier for 3-methoxybutyl acetate as an example of EPA not considering or analyzing that substance's moderate flammability.

Response: EPA considered all reasonably available information, which included the additional endpoints recommended by the commenters, in the screening review of the Low-Priority Substances. For example, EPA considered potential acute physical hazards, like flammability and explosive and self-ignition properties, for the Low-Priority Substances and found that the 20 Low-Priority Substances do not exhibit explosive, flammable, or self-ignition properties near ambient temperatures. As a result, EPA did not include acute physical hazard endpoints in its published screening review because the physical-chemical properties of the Low-Priority Substances indicate that these chemicals do not meet the standard for a High-Priority Substance for risk evaluation.

Comment: Two commenters stated that EPA failed to consider immunotoxicity and respiratory sensitization for all 20 Low-Priority Substances, and that EPA needs to

consider these endpoints to fulfill its mandate under TSCA. In particular, commenters pointed out that immunotoxicity is relevant to vulnerable populations, including women, children, and the elderly, who may be more susceptible to immune system damage from chemical exposure, and respiratory sensitization is particularly relevant to children's health issues due to increasing childhood asthma and other illnesses.

Response: EPA has added discussion of immunotoxicity and respiratory sensitization to each Low-Priority Substance's screening review. Inclusion of these endpoints helps to clarify that the Agency has addressed potential concerns for populations that could be exposed or susceptible to immunological toxicants.

Comment: A few commenters stated that EPA's mandate under TSCA requires a consideration of potential adverse endocrine effects and developmental neurotoxicity for the Low-Priority Substances.

Response: In considering the reasonably available information, EPA reviewed repeated dose, reproductive and developmental studies for documented changes in developmental neurotoxicity, such as behavioral, functional, or structural changes related to neurological outcomes in mammalian offspring. The Agency also reviewed information from high-throughput ToxCast assays and found no evidence of endocrine activity. Therefore, EPA believes it has sufficient information to designate these chemical substances as Low-Priority Substances.

3. Sufficient Information To Support a Low-Priority Substance Designation

Comment: Several commenters generally stated that EPA did not have sufficient information to support a low-priority designation for these 20 substances. Commenters also contended that EPA's methods disregarded, without sufficient justification, pieces of evidence suggesting the substances may have adverse effects. One commenter stated that more robust and complete data are needed for low-priority designations than for high-priority designations, and that EPA should not risk an erroneous designation of a substance as low priority.

Response: Congress chose not to define ''screening process'' in the statute, leaving EPA the discretion to create a risk-based screening process according to the considerations expressed in section 6(b)(1)(A). EPA created a transparent literature review method for the purposes of prioritization and screening review under this section. The Approach Document (Ref. 10) includes a description of elements for weight of scientific evidence and explains how these can be applied in a manner appropriate to screening-level review and Low-Priority Substance designations. In compliance with section 26, EPA considered the reasonably available information, including studies and data, on each Low-Priority Substance relevant to the screening criteria and used such information in a manner consistent with best available science. EPA notes the following text from the Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act: ''The screening review is not a risk evaluation, but rather a review of reasonably available information on the chemical substance that relates to the screening criteria. EPA expects to review all sources of relevant information, consistent with the scientific standards in 15 U.S.C. 2625(h), while conducting the screening review'' (Ref. 9 at 33759). EPA also kept in mind the nine- to twelve-month deadline to complete the prioritization process, while accommodating and incorporating the statutorily-required cumulative six months of public comment. Congress recognized the importance of public input and EPA has considered and incorporated, as appropriate, the comments that were received.

Low-Priority Substance designations are not determinations that these chemical substances do not present any risks, rather that EPA, through the prioritization process, has determined that sufficient information supports the determination that these chemical substances do not meet the standard provided in TSCA section 6(b)(1)(B)(i) to designate these chemical substances as High-Priority Substances.

Comment: Two commenters raised concerns about the adequacy of EPA's Low-Concern Criteria and their application to the 20 Low-Priority Substances. For example, commenters stated that the Low-Concern Criteria were not sufficiently rigorous to determine whether a substance had an insignificant toxicological hazard, and pointed out flaws in the Criteria including missing endpoints and insufficient consideration of expected exposure. Another commenter recommended that EPA use transparent and scientifically accepted methods when evaluating studies for consideration in the prioritization process.

Response: In developing an approach for evaluating Low-Priority Substances, EPA assembled protective, pragmatic benchmarks and methodologies informed by precedent, routinely used by the Agency, and familiar to the regulated community and the public. The Approach Document (Ref. 10) explains the methods used to ensure comprehensive, objective, transparent and consistent review of all reasonably available information for the Low-Priority Substances, while remaining grounded in the view that what is required is sufficient information for designation.

Comment: One commenter generally supported EPA's approach to considering conditions of use, but recommended that EPA apply a quality review to all sources of information used when assessing conditions of use. The commenter suggested that this quality review process be addressed in the Approach Document (Ref. 10). The commenter also stated that EPA's considerations of changes in conditions of use and changes in volume were pragmatic.

Response: EPA included all known, intended, or reasonably foreseen uses in the Low-Priority Substance screening reviews to be as inclusive as possible and to account for reasonably foreseeable uses.

Comment: One commenter supported EPA's pragmatic approach to considering storage near drinking water and recommended that EPA approach this criterion in the longer term using improved exposure models that can better predict fate and environmental partitioning into water sources. Another commenter stated that EPA's Low-Priority Substance dossiers did not adequately analyze storage near significant sources of drinking water. The commenter stated that EPA should have obtained data on the substances' actual storage near drinking water sources.

Response: EPA has sufficient information to establish that the Low-Priority Substances do not meet the definition for a High-Priority Substance based on their low-hazard profiles, biodegradation potential, wastewater treatment plant removal (greater than 80% for all 20 chemicals) and related characteristics. The Agency therefore did not use its information gathering authorities to obtain data on storage of the Low-Priority Substances. Additionally, similar to longer-term testing that is unavailable within the prioritization timeframe, EPA did not find information on the storage location of the Low-Priority Substances that was reasonably available.

Comment: One commenter stated that EPA dismissed, or did not seek,

information regarding certain subpopulations' heightened susceptibility to adverse effects from chemical exposure. The commenter stated that EPA made unjustified assumptions that subpopulations such as children face the same level of risk as does the general public.

Response: EPA did consider potentially exposed or susceptible subpopulations (PESS) in its Low-Priority Substance designations, per TSCA section 6(b)(1). EPA found that a change in the conditions of use for the Low-Priority Substances could result in an increase in exposures to certain populations, but that the consistently low-hazard profiles associated with these chemicals are sufficient information to demonstrate that there are no groups with heightened susceptibility. Based on the weight of scientific evidence, EPA has sufficient information to support the Low-Priority Substance designation of these chemical substances as they do not meet the standard for a High-Priority Substance for risk evaluation, including consideration of PESS.

Comment: Commenters stated that EPA dismissed the importance of exposure by making unsubstantiated assumptions of low exposure, and also failed to consider data on inhalation and dermal routes of exposure, both of which preclude definitive low-priority designations. One commenter further stated that EPA must establish the absence of adverse effects or potential exposure to support a low-priority designation. Another commenter generally supported EPA's approach to addressing exposure potential, but suggested that EPA could improve public understanding of its risk-based screening approach by adding information to the Approach Document (Ref. 10) explaining its approach to identifying, screening, evaluating, and integrating relevant information about potential exposure. The commenter also suggested that EPA consider formalizing risk-based screening by presenting margins of exposure.

Response: EPA developed a fit-for-purpose screening process appropriate for the designation of Low-Priority Substances. This approach focused on identifying chemicals that consistently exhibit low-hazard characteristics across the spectrum of endpoints. The hazard data included experimental data on the chemicals themselves and close analogs, data from New Approach Methodologies (NAMs), and data extrapolated across routes of exposure. For a small number of chemicals, EPA performed route-to-route extrapolations from available data to predict toxicity values from inhalation and/or dermal exposures. EPA included a qualitative review of exposure potential as requiring margin of exposure estimates or other elements of a risk evaluation are beyond the scope of a screening-level review for prioritization. EPA included potential changes in exposure, conditions of use and production volume, and determined that changes in conditions of use or production volume would be unlikely to change the Agency's Low-Priority Substance designations.

Comment: Several commenters expressed that EPA did not sufficiently address specific human health hazard endpoints. Generally, commenters stated that for multiple endpoints, EPA relied on insufficient data, made unsupported assumptions of low risk, dismissed data, and failed to make appropriate use of metrics and criteria for assessing these endpoints. For several endpoints, one commenter stated that EPA had appropriately used available tools and information to designate substances without requiring the development of new information, consistent with the goals of the amended TSCA. Comments were received on the following human health hazard endpoints: Inhalation and dermal toxicity; adsorption, distribution, metabolism, and excretion (ADME); acute mammalian toxicity; reproductive toxicity; mutagenicity/genotoxicity; carcinogenicity; neurotoxicity; and eye irritation.

Response: In developing an approach for evaluating Low-Priority Substances, EPA assembled protective, pragmatic criteria and methodologies informed by precedent, routinely used by the Agency, and familiar to the regulated community and the public. EPA's approach was thorough in searching for and compiling data and information on individual chemicals and toxicological endpoints. At the same time, the approach was grounded in the view that what is required is sufficient information for prioritization, which would consider a chemical substance's overall hazard profile, application of assessment methods with reasonably available data, the weight of toxicological evidence, and the requisite definition for a Low-Priority Substance (namely, a chemical that at the time of its designation would not meet the standard for a High-Priority Substance). More detailed responses can be found in the full response to general comments document (Ref. 7).

Comment: Similarly, multiple commenters stated that EPA did not sufficiently address environmental hazard endpoints, including chronic aquatic toxicity, bioaccumulation, persistence, and biodegradation. One commenter stated that EPA's system for environmental hazard classification was incomplete or not in alignment with established systems. Generally, commenters stated that for multiple endpoints, EPA relied on insufficient data or relied only on model predictions, dismissed possible concerns, or made unjustified assumptions. For some endpoints, two commenters stated that EPA designated the Low-Priority Substances using tools and information that were sufficient for prioritization purposes.

Response: While the Low-Priority Substances may not have experimental data for every endpoint, new approach methods, including QSARs and modeling, such as ECOSAR and EPISuite, are widely accepted methodologies for estimating environmental hazard endpoints. More detailed responses can be found in the full response to general comments document (Ref. 7).

4. Discrepancies With Other Governing Bodies

Comment: Several commenters noted discrepancies between EPA's approach to reviewing and designating low-priority candidates and Globally Harmonized System of Classification and Labelling of Chemicals (GHS) criteria, other EPA criteria and guidance, and other organizations' findings on specific chemicals. Several commenters called out discrepancies for specific human health and environmental endpoints, including acute mammalian toxicity, reproductive and developmental toxicity, carcinogenicity, neurotoxicity, immunotoxicity, respiratory sensitization, and acute and chronic aquatic toxicity.

Response: EPA developed a fit-for-purpose screening process appropriate for the designation of Low-Priority Substances. The risk evaluation guidelines suggested by the commenters are not appropriate for the purposes of prioritization. In developing an approach for evaluating Low-Priority Substances, EPA assembled protective, pragmatic benchmarks and methodologies informed by precedent, routinely used by the Agency, and familiar to the regulated community and the public. As part of its thorough search for information on the Low-Priority Substances, EPA considered the hazard findings of other countries as noted in each chemical's screening review. It is not unusual for data interpretations and findings to differ among countries because every country assesses chemicals and makes decisions

based on its own governing statutes. EPA made Low-Priority Substance designations according to TSCA's risk-based statutory requirements. Based on its low-concern benchmarks, reasonably available information, and data screening approach, EPA finds it has sufficient information to designate the 20 chemical substances as Low-Priority Substances and that the chemical substances do not meet the standard for a High-Priority Substance for risk evaluation.

5. Analog Selection and Use

Comment: Multiple commenters raised concerns about the rigor and transparency of EPA's analog selection method and stated that EPA did not sufficiently justify its analog selections. Another commenter stated that EPA appropriately used the available tools and information, as well as its own expert judgement, to designate these substances without requiring the development of new information, consistent with the goals of the amended TSCA.

Response: EPA provides more information in the full response to general comments document (Ref. 7) on its selection of analogs based on the publicly available Analog Identification Methodology (AIM) software, the availability of relevant data on potential analogs, and EPA's best professional judgement.

6. Additional Comments

Comment: One commenter noted technical corrections related to the descriptions of dipropylene glycol and tripropylene glycol in Section 2 of the respective supporting documents.

Response: EPA updated Section 2 of both supporting documents to reflect these corrections.

Comment: Several commenters provided broader comments on how EPA should have improved the prioritization process or how EPA could improve the process for future prioritization efforts. For example, one commenter stated that EPA underestimated the costs of prioritization in the TSCA fee rule, and as a result did not devote the resources necessary to compile sufficiently robust low priority dossiers. The commenter recommended that EPA incorporate additional prioritization costs in the TSCA fee rule.

Response: EPA appreciates commenters' concern for Agency resources. The screening reviews for each Low-Priority Substance contain the statutorily required elements needed to support designation. Using its current resource base, the Agency has compiled and analyzed sufficient reasonably available information to support candidate identification, screening review, and Low-Priority Substance designation for each chemical substance. Comments on the TSCA fee rule are outside of this action's scope.

Comment: Several commenters argued there is missing or incomplete information in EPA's Approach Document (Ref. 10). Commenters recommended that information be added or improved around several topics including statutory and regulatory screening criteria, EPA's approach to data integration, and EPA's approach to evaluating data quality. Commenters also stated that some criteria presented in the Approach Document (Ref. 10) were not supported by EPA precedent or by the broader scientific community. Commenters stated that EPA's criteria for reviewing and integrating studies was inconsistent with previous EPA criteria and with currently accepted approaches, and also stated that EPA used a new ''weight of the scientific evidence'' definition that is inconsistent with EPA's risk evaluation regulations and currently accepted scientific standards. One commenter expressed support for EPA's development and application of the Approach Document (Ref. 10).

Response: The goal of the Approach Document (Ref. 10) was to establish a transparent process for review of the reasonably available hazard information presented in the Low-Priority Substance supporting documents. The Approach Document is not intended to address all elements of a systematic review or risk evaluation, which are beyond the scope of a screening review. The individual screening reviews provide further details regarding EPA's approach and the statutory criteria for designating Low-Priority Substances. EPA will consider updating its Approach Document (Ref. 10) in the future to elaborate on its data integration methodology.

Comment: One commenter stated that the presence of a substance on the Safer Chemical Ingredients List (SCIL) is not sufficient for designating the substance as low-priority. The commenter stated that EPA should also consider, among other things, whether sufficient information exists on all conditions of use and hazard endpoints, what vulnerable subpopulations may be exposed, and whether there are potential environmental releases.

Response: EPA did not base its Low-Priority Substance designations on a chemical's presence on SCIL. Instead, SCIL offered a pool of chemicals and a starting point in the Agency's search for suitable Low-Priority Substance candidates. EPA reviewed the Low-Priority Substances by gathering and analyzing the reasonably available information to assess these chemicals and determined with sufficient information that these chemicals do not meet the statutory standard to be considered a High-Priority Substance.

Comment: One commenter commended EPA for taking care in its prioritization procedures rule, in its working approach document, in its Approach Document, and in its notices initiating prioritization and proposing chemicals as low-priority to make clear what a designation of a chemical as a High-Priority Substance or as a Low-Priority Substance means.

Response: EPA appreciates the commenter's viewpoint.

Comment: One commenter provided recommendations for EPA's longer-term approaches to substance prioritization. The commenter recommended that EPA examine the applicability of using advanced approaches for evaluating exposure and bioactivity/toxicity as parallel evidence for use at the screening review step of the prioritization process. The commenter also recommended that EPA consider recent developments to tools for assessing persistence and bioaccumulation, and generally recommended that EPA should rely increasingly on use of New Approach Methodologies (NAMs) and other 21st century tools and sources of information to identify and propose chemicals as low priority.

Response: EPA appreciates the commenter's points and will consider them going forward.

IV. Chemical Substances Which EPA Is Designating as a Low-Priority Substance for Prioritization

A. Approach for Gathering Information, Conducting Analysis and Forming the Basis To Support the Final Low-Priority Substance Designation

EPA used reasonably available information, including public comments received on specific chemical substances during the 90-day comment periods following initiation of the prioritization process and proposal of the designations for Low-Priority Substances, to screen the candidate chemical substances against the criteria and considerations in TSCA section 6(b)(1)(A) and 40 CFR 702.9 (see Unit III.).

Each supporting document for the chemical substances designated as a Low-Priority Substance includes the information, analysis and basis for the

final designation. In the absence of experimental data for a given endpoint, EPA integrated information using New Approach Methodologies (NAMs), discussed further in the respective supporting documents. These documents are available in the docket of each of the chemical substances with a final designation as a Low-Priority Substance. The final designations are presented in Unit IV.B., along with the docket references.

B. Final Priority Designation as Low-Priority Substances

EPA is publishing the final designation for the following 20 chemical substances as Low-Priority Substances for which risk evaluation is not warranted at this time. Using the approach described in Unit IV.A., and including information provided by commentators during comment periods in the designation process, as appropriate, the final designations are based on the conclusion that the chemical substance satisfies the definition of Low-Priority Substance. Under TSCA section 6(b)(1)(B) and implementing regulations (40 CFR 702.3), a Low-Priority Substance is described as a chemical substance that the Administrator concludes does not meet the standard for designation as a High-Priority Substance, based on information sufficient to establish that conclusion, without consideration of costs or other non-risk factors. The chemical substances designated as Low-Priority Substances are listed below:

1. *1-Butanol, 3-methoxy-, 1-acetate, CAS RN 4435–53–4, Docket number: EPA–HQ–OPPT–2019–0106.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

2. *D-gluco-Heptonic acid, sodium salt (1:1), (2.xi.)-, CAS RN 31138–65–5, Docket number: EPA–HQ–OPPT–2019–0107.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

3. *D-Gluconic acid, CAS RN 526–95–4, Docket number: EPA–HQ–OPPT–2019–0108.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

4. *D-Gluconic acid, calcium salt (2:1), CAS RN 299–28–5, Docket number: EPA–HQ–OPPT–2019–0109.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

5. *D-Gluconic acid, .delta.-lactone, CAS RN 90–80–2, Docket number: EPA–HQ–OPPT–2019–0110.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

6. *D-Gluconic acid, potassium salt (1:1), CAS RN 299–27–4, Docket number: EPA–HQ–OPPT–2019–0111.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

7. *D-Gluconic acid, sodium salt (1:1), CAS RN 527–07–1, Docket number: EPA–HQ–OPPT–2019–0112.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

8. *Decanedioic acid, 1,10-dibutyl ester, CAS RN 109–43–3, Docket number: EPA–HQ–OPPT–2019–0113.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

9. *1-Docosanol, CAS RN 661–19–8, Docket number: EPA–HQ–OPPT–2019–0114.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

10. *1-Eicosanol, CAS RN 629–96–9, Docket number: EPA–HQ–OPPT–2019–0115.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

11. *1,2-Hexanediol, CAS RN 6920–22–5, Docket number: EPA–HQ–OPPT–2019–0116.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

12. *1-Octadecanol, CAS RN 112–92–5, Docket number: EPA–HQ–OPPT–2019–0117.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

13. *Propanol, [2-(2-butoxymethylethoxy)methylethoxy]-, CAS RN 55934–93–5, Docket number: EPA–HQ–OPPT–2019–0118.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

14. *Propanedioic acid, 1,3-diethyl ester, CAS RN 105–53–3, Docket number: EPA–HQ–OPPT–2019–0119.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

15. *Propanedioic acid, 1,3-dimethyl ester, CAS RN 108–59–8, Docket number: EPA–HQ–OPPT–2019–0120.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

16. *Propanol, 1(or 2)-(2-methoxymethylethoxy)-, acetate, CAS RN 88917–22–0, Docket number: EPA–HQ–OPPT–2019–0121.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

17. *Propanol, [(1-methyl-1,2-ethanediyl)bis(oxy)]bis-, CAS RN 24800–44–0, Docket number: EPA–HQ–OPPT–2019–0122.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

18. *2-Propanol, 1,1′-oxybis-, CAS RN 110–98–5, Docket number: EPA–HQ–OPPT–2019–0123.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

19. *Propanol, oxybis-, CAS RN 25265–71–8, Docket number: EPA–HQ–OPPT–2019–0124.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

20. *Tetracosane, 2,6,10,15,19,23-hexamethyl-, CAS RN 111–01–3, Docket number: EPA–HQ–OPPT–2019–0125.* The information, analysis and basis used to support the final designation as a Low-Priority Substance are in the docket for this chemical substance.

V. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. Initiation of Prioritization Under the Toxic Substances Control Act (TSCA). Notice. **Federal Register**. (84 FR 10491, March 21, 2019) (FRL–9991–06).
2. EPA. Proposed Low-Priority Substance Designation Under the Toxic Substances Control Act (TSCA). Notice. **Federal Register**. (84 FR 41712, August 15, 2019)

(FRL–9997–63).
3. EPA. Information Relevant to Prioritization for Propanol, [(1-methyl-1,2-ethanediyl)bis(oxy)]bis-. Docket ID: EPA–HQ–OPPT–2019–0122. Available at *https://www.regulations.gov.*
4. EPA. Information Relevant to Prioritization for Propanol, 1(or 2)-(2-methoxymethylethoxy)-, acetate. Docket ID: EPA–HQ–OPPT–2019–0121. Available at *https://www.regulations.gov.*
5. EPA. Information Relevant to Prioritization for Propanol, [2-(2-butoxymethylethoxy)methylethoxy]-. Docket ID: EPA–HQ–OPPT–2019–0118. Available at *https://www.regulations.gov.*
6. EPA. Information Relevant to Prioritization for Propanol, oxybis-. Docket ID: EPA–HQ–OPPT–2019–0124. Available at *https://www.regulations.gov.*
7. EPA. Summary of General Public Comments and Responses on the Proposed Designation of Low-Priority Substances under the Toxic Substances Control Act (TSCA). January 16, 2020.
8. EPA. Summary of Chemical-Specific Public Comments and Responses on the Proposed Designation of Low-Priority Substances under the Toxic Substances Control Act (TSCA). January 16, 2020.
9. EPA. Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act. Notice. **Federal Register**. (82 FR 33753, September 18, 2017) (FRL–9964–24).
10. EPA. Approach Document for Screening Hazard Information for Low-Priority Substances Under TSCA. August 2019. EPA Document ID No. 740B19008. Office of Pollution Prevention and Toxics. Washington, DC. Available at *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2019-0450-0002*.
11. EPA. *Procedures for Prioritization of Chemicals for Risk Evaluation under TSCA: Response to Public Comments;* SAN 5943; RIN 2070–AK23; EPA–HQ–OPPT–2016–0636. 2017. EPA. Health and Environmental Research Online: A Database of Scientific Studies and References. Available at *https://hero.epa.gov/hero/.*
12. *S. Rep. No. 114–67,* 114th Cong., 1st Sess. 2015. Available at *https://www.congress.gov/114/crpt/srpt67/CRPT-114srpt67.pdf.*
13. EPA. ''A Working Approach for Identifying Potential Candidate Chemicals for Prioritization.'' (*https://www.epa.gov/sites/production/files/2018-09/documents/preprioritization_white_paper_9272018.pdf*). September 26, 2018.

(Authority: 15 U.S.C. 2601 *et seq.*)

Dated: February 19, 2020.

Andrew R. Wheeler,

Administrator.

[FR Doc. 2020–03869 Filed 2–25–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2019–0500; FRL–10005–52]

Trichloroethylene; Draft Toxic Substances Control Act (TSCA) Risk Evaluation and TSCA Science Advisory Committee on Chemicals (SACC) Meetings; Notice of Availability, Public Meetings, and Request for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing the availability of and soliciting public comment on the draft Toxic Substances Control Act (TSCA) risk evaluation of trichloroethylene (TCE). EPA is also submitting the same document to the TSCA Science Advisory Committee on Chemicals (SACC) for peer review and is announcing that there will be an in-person public meeting of the TSCA SACC to consider and review the draft risk evaluation. Preceding the in-person meeting, there will be a preparatory virtual public meeting for the panel to consider the scope and clarity of the draft charge questions for the peer review. The purpose of conducting risk evaluations under TSCA is to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use, including an unreasonable risk to a relevant potentially exposed or susceptible subpopulation.

DATES:

Virtual Meeting: The preparatory virtual meeting will be held on March 3, 2020, from 1:00 p.m. to approximately 4:00 p.m. (EST). You must register online on or before March 3, 2020 to receive the webcast meeting link and audio teleconference information. Submit your comments for the preparatory virtual meeting, or request time to present oral comments, on or before noon, February 28, 2020.

In-Person Meeting: The in-person meeting will be held on March 24–26, 2020, from 8:00 a.m. to approximately 5:30 p.m. (EST) (final times for each day will be provided in the meeting agenda that will be posted in the docket at *http://www.regulations.gov* and the TSCA SACC website at *http://www.epa.gov/tsca-peer-review*). Any comments submitted on the draft risk evaluation on or before March 18, 2020, will be provided to the TSCA SACC committee for their consideration before the meeting. Comments received after March 18, 2020 and prior to the oral public comment period during the meeting will be available to the SACC for their consideration during the meeting. Please submit requests to present oral comments during the in-person meeting on or before March 18, 2020, to be included on the meeting agenda. All comments received by the end of the comment period will be considered by EPA.

Comments: All comments on the draft risk evaluation must be received on or before April 27, 2020. For additional instructions, see Unit III. of the **SUPPLEMENTARY INFORMATION**.

ADDRESSES:

Virtual Meeting: Please visit *http://www.epa.gov/tsca-peer-review* to register.

In-Person Meeting: The location of the in-person meeting will be at the Washington Plaza Hotel, 10 Thomas Circle NW, Washington, DC 20005.

Comments. Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0500, by one of the following methods:

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

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

Requests to present oral comments and requests for special accommodations. Submit requests for special accommodations, or requests to present oral comments during the virtual meeting and/or in-person peer review meeting to the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT** by the deadline identified in the **DATES** section.

FOR FURTHER INFORMATION CONTACT:

TSCA SACC: Dr. Todd Peterson, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–6428; email address: *peterson.todd@epa.gov.*

Draft Risk Evaluation: Dr. Stan Barone, Office of Pollution Prevention and Toxics (7403M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–1169; email address: *barone.stan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may be of interest to persons who are or may be required to conduct testing and those interested in risk evaluations of chemical substances under TSCA, 15 U.S.C. 2601 *et seq.* Since other entities may also be interested in this draft risk evaluation, the EPA has not attempted to describe all the specific entities that may be affected by this action.

B. What is EPA's authority for taking this action?

TSCA section 6, 15 U.S.C. 2605, requires EPA to conduct risk evaluations to ''determine whether a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.'' 15 U.S.C. 2605(b)(4)(A). TSCA sections 6(b)(4)(A) through (H) enumerate the deadlines and minimum requirements applicable to this process, including provisions that provide instruction on chemical substances that must undergo evaluation, the minimum components of a TSCA risk evaluation, and the timelines for public comment and completion of the risk evaluation. TSCA also requires that EPA operate in a manner that is consistent with the best available science, make decisions based on the weight of the scientific evidence and consider reasonably available information. 15 U.S.C. 2625(h), (i), and (k).

The statute identifies the minimum components for all chemical substance risk evaluations. For each risk evaluation, EPA must publish a document that outlines the scope of the risk evaluation to be conducted, which includes the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations that EPA expects to consider. 15 U.S.C. 2605(b)(4)(D). The statute further provides that each risk evaluation must also: (1) Integrate and assess available information on hazards and exposures for the conditions of use of the chemical substance, including information that is relevant to specific risks of injury to health or the environment and information on relevant potentially exposed or susceptible subpopulations; (2) describe whether aggregate or sentinel exposures were considered and the basis for that consideration; (3) take into account, where relevant, the likely duration, intensity, frequency, and number of exposures under the conditions of use; and (4) describe the weight of the scientific evidence for the identified hazards and exposures. 15 U.S.C. 2605(b)(4)(F)(i)–(ii) and (iv)–(v). Each risk evaluation must not consider costs or other nonrisk factors. 15 U.S.C. 2605(b)(4)(F)(iii).

The statute requires that the risk evaluation process last no longer than three years, with a possible additional six-month extension. 15 U.S.C. 2605(b)(4)(G). The statute also requires that the EPA allow for no less than a 30-day public comment period on the draft risk evaluation, prior to publishing a final risk evaluation. 15 U.S.C. 2605(b)(4)(H).

C. What action is EPA taking?

EPA is announcing the availability of and seeking public comment on the draft risk evaluation of the chemical substance identified in Unit II. EPA is seeking public comment on all aspects of the draft risk evaluation, including any preliminary conclusions, findings, and determinations, and the submission of any additional information that might be relevant to the draft risk evaluation, including the science underlying the risk evaluation and the outcome of the systematic review associated with the chemical substance. This 60-day comment period on the draft risk evaluation satisfies TSCA section 6(b)(4)(H), which requires EPA to ''provide no less than 30 days public notice and an opportunity for comment on a draft risk evaluation prior to publishing a final risk evaluation'' and 40 CFR 702.49(a), which states that ''EPA will publish a draft risk evaluation in the **Federal Register**, open a docket to facilitate receipt of public comment, and provide no less than a 60-day comment period, during which time the public may submit comment on EPA's draft risk evaluation.'' In addition to any new comments on the draft risk evaluation, the public should resubmit or clearly identify any previously filed comments, modified as appropriate, that are relevant to the draft risk evaluation and that the submitter feels have not been addressed. EPA does not intend to respond to comments submitted prior to the release of the draft risk evaluation unless they are clearly identified in comments on the draft risk evaluation.

EPA is also submitting the draft risk evaluation and associated supported documents to the TSCA SACC for peer review and announcing the meeting for the peer review panel. All comments submitted to the docket on the draft risk evaluation by the deadline identified in the **DATES** section will be provided for consideration to the TSCA SACC peer review panel, which will have the opportunity to consider the comments during its discussions.

D. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. Draft TSCA Risk Evaluation

A. What is EPA's risk evaluation process for existing chemicals under TSCA?

The risk evaluation process is the second step in EPA's existing chemical process under TSCA, following prioritization and before risk management. As this chemical is part of the first ten chemical substances undergoing risk evaluation, the chemical substance was not required to go through prioritization (81 FR 91927, December 19, 2016) (FRL–9956–47). The purpose of conducting risk evaluations is to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment, under the conditions of use, including an unreasonable risk to a relevant potentially exposed or susceptible subpopulation. As part of this process, EPA must evaluate both hazard and exposure, not consider costs or other nonrisk factors, use reasonably available information and approaches in a

manner that is consistent with the requirements in TSCA for the use of the best available science, and ensure decisions are based on the weight-of-scientific-evidence.

The specific risk evaluation process that EPA has established by rule to implement the statutory process is set out in 40 CFR part 702 and summarized on EPA's website at *http://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluations-existing-chemicals-under-tsca.* As explained in the preamble to EPA's final rule on procedures for risk evaluation (82 FR 33726, July 20, 2017) (FRL–9964–38), the specific regulatory process set out in 40 CFR part 702, subpart B will be followed for the first ten chemical substances undergoing risk evaluation to the maximum extent practicable.

B. What is trichloroethylene?

Trichloroethylene (TCE) has a wide-range of uses in consumer and commercial products and in industry. An estimated 84% of TCE's annual production volume is used as an intermediate in the manufacture of the hydrofluorocarbon HFC–134a. Another 15% of TCE production volume is used as a degreasing solvent, leaving approximately 1% for other uses. The total aggregate production volume decreased from 220.5 to 171.9 million pounds between 2012 and 2015.

Information about the problem formulation and scope phases of the TSCA risk evaluation for this chemical is available at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluation-trichloroethylene-tce-0.*

III. TSCA SACC

A. What is the purpose of the TSCA SACC?

The TSCA SACC was established by EPA in 2016 and operates in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix 2 *et seq.* The TSCA SACC provides expert independent scientific advice and consultation to the EPA on the scientific and technical aspects of risk assessments, methodologies, and pollution prevention measures and approaches for chemicals regulated under TSCA.

The TSCA SACC is comprised of experts in: Toxicology; human health and environmental risk assessment; exposure assessment; and related sciences (*e.g.,* synthetic biology, pharmacology, biotechnology, nanotechnology, biochemistry, biostatistics, physiologically based pharmacokinetic modelling (PBPK) modeling, computational toxicology, epidemiology, environmental fate, and environmental engineering and sustainability). When needed, the committee will be assisted in their reviews by ad hoc participants with specific expertise in the topics under consideration.

B. How can I access the TSCA SACC documents?

EPA's background documents, related supporting materials, and draft charge questions to the TSCA SACC are available on the TSCA SACC website and in the docket established for the specific chemical substance. In addition, EPA will provide additional background documents (*e.g.,* TSCA SACC members participating in this meeting and the meeting agenda) as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available, in the docket at *http://www.regulations.gov* and the TSCA SACC website at *http://www.epa.gov/tsca-peer-review.*

After the public meeting, the TSCA SACC will prepare meeting minutes summarizing its recommendations to the EPA. The meeting minutes will be posted on the TSCA SACC website and in the relevant docket.

C. What do I need to know about the TSCA SACC public meetings?

The focus of the public meetings is to peer review EPA's draft risk evaluation. After the peer review process, EPA will consider peer reviewer comments and recommendations and public comments, in finalizing the risk evaluation. The draft risk evaluation contains: Discussion of chemistry and physical-chemical properties; characterization of conditions of use; environmental fate and transport assessment; human health exposures; environmental hazard assessment; risk characterization; risk determination; and a detailed description of the systematic review process developed by the Office of Pollution Prevention and Toxics to search, screen, and evaluate scientific literature for use in the risk evaluation process.

D. How do I participate in the public meetings?

You may participate in the public meetings by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify the corresponding docket ID number in the subject line on the first page of your request.

1. Preparatory virtual meeting. The preparatory virtual meeting will be conducted via webcast and telephone. You may participate in the preparatory virtual meeting by registering to join the webcast. You may also submit written or oral comments.

i. *Registration.* You must register to participate in the preparatory virtual meeting. To participate by listening or making a comment during this meeting, please go to the EPA website to register: *http://www.epa.gov/tsca-peer-review.* Registration online will be confirmed by an email that will include the webcast meeting link and audio teleconference information.

ii. *Written comments.* Written comments for consideration during the preparatory virtual meeting should be submitted, using the instructions in **ADDRESSES** and this unit, on or before the date set in the **DATES** section.

iii. *Oral comments.* Requests to make brief oral comments to the TSCA SACC during the preparatory virtual meeting should be submitted when registering online or with the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before noon on the date set in the **DATES** section. Oral comments before the TSCA SACC during the preparatory virtual meeting are limited to approximately 5 minutes due to the time constraints of this virtual meeting.

2. *In-person meeting.* You may participate in the in-person public meeting by attending and by providing written or oral comments. The in-person meeting may also be webcast. Please refer to the TSCA SACC website at *http://www.epa.gov/tsca-peer-review* for information on how to access the webcast. Please note that for the in-person meeting, the webcast is a supplementary public process provided only for convenience. If difficulties arise resulting in webcasting outages, the in-person meeting will continue as planned.

i. *Seating at the meeting.* Seating at the meeting will be open and on a first-come basis.

ii. *Written comments.* To provide the TSCA SACC the time necessary to consider and review your comments, written comments must be submitted by the date set in the **DATES** section and using the instructions in the **ADDRESSES** section and this unit. Comments received after the date set in the **DATES** section and prior to the end of the oral public comment period during the meeting will still be provided to the TSCA SACC for their consideration.

iii. *Oral comments.* To be included on the meeting agenda, submit your request to make brief oral comments at the in-person meeting to the DFO listed under

FOR FURTHER INFORMATION CONTACT on or before the date set in the **DATES** section. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment. Oral comments before TSCA SACC during the in-person meeting are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should email their comments and presentation to the DFO listed under **FOR FURTHER INFORMATION CONTACT**, preferably, at least 24 hours prior to the oral public comment period.

(Authority: 15 U.S.C. 2601 *et seq.*)

Dated: February 19, 2020.

Andrew R. Wheeler,

Administrator.

[FR Doc. 2020–03866 Filed 2–25–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012139–003.

Agreement Name: ML/MSC Oceania Space Charter Agreement.

Parties: Maersk A/S and Mediterranean Shipping Company S.A.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment updates the name of the Maersk entity that is a party to the Agreement.

Proposed Effective Date: 2/14/2020.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/306.

Agreement No.: 011741–024.

Agreement Name: U.S. Pacific Coast-Oceania Agreement.

Parties: Maersk A/S; Hapag-Lloyd AG; and ANL Singapore Pte. Ltd.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment updates the name of the Maersk entity that is a party to the Agreement.

Proposed Effective Date: 2/14/2020.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/601.

Agreement No.: 012448–002.

Agreement Name: ECUS/ECSA Slot Exchange Agreement.

Parties: Maersk A/S; Hapag-Lloyd AG; and Mediterranean Shipping Company S.A.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment updates the name of the Maersk entity that is a party to the Agreement.

Proposed Effective Date: 2/14/2020.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/1929.

Agreement No.: 011707–018.

Agreement Name: Gulf/South America Discussion Agreement.

Parties: BBC Chartering Carriers GmbH & Co. KG; Industrial Maritime Carriers, LLC; and Seaboard Marine Ltd.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment deletes ZEAMARINE Carrier GmbH as a party and replaces it with Industrial Maritime Carriers, L.L.C.

Proposed Effective Date: 4/3/2020.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/684.

Dated: February 21, 2020.

Rachel Dickon,

Secretary.

[FR Doc. 2020–03882 Filed 2–25–20; 8:45 am]

BILLING CODE 6731–AA–P

FEDERAL TRADE COMMISSION

[File No. 191 0074]

Rent-to-Own Store Swaps; Analysis of Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreements in this matter settle alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Agreement Containing Consent Order to Aid Public Comment describes both the allegations in the complaints and the terms of the consent orders—embodied in the consent agreements—that would settle these allegations.

DATES: Comments must be received on or before March 27, 2020.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: ''Rent-to-Own Store Swaps; File No. 191 0074'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Joseph Lipinsky (206–220–4473), Federal Trade Commission, 915 Second Avenue, Room 2896, Seattle, WA 98174.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website (for February 20, 2020), at this web address: *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before March 27, 2020. Write ''Rent-to-Own Store Swaps; File No. 191 0074'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Rent-to-Own Store Swaps; File No. 191 0074'' on your comment and on the envelope, and mail your comment to the following address:

Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before March 27, 2020. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Agreement Containing Consent Order To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Order with Aaron's, Inc. (''Aaron's''); an Agreement Containing Consent Order with Buddy's Newco, LLC (''Buddy's''); and an Agreement Containing Consent Order with Rent-A-Center, Inc. (''RAC'') (''Consent Agreements''). The proposed Consent Agreements are intended to remedy anticompetitive effects resulting from reciprocal purchase agreements made between Aaron's, Buddy's, and RAC, and certain of their competitors in the brick-and-mortar rent-to-own (''RTO'') industry.

Pursuant to the reciprocal purchase agreements, Aaron's, Buddy's, and RAC sold consumer rental contracts to nearby competitors contingent on Aaron's, Buddy's, or RAC acquiring that competitor's consumer rental contracts in another geographic area. These reciprocal purchase agreements, called swap agreements (''Swap Agreements'') by the RTO industry, also included non-competition agreements whereby Aaron's, Buddy's, or RAC and the nearby competitors each agreed to close stores associated with the consumer rental contacts being sold and to not open new stores within a specified distance for a limited amount of time. Not all swap agreements violate the antitrust laws. Swap agreements between companies in the same industry that generate significant procompetitive benefits for consumers, such as more efficient distribution or creation of a new product, may not violate the law. The Swap Agreements and ancillary non-competition agreements at issue in the present case, however, likely reduced competition between Aaron's, Buddy's, RAC, and their competitors in the RTO industry in several local markets in the United States, reducing consumer choice and depriving consumers of the benefits of price and quality competition.

Under the Consent Agreements, Aaron's and Buddy's agree that they will no longer enter into Swap Agreements and will not take any steps to enforce any non-competition agreements associated with the Swap Agreements. The proposed Decision and Order (''Order'') in each Consent Agreement preserves competition in the RTO industry by prohibiting such Swap Agreements and enforcement of ancillary non-competition agreements.

II. The Parties

A. Aaron's, Inc.

Aaron's is headquartered in Atlanta, Georgia. As of December 2018, Aaron's, the second largest operator of RTO stores, has 1,689 stores, comprised of 1,312 company-operated stores and 377 independently owned franchised stores operating in 47 states. Aaron's estimates its 2018 fiscal year revenues were roughly $3.8 billion with over $196 million in net earnings.

B. Buddy's Newco, LLC

Buddy's, doing business as Buddy's Home Furnishings, is a limited liability company headquartered in Orlando, Florida. Buddy's operates approximately 300 franchised and corporate stores throughout the Continental United States.

C. Rent-A-Center, Inc.

Rent-A-Center, Inc. is a corporation headquartered in Plano, Texas. RAC has approximately 2,800 company-owned stores and 225 RAC franchised stores throughout the United States.

III. The Complaints

A. Background

In the RTO business, consumers do not buy merchandise outright, but rather take possession after entering into rental contracts with an RTO company. The contracts are shortterm contracts (typically one week or one month) that renew when the consumer makes the lease payment. The rental contracts are at-will; consumers may terminate the contracts and return the merchandise without penalty. The rental contracts create a recurring revenue stream for the RTO company. If an RTO store closes, the RTO company will either transfer the store's rental contracts to another of its own stores, or sell them to a nearby competitor.

A large percentage of RTO customers travel to the RTO store associated with their rental contract to make their weekly or monthly payments. If an RTO company seeks to close a store and

transfer the store's contracts to another, more distant store, the consumer may terminate the rental contract rather than traveling to the more distant store. The greater the distance between the receiving store and the closing store, the greater the likelihood that the consumer will terminate the contract. Therefore, if an RTO company does not have another store near the closing store, it may opt to sell its rental contracts to a competitor that has an RTO store in close proximity to the closing store.

B. The Challenged Conduct

Between 2015 and 2018, Aaron's, Buddy's, and RAC entered into several Swap Agreements with one another and with other RTO operators. These agreements typically covered stores in multiple different markets. Each Swap Agreement consists of two related transactions. In one transaction, a competitor closes one or more RTO stores and sells the closing stores' consumer rental contracts to Aaron's, Buddy's, or RAC, which have RTO stores near the competitor's soon-to-close stores. In the other transaction, the facts are reversed: Aaron's, Buddy's, or RAC closes one or more of its RTO stores and sells the soon-to-close stores' consumer rental contracts to the competitor which has RTO stores nearby. The sales of the rental contracts by Aaron's, Buddy's, or RAC is explicitly contingent on the purchase of the competitor's rental contracts. Parties to the Swap Agreement also sign non-compete agreements, usually for a three-year period, for the areas in the immediate vicinity of the closed stores.

C. Effects of the Challenged Conduct

The evidence indicates that at least some of the Swap Agreements entered into by Buddy's, Aaron's, and RAC, had the purpose and effect of facilitating each party's ability to induce its competitor to exit a market. Such agreements are a form of restraint that reduces competition and creates a clear threat of consumer harm. Consumers in the affected geographic areas lost any benefits of competition resulting from the closing of RTO stores and had fewer options for rental merchandise. Moreover, the evidence indicates that Aaron's, Buddy's, and RAC closed stores that might not have been closed but for the Swap Agreements. As a result, the FTC has issued its Complaints and entered into the Consent Agreements, which remedy the harm to competition.

IV. The Agreement Containing Consent Order

The proposed Orders fully address Aaron's, Buddy's, and RAC's past actions and contain important fencing in and notification provisions. The Orders prohibit Aaron's, Buddy's, and RAC from entering into any future Swap Agreements and from enforcing any non-compete clauses that are still in effect from past Swap Agreements. The Orders also prohibit any Aaron's or Buddy's representatives from serving on the Board of Directors of any of their competitors, or any competitor's representatives from serving on the Aaron's or Buddy's Board. RAC's Order does not contain this prohibition because, unlike Buddy's and Aaron's, there is no evidence that a RAC representative has previously served on a competitor's Board of Directors. The Orders require Aaron's and Buddy's to establish antitrust compliance programs, while RAC must establish a compliance program related to its Order. Finally, all the Orders impose reporting requirements, and the Orders will terminate in 20 years.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Orders or to modify their terms in any way.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2020–03782 Filed 2–25–20; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2020–0011]

DRAFT Infection Control in Healthcare Personnel: Epidemiology and Control of Selected Infections Transmitted Among Healthcare Personnel and Patients: Diphtheria, Group A Streptococcus, Meningococcal Disease, and Pertussis Sections

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (DHHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), in the Department of Health and Human Services (DHHS), announces the opening of a docket to obtain comment on the *DRAFT Infection Control in Healthcare Personnel: Epidemiology and Control of Selected Infections Transmitted Among Healthcare Personnel and Patients: Diphtheria, Group A* Streptococcus, *Meningococcal Disease, and Pertussis Sections* (''*Draft Guideline*''). The *Draft Guideline* updates four sections of the *Guideline for infection control in health care personnel, 1998* (''1998 Guideline''), *Part E: Epidemiology and Control of Selected Infections Transmitted Among Health Care Personnel and Patients,* and their corresponding recommendations in Part II of the *1998 Guideline:* ''4. Diphtheria;'' ''9. Meningococcal Disease;'' ''12. Pertussis;'' and ''18. *Streptococcus,* group A infection.'' The updated recommendations in the *Draft Guideline* are intended for use by the leaders and staff of Occupational Health Services (OHS) to facilitate the provision of occupational infection prevention and control (IPC) services to healthcare personnel (HCP) for the management of exposed or infected HCP who may be contagious to others in the workplace.

DATES: Written comments must be received on or before April 27, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2020–0011, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Division of Healthcare Quality Promotion, National Center for Emerging and Zoonotic Infectious Diseases, Centers for Disease Control and Prevention, Attn: Docket No. CDC–2020–0011, HICPAC Secretariat, 1600 Clifton Rd. NE, Mailstop H16–3, Atlanta, Georgia, 30329.

Instructions: Submissions via *http://regulations.gov* are preferred. All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *http://regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kendra Cox, Division of Healthcare Quality Promotion, National Center for Emerging and Zoonotic Infectious Diseases, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H16–2, Atlanta, Georgia, 30329; Telephone: (404) 639–4000.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data related to the *Draft Guideline.*

Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on *https://www.regulations.gov.* Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted in preparation of the final *Infection Control in Healthcare Personnel: Epidemiology and Control of Selected Infections Transmitted Among Healthcare Personnel and Patients* and may revise the final document as appropriate.

Background

The *Draft Guideline,* located in the ''Supporting & Related Material'' tab of the docket, updates four sections of the *1998 Guideline, Part E: Epidemiology and Control of Selected Infections Transmitted Among Health Care Personnel and Patients,* and their corresponding recommendations in Part II of the *1998 Guideline:* ''4. Diphtheria;'' ''9. Meningococcal Disease;'' ''12. Pertussis;'' and ''18. *Streptococcus,* group A infection.'' That section provided information and recommendations for Occupational Health Services (OHS) of healthcare facilities and systems on the prevention of transmission of infectious diseases among healthcare personnel (HCP) and patients. Additional updated sections are forthcoming.

The *Draft Guideline* is intended for use by the leaders and staff of OHS to guide the management of exposed or infected HCP who may be contagious to others in the workplace. The draft recommendations update the 1998 recommendations with current guidance on the management of exposed or potentially infectious HCP, focusing on postexposure management, including postexposure prophylaxis (PEP), for exposed HCP and work restrictions for exposed or infected HCP.

Since 2015, the Healthcare Infection Control Practices Advisory Committee (HICPAC) has worked with national partners, academicians, public health professionals, healthcare providers, and other partners to develop this *Draft Guideline* as a recommendation for CDC to update sections of the *1998 Guideline.* HICPAC includes representatives from public health, infectious diseases, regulatory and other federal agencies, professional societies, and other stakeholders.

The updated draft recommendations in this *Draft Guideline* are informed by reviews of the *1998 Guideline;* current CDC resources, guidance, and guidelines; and new resources and evidence, when available. This *Draft Guideline* will not be a federal rule or regulation.

Dated: February 21, 2020.

Sandra Cashman,

Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2020–03848 Filed 2–25–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—RFA–PS–20–001, Evaluation of New HIV Testing Technologies in Clinical Settings with High HIV Incidence.

Date: June 9, 2020

Time: 10:00 a.m.–5:00 p.m., (EDT)

Place: Teleconference, Centers for Disease Control and Prevention, Room 1080, 8 Corporate Square Blvd., Atlanta, GA 30329.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road, NE, Mailstop US8–1, Atlanta, Georgia 30329, (404) 718–8833, *gca5@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–03832 Filed 2–25–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2020–0001; NIOSH–333]

Developing a Workplace Supported Recovery Program: A Strategy for Assisting Workers and Employers With the Nation's Opioid and Substance Use Disorder Epidemics: Request for Information

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), within the Centers for Disease Control and Prevention (CDC), announces an opportunity to provide input on a NIOSH plan to develop resources and conduct research on the topic of *Workplace Supported Recovery. Workplace Supported Recovery* programs (WSRPs) assist workers and employers facing the nation's crisis related to the misuse of opioids and other drugs, and related substance use disorders.

DATES: Comments must be received April 27, 2020.

ADDRESSES: You may submit written comments, identified by docket numbers CDC–2020–0001 and NIOSH–333, by either of the following two methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* National Institute for Occupational Safety and Health, NIOSH Docket Office, 1090 Tusculum Avenue, MS C–34, Cincinnati, Ohio 45226–1998.

Instructions: All information received in response to this notice must include the agency name and docket number [CDC–2020–0001; NIOSH–333]. All relevant comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: L. Casey Chosewood, NIOSH, 1600 Clifton Road, NE; Mailstop V24–4, Atlanta, GA 30329; phone: 404–498–2483 (not a toll-free number); email: *twh@cdc.gov.*

SUPPLEMENTARY INFORMATION: The United States is in the midst of a drug overdose epidemic. More than 70,000 Americans died of drug overdoses in 2017, more than any year on record. Two-thirds of drug overdoses involved an opioid.[1] About 44 percent of adults with a substance use disorder are employed full-time and an additional 10 percent are employed part-time.[2] A 2017 National Safety Council survey found that 70 percent of employers reported experiencing the negative effects of prescription drug misuse at the organizational level, noting recruitment issues related to positive drug tests, absenteeism, injuries, and overdoses within the workplace.[3] Misuse of any drug, including prescription drugs, may impact the ability of a person to function safely in the workplace and may also hinder return to work following an injury or illness, negatively affecting their livelihood.

The effects of substance use and misuse are not isolated to work or home environments, and the potential for developing a substance use disorder may be preceded by injuries that happen in the workplace, with the consequences affecting both an individual's working life as well as their home life. Regardless of the circumstances that may have led to substance misuse, employment is a key goal among individuals in recovery.[4] Work can also provide a sense of purpose and the income needed to participate in community life, and the workplace offers social networks that provide support and friendship. By using *Total Worker Health*® principles,[5] NIOSH is developing solutions to help workers and employers facing the drug crisis in their communities. To that end, NIOSH is interested in developing resources and conducting research on the topic of *Workplace Supported Recovery.*

In a *Workplace Supported Recovery* program (WSRP), employers use evidence-based policies and programs to reduce the risk factors associated with initiating substance misuse and the progression to a substance use disorder and take steps to assist workers in recovery in staying at work or returning to work. WSRP efforts could potentially include, but would not necessarily be limited to, the following:

- Preventing work-related injuries and illnesses;
- Promoting the use of alternatives to opioids for pain relief associated with a workplace injury or illness;
- Preventing initiation of misuse;
- Developing return-to-work plans for employees after medical treatment;
- Supporting second chance employment, a process that allows for workers in recovery to rejoin the workforce after a job loss related to drug misuse;
- Providing accommodations, including access to medication-based or medication-assisted treatment (MAT) together with individual counseling;
- Offering peer support groups; and
- Peer coaching.

NIOSH is interested in input related to WSRPs from a variety of stakeholders, including employers, labor unions, workers, researchers, treatment providers, and government agencies at all levels (Federal, state, territorial, local, and tribal). Information and data from interested parties is requested on the following questions:

General Questions

1. What elements, attributes, activities, and resources should be involved in a *Workplace Supported Recovery* program (WSRP)? Describe why inclusion would benefit a WSRP.

2. How do the elements, attributes, activities, and resources that make up WSRPs vary by industry and establishment size?

3. What WSRPs or related approaches are you aware of? Do any of these programs have evaluation or other outcome measures available?

4. Are you aware of any programs that may help employers fund or otherwise develop WSRPs? If so, what are they?

5. What information is available about possible benefits for employers in hiring and/or retaining workers who are in recovery from substance misuse or a substance use disorder?

6. What are the biggest concerns, fears, or challenges around WSRPs? If available, please provide any data or information to support these concerns.

7. What training related to this effort would be of value to managers/supervisors? To workers?

Questions About Workplaces

8. Are you aware of policies that organizations (including yours) have in place to address substance misuse and substance use disorder and, if so, what are they? (*e.g.,* pre-employment drug testing, hiring, dismissal, disability, medical leave, benefits, and compliance with or implementation of Fair Labor Standards Act provisions)

9. Which parts of your organization are involved in issues related to substance misuse or substance use disorders among your workers? (*e.g.,* employee bargaining units, occupational health, safety department, human resources department, Employee Assistance Program)

Questions About Workplaces With a Recovery Program in Place

10. What services are offered as part of the program? Are there any limits or restrictions on these resources (*e.g.,* position in organization, duration, eligibility)? If so, what are they?

11. Are any of these services available to employees dealing with the substance use disorder of another person, such as a spouse/partner, child, parent, or close friend? If so, what are they?

12. What major challenges and successes has your program had?

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2020–03785 Filed 2–25–20; 8:45 am]

BILLING CODE 4163–18–P

[1] Hedegaard H, Minino AM, Warner M [2018]. Drug overdose deaths in the United States, 1999–2017. NCHS Data Brief No. 329. Hyattsville, MD: National Center for Health Statistics, November. *https://www.cdc.gov/nchs/products/databriefs/db329.htm.*

[2] SAMHSA [2017]. 2016 National Survey on Drug Use and Health. Washington, DC: Substance Abuse and Mental Health Service Administration, *https://nsduhweb.rti.org/respweb/homepage.cfm.*

[3] NSC [2017]. How the prescription drug crisis is impacting American employers. Itasca, IL: National Safety Council, *https://www.nsc.org/Portals/0/Documents/NewsDocuments/2017/Media-Briefing-National-Employer-Drug-Survey-Results.pdf.*

[4] Laudet AB [2012] Rate and predictors of employment among formerly polysubstance dependent urban individuals in recovery. J Addict Dis 31(3):288–302.

[5] *Total Worker Health*® is a registered trademark of the U.S. Department of Health and Human Services. For more information, please visit: *https://www.cdc.gov/niosh/twh/totalhealth.html*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–10185 and CMS–10537]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by April 27, 2020.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10185 Medicare Part D Reporting Requirements

CMS–10537 National Implementation of Hospice Experience of Care Survey (CAHPS Hospice Survey)

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision with change of a currently approved collection; *Title of Information Collection:* Medicare Part D Reporting Requirements; *Use:* Data collected via Medicare Part D Reporting Requirements will be an integral resource for oversight, monitoring, compliance and auditing activities necessary to ensure quality provision of the Medicare Prescription Drug Benefit to beneficiaries. For all reporting sections, data are reported electronically to CMS. Each reporting section is reported at one of the following levels: Contract (data should be entered at the H#, S#, R#, or E# level) or Plan (data should be entered at the Plan Benefit Package (PBP level, *e.g.* Plan 001 for contract H#, R#, S#, or E). Sponsors should retain documentation and data records related to their data submissions. Data will be validated, analyzed, and utilized for trend reporting by the Division of Clinical and Operational Performance (DCOP) within the Medicare Drug Benefit and C & D Data Group. If outliers or other data anomalies are detected, DCOP will work in collaboration with other Divisions within CMS for follow-up and resolution.

In accordance with Title I, Part 423, Subpart K (§ 423.514), the Act requires each Part D Sponsor to have an effective procedure to provide statistics indicating:

- The cost of its operations
- the patterns of utilization of its services
- the availability, accessibility, and acceptability of its services
- information demonstrating it has a fiscally sound operation
- other matters as required by CMS

Subsection 423.505 of the MMA regulation establishes as a contract provision that Part D Sponsors must comply with the reporting requirements for submitting drug claims and related information to CMS. *Form Number:* CMS–10185 (OMB control number: 0938–0992); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 744; *Total Annual Responses:* 17,080; *Total Annual Hours:* 25,256. (For policy questions regarding this collection contact Chanelle Jones at 410–786–8008.)

2. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* National Implementation of Hospice Experience of Care Survey (CAHPS Hospice Survey); *Use:* CMS launched the development of the CAHPS® Hospice Survey in 2012. Public reporting of the results on Hospice Compare started in 2018. The goal of the survey is to measure the experiences of patients and their caregivers with hospice care. The survey was developed to:

- Provide a source of information from which selected measures could be publicly reported to beneficiaries and their family members as a decision aid for selection of a hospice program;

• Aid hospices with their internal quality improvement efforts and external benchmarking with other facilities; and

• Provide CMS with information for monitoring the care provided.

CAHPS is a standardized family of surveys developed by the Agency for Healthcare Research and Quality (AHRQ) for patients to assess and report the quality of care they receive from their health care providers and health care delivery systems.

CMS announced its intention to implement the CAHPS® Hospice Survey in the FY 2014 Hospice Wage Index and Payment Rate Update; Hospice Quality Reporting Requirements; and Updates on Payment Reform. National implementation of the survey launched on January 1, 2015 with hospices administering the survey for a ''dry run'' for at least one month in the first quarter of 2015. Starting April 1, 2015 (second quarter), hospices were required to participate on a monthly basis in order to receive the full Annual Payment Update (APU). Implementation is ongoing and there have been no changes to the questionnaire.

Publicly reporting comparative survey results related to patients' perspectives of the care they receive from providers and plans collected through the Consumer Assessment of Healthcare Providers and Systems (CAHPS®) Surveys support CMS's efforts to put patients first and improve the beneficiary experience. *Form Number:* CMS–10537 (OMB control number: 0938–1257); *Frequency:* Yearly; *Affected Public:* Individuals and Households; *Number of Respondents:* 1,032,004; *Total Annual Responses:* 1,032,004; *Total Annual Hours:* 180,004. (For policy questions regarding this collection contact Debra Dean-Whittaker at 410–786–0848.)

Dated: February 20, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020–03746 Filed 2–25–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Proposed Collection; Comment Request; National Adult Maltreatment Reporting System; [OMB# 0985–0054]

AGENCY: Administration for Community Living (ACL), HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under the Paperwork Reduction Act of 1995. This 30-Day notice collects comments on the information collection requirements related to an extension without change and solicits comments on the information collection requirements relating to the National Adult Maltreatment Reporting System (NAMRS).

DATES: Submit written comments on the collection of information by March 27, 2020.

ADDRESSES: Submit written comments on the collection of information by:

(a) *Email to: OIRA_submission@omb.eop.gov,* Attn: OMB Desk Officer for ACL;

(b) fax to 202.395.5806, Attn: OMB Desk Officer for ACL; or

(c) by mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Stephanie Whittier Eliason, Administration for Community Living, Washington, DC 20201, at 202–795–7467 or *Stephanie.WhittierEliason@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, ACL has submitted the following proposed collection of information to OMB for review and clearance. The National Adult Maltreatment Reporting System authorized under the Elder Justice Act of 2009, which amends Title XX of the Social Security Act [42.U.S.C. 13976 *et seq.*], requires that the Secretary of the U.S. Department of Health and Human Services ''collects and disseminates data annually relating to the abuse, exploitation, and neglect of elders in coordination with the Department of Justice'' [Sec. 2041 (a)(1)(B)] and ''conducts research related to the provision of adult protective services'' [Sec. 2041 (a)(1)(D)].

The Elder Justice Coordinating Council (EJCC) recommended development of ''a national adult protective services (APS) system based upon standardized data collection and a core set of service provision standards and best practices.''

NAMRS is a voluntary system that has been annually collecting since FFY2016 both summary and de-identified case-level data on APS investigations submitted by states. NAMRS consists of three components:

(1) ACL proposes to collect descriptive data on state agency and practices from all states through the ''Agency Component,'' and

(2) Case-level, non-identifiable data on persons who receive an investigation by APS in response to an allegation of abuse, neglect, or exploitation through ''Case Component'', or

(3) For states that are unable to submit a case-level file through the ''Case Component,'' a ''Key Indicators Component'' will be available for them to submit data on a smaller set of core items.

ACL provides technical assistance to states to assist in the preparation of their data submissions. Respondents are state APS agencies and APS agencies in the District of Columbia, Puerto Rico, Guam, Northern Mariana Islands, Virgin Islands, and American Samoa (states, hereafter). No personally identifiable information is collected. The proposed form(s) may be found on the ACL website at *https://www.acl.gov/about-acl/public-input.*

Estimated Program Burden

ACL estimates the burden associated with this collection of information as follows: 56 States will respond every year. It will take approximately 4 hours for all 56 states to respond to the Agency Component, 20 hours for 17 states to respond to the Key Indicator Component, and 100 hours for 35 states to respond to the Case Component. The total annual burden is estimated to be 4,164 hours. The estimates are based on the amount of time States have previously reported in completing the data collection instruments; continued increase in the number of states reporting on Case Component and Key Indicator Component data; and assumption of modest incremental efficiencies by States in reporting data to NAMRS every year, including, most significantly, minimal need to recode to extract data after the initial year.

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Annual burden hours
Agency Component	56	1	4	224
Key Indicators Component	17	1	20	340
Case Component	36	1	100	3,600
Total				4,164

Dated: February 19, 2020.

Mary Lazare,

Principal Deputy Administrator.

[FR Doc. 2020–03842 Filed 2–25–20; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–5625]

Recommendations for Dual 510(k) and Clinical Laboratory Improvement Amendments Waiver by Application Studies; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Recommendations for Dual 510(k) and CLIA Waiver by Application Studies.'' It describes study designs for generating data that may support both 510(k) clearance and Clinical Laboratory Improvement Amendments (CLIA) waiver. Use of the Dual 510(k) and CLIA Waiver by Application pathway is optional; however, FDA believes this pathway is in many instances the least burdensome and fastest approach for manufacturers to obtain a CLIA waiver at the same time as 510(k) clearance for new in vitro diagnostic (IVD) tests. FDA believes increased use of this pathway will speed up the process of bringing simple and accurate IVD tests to CLIA-waived settings, which will better serve patients and providers.

DATES: The announcement of the guidance is published in the **Federal Register** on February 26, 2020.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–D–5625 for ''Recommendations for Dual 510(k) and CLIA Waiver by Application Studies.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Recommendations for Dual 510(k) and CLIA Waiver by Application Studies'' to the Office of

Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Peter Tobin, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3435, Silver Spring, MD 20993–0002, 240–402–6169.

SUPPLEMENTARY INFORMATION:

I. Background

Typically, in an application for CLIA waiver (CLIA Waiver by Application) a manufacturer submits evidence to FDA that a previously cleared or approved test, initially categorized as moderate complexity, meets the CLIA statutory criteria for waiver (see 42 U.S.C. 263a(d)(3)) and requests that FDA categorize the test as waived. This means that historically a CLIA Waiver by Application has followed clearance or approval of an IVD test.

While a premarket notification (510(k); 21 U.S.C. 360(k)) and CLIA Waiver by Application each include discrete elements not required in the other, both submissions generally include comparison and reproducibility studies. For a 510(k), such studies are often performed by trained operators (*i.e.,* test operators who meet the qualifications to perform moderate complexity testing; sometimes referred to as ''moderate complexity users''). For a CLIA Waiver by Application, we believe such studies should be conducted by the intended user (*i.e.,* test operators in waived settings and with limited or no training or hands-on experience in conducting laboratory testing; sometimes referred to as ''untrained operators'' or ''waived users'') (see 42 U.S.C. 263a(d)(3)).

An applicant may choose to conduct a single set of comparison and reproducibility studies with untrained operators to satisfy certain requirements to establish both substantial equivalence under section 513(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(i)) for 510(k) clearance and simplicity and insignificant risk of erroneous results under 42 U.S.C. 263a(d)(3) for CLIA waiver. To streamline the review of such data, the Dual 510(k) and CLIA Waiver by Application (Dual Submission) pathway was established as part of the Medical Device User Fee Amendments of 2012, allowing the review of both a 510(k) and CLIA Waiver by Application within a single submission with a reduced overall review time compared to separate, sequential submissions.

FDA considered comments received on the draft guidance that appeared in the **Federal Register** of November 29, 2018 (83 FR 61387). FDA revised the guidance as appropriate in response to the comments.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Recommendations for Dual 510(k) and CLIA Waiver by Application Studies.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products.* This guidance document is also available at *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Recommendations for Dual 510(k) and CLIA Waiver by Application Studies'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 16038 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the following FDA regulations and guidance have been approved by OMB as listed in the following table:

21 CFR part or guidance	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices''.	CLIA Waiver Applications	0910–0598
''Administrative Procedures for Clinical Laboratory Improvement Amendments of 1988 Categorization''.	CLIA Categorizations	0910–0607
''Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program''.	Q-submissions	0910–0756

Dated: February 21, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–03859 Filed 2–25–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–5570]

Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices.'' FDA has updated this guidance to implement the waiver improvements section of the 21st Century Cures Act (the Cures Act), which requires FDA to revise ''Section V. Demonstrating Insignificant Risk of an Erroneous Result—Accuracy'' of the guidance ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices'' (''2008 CLIA Waiver Guidance'') that was issued on January 30, 2008. The remainder of the 2008 CLIA Waiver Guidance, with exception of technical edits for consistency with the newly amended section V, has not been substantively changed. This final guidance provides additional and updated approaches for demonstrating that a test meets the statutory criteria for waiver and includes FDA's revised thinking regarding ''the appropriate use of comparable performance between a waived user and a moderately complex laboratory user to demonstrate accuracy.''

DATES: The announcement of the guidance is published in the **Federal Register** on February 26, 2020.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–D–5570 for ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices'' to the Office of Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002 or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to

assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Peter Tobin, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3435, Silver Spring, MD 20993–0002, 240–402–6169 or Stephen Ripley, 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.

SUPPLEMENTARY INFORMATION:

I. Background

This final guidance revises the guidance titled ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices'' (''2008 CLIA Waiver Guidance'') that was issued on January 30, 2008, to implement section 3057 of the Cures Act (Pub. L. 114–255), which requires FDA to revise ''Section V. Demonstrating Insignificant Risk of an Erroneous Result—Accuracy'' of the 2008 CLIA Waiver Guidance. The remainder of the 2008 CLIA Waiver Guidance, with exception of technical edits for consistency with the newly amended section V, has not been substantively changed. This update provides additional approaches for demonstrating that a test meets the criteria in 42 U.S.C. 263a(d)(3)(A) and includes FDA's revised thinking regarding ''the appropriate use of comparable performance between a waived user and a moderately complex laboratory user to demonstrate accuracy.''

The Secretary of Health and Human Services has delegated to FDA the authority to determine whether particular tests are ''simple'' and have ''an insignificant risk of an erroneous result'' under CLIA and thus are eligible for CLIA waiver (69 FR 22849, April 27, 2004). The Centers for Medicare & and Medicaid Services is responsible for oversight of clinical laboratories, which includes issuing Certificates of Waiver. CLIA requires that clinical laboratories obtain a certificate before accepting materials derived from the human body for laboratory tests (42 U.S.C. 263a(b)).

The 2008 CLIA Waiver Guidance describes recommendations for device manufacturers about study design and analysis for CLIA Waiver by Application to support an FDA determination as to whether the device meets the statutory criteria for waiver.

On November 29, 2017, FDA issued a draft guidance titled ''Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices.'' This draft guidance proposed additional approaches for demonstrating that a test meets the criteria in 42 U.S.C. 263a(d)(3)(A). On November 29, 2018, FDA issued a revised draft guidance by the same title, which appeared in the **Federal Register** of November 29, 2018 (83 FR 61391), after considering comments received on the draft guidance issued November 29, 2017. This document revises section V of the guidance ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices,'' issued on January 30, 2008.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products* or *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances.* This guidance document is also available at *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 16046 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the following FDA regulations and guidance have been approved by OMB as listed in the following table:

21 CFR part or guidance	Topic	OMB control No.
50, 56	Protection of Human Subjects: Informed Consent; Institutional Review Boards.	0910–0755
54	Financial Disclosure by Clinical Investigators.	0910–0396
803	Medical Device Reporting	0910–0437
809	Medical Device Labeling Regulations	0910–0485
812	Investigational Device Exemption	0910–0078
''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices''.	CLIA Waiver Applications	0910–0598
''Administrative Procedures for Clinical Laboratory Improvement Amendments of 1988 Categorization''.	CLIA Categorizations	0910–0607
''Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program''.	Q-submissions	0910–0756

Dated: February 21, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–03860 Filed 2–25–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–1804]

Product Labeling for Laparoscopic Power Morcellators; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance entitled ''Product Labeling for Laparoscopic Power Morcellators.'' This draft guidance proposes updated ''Contraindications'' and ''Warnings'' in product labeling information to reflect the state of the science and available technology regarding use of laparoscopic power morcellators (LPMs). This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by April 27, 2020 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–D–1804 for ''Product Labeling for Laparoscopic Power Morcellators.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled ''Product Labeling for Laparoscopic Power Morcellators'' to the Office of Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Veronica Price, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2659, Silver Spring, MD 20993–0002, 301–796–6538.

SUPPLEMENTARY INFORMATION:

I. Background

Following issuance of the 2014 guidance document entitled ''Immediately in Effect Guidance Document: Product Labeling for Laparoscopic Power Morcellators,'' (*https://www.fda.gov/regulatory-information/search-fda-guidance-documents/immediately-effect-guidance-document-product-labeling-laparoscopic-power-morcellators*) FDA continued to consider new scientific information and the input of stakeholders. Additional scientific information is available that stratifies the risks of an undetected uterine cancer in women with presumed fibroids based on age.

FDA also considered scientific information pertaining to the risk of spreading benign uterine tissue beyond the uterus during gynecologic surgeries when LPMs are used. Parasitic myomas and disseminated peritoneal leiomyomatosis, while benign, have been associated with the need for additional surgery due to symptoms

such as abdominal pain and distension. Finally, FDA considered additional available mitigations for the spread of uterine tissue. Since 2014, FDA has provided marketing authorization for LPM containment systems intended to isolate and contain tissue that is considered benign. These products have been shown, through bench testing and simulated use testing, to contain such tissue during morcellation.

For these reasons, FDA is proposing in this draft guidance to update its recommendations, as originally described in the 2014 guidance document, concerning the content and format of certain labeling information for LPMs. Specifically, FDA is recommending that manufacturers incorporate into the labeling for these devices information providing greater specificity regarding the risks of use as it relates to age, information regarding the risk of spreading benign uterine tissue, and information regarding the use of LPM containment systems.

FDA considered comments received on the final guidance document that appeared in the **Federal Register** of November 25, 2014 (79 FR 70193). FDA revised the guidance as appropriate in response to the comments.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Product Labeling for Laparoscopic Power Morcellators.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* This guidance document is also available at *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Product Labeling for Laparoscopic Power Morcellators'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1400052 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the following FDA regulations have been approved by OMB as listed in the following table:

21 CFR part	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
800, 801, and 809	Medical Device Labeling Regulations	0910–0485
803	Medical Devices; Medical Device Reporting; Manufacturer reporting, importer reporting, user facility reporting, distributor reporting.	0910–0437

Dated: February 20, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–03827 Filed 2–25–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Shortage Designation Management System

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than April 27, 2020.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Shortage Designation Management System OMB No. 0906–0029—Revision.

Abstract: HRSA's Bureau of Health Workforce is committed to improving the health of the Nation's underserved communities and vulnerable populations by developing, implementing, evaluating, and refining programs that strengthen the nation's health workforce. HHS relies on two federal shortage designations to identify and dedicate resources to areas and populations in greatest need of providers: Health Professional Shortage Area (HPSA) designations and Medically Underserved Area/Medically Underserved Population (MUA/P) designations. HPSA designations are geographic areas, population groups, and facilities that are experiencing a shortage of health professionals. The authorizing statute for the National Health Service Corps (NHSC) created HPSAs to fulfill the statutory requirement that NHSC personnel be directed to areas of greatest need. To further differentiate areas of greatest need, HRSA calculates a score for each HPSA. There are three categories of HPSAs based on health discipline: Primary care, dental health, and mental health. Scores range from 1 to 25 for

primary care and mental health and from 1 to 26 for dental, with higher scores indicating greater need. They are used to prioritize applications for NHSC Loan Repayment Program award funding, and determine service sites eligible to receive NHSC Scholarship and Students-to-Service participants.

MUA/P designations are geographic areas, or population groups within geographic areas, that are experiencing a shortage of primary care health care services based on the Index of Medical Underservice. MUAs are designated for the entire population of a particular geographic area. MUA/P designations are limited to particular subset of the population within a geographic area. Both designations were created to aid the federal government in identifying areas with healthcare workforce shortages.

As part of HRSA's cooperative agreement with the State Primary Care Offices (PCOs), the State PCOs conduct needs assessment in their states, determine what areas are eligible for designations, and submit designation applications for HRSA review via the Shortage Designation Management System (SDMS). Requests that come from other sources are referred to the PCOs for their review, concurrence, and submission via SDMS. In order to obtain a federal shortage designation for an area, population, or facility, PCOs must submit a shortage designation application through SDMS for review and approval by HRSA. Both the HPSA and MUA/P application request local, state, and national data on the population that is experiencing a shortage of health professionals and the number of health professionals relative to the population covered by the proposed designation. The information collected on the applications is used to determine which areas, populations, and facilities have qualifying shortages. In addition, interested parties, including the Governor, the State Primary Care Association, state professional associations, etc. are notified of each designation request submitted via SDMS for their comments and recommendations.

Previously, PCOs were required to provide HRSA with Census, American Community Survey, and Centers for Disease Control and Prevention data specific to the intended geographic area for designation known as a rational service area. With the development of the SDMS, PCOs are no longer required to provide this information as it is automatically populated in the system when they select the service area for designation.

HRSA reviews the HPSA applications submitted by the State PCOs, and—if they meet the designation eligibility criteria for the type of HPSA or MUA/P the application is for—designates the HPSA or MUA/P on behalf of the Secretary. HPSAs are statutorily required to be annually reviewed and revised as necessary after initial designation to reflect current data. HPSAs scores, therefore, may and do change from time to time. Currently, MUA/Ps do not have a statutorily mandated review period.

The lists of designated HPSAs are published annually in the **Federal Register**. In addition, lists of HPSAs are updated on the HRSA website, *https://data.hrsa.gov/tools/shortage-area,* so that interested parties can access the information.

Need and Proposed Use of the Information: In 2014, SDMS was launched to facilitate the collection of information needed to designate HPSAs and MUA/Ps. The information obtained from the SDMS Application is used to determine which areas, populations, and facilities have critical shortages of health professionals per PCO application submission. The SDMS HPSA application and SDMS MUA/P Application are used for these designation determinations. Applicants must submit a SDMS application to HRSA to obtain a federal shortage designation. The application asks for local, state, and national data required to determine the application's eligibility to obtain a federal shortage designation. In addition, applicants must enter in detailed information explaining how the area, population, or facility faces a critical shortage of health professionals.

Likely Respondents: State Primary Care Offices interested in obtaining a primary care, dental, or mental HPSA designation or a MUA/P in their state.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Designation Planning and Preparation	54	48	2,592	8.00	20,736
SDMS Application	54	83	4,482	4.00	17,928
Total	54	.....	7,074	.....	38,664

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020–03783 Filed 2–25–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0438–60D]

Agency Information Collection Request; 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before April 27, 2020.

ADDRESSES: Submit your comments to *Sherrette.Funn@hhs.gov* or by calling (202) 795–7714.

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990–0438–60D, and project title for reference, to Sherrette Funn, the Reports Clearance Officer, *Sherrette.funn@hhs.gov,* or call 202–795–7714.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Teen Pregnancy Prevention (TPP) Performance Measures for FY2020.

Type of Collection: Revision.

OMB No. 0990–0438—OS-Office of Population Affairs

Abstract: The Office of Population Affairs (OPA), U.S. Department of Health and Human Services (HHS), is requesting a revision of the Teen Pregnancy Prevention Program (TPP) performance measures to collect data from new grantees. In FY2020, OPA expects to award 3-year TPP cooperative agreements to up to 90 organizations across three funding announcements. Collection of performance measures is a requirement of all TPP grant awards and is included in the funding announcements. The measures include dissemination, partners, training, sustainability, reach, dosage, fidelity, quality, Tier 1 supportive services referrals, stakeholder engagement, and Tier 2 Innovation project stage. To reflect the priorities of the new funding announcements, some of the measures and forms have been revised. The data collection will allow OPA to comply with federal accountability and performance requirements, inform stakeholders of grantee progress in meeting TPP program goals, provide OPA with metrics for monitoring FY2020 TPP grantees, and facilitate individual grantees' continuous quality improvement efforts within their projects.

Clearance is requested for three years.

Type of respondent: TPP grantees and their staff.

ANNUALIZED BURDEN HOUR TABLE

Forms (if necessary)	Respondents (if necessary)	Number of respondents	Number of responses per respondents	Average burden per response	Total burden hours
Grantee-level	All grantees	90	2	1	180
Program-level	Tier 1 and Tier 2 Phase 2 grantees	64	2	7	896
Stakeholder Engagement	Tier 1 and Tier 2 Innovation Network Grantees.	69	2	15/60	35
Innovation Network	Tier 2 Innovation Network Grantees	14	2	15/60	8
Supportive Services	Tier 1 Grantees	54	2	15/60	27
Total			2		1146

Dated: February 21, 2020.

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2020–03839 Filed 2–25–20; 8:45 am]

BILLING CODE 4150–34–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2020–N034; FXES11130800000–201–FF08E00000]

Endangered and Threatened Species; Receipt of Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received applications for permits to conduct activities intended to enhance the propagation or survival of endangered or threatened species under the Endangered Species Act. We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before March 27, 2020.

ADDRESSES: *Document availability and comment submission:* Submit requests for copies of the applications and related documents and submit any comments by one of the following methods. All requests and comments should specify the applicant name(s) and application number(s) (*e.g.,* TEXXXXXX).

- *Email: permitsr8es@fws.gov.*
- *U.S. Mail:* Robert Krijgsman, Endangered Species Program Manager, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W–2606, Sacramento, CA 95825.

FOR FURTHER INFORMATION CONTACT: Robert Krijgsman, via phone at 760–431–9440, via email at *permitsr8es@fws.gov,* or via the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications for permits under section 10(a)(1)(A) of the Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The requested permits would allow the applicants to conduct activities intended to promote recovery of species that are listed as endangered or threatened under the ESA.

Background

With some exceptions, the ESA prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of ''take'' includes such activities as pursuing, harassing,

trapping, capturing, or collecting in addition to hunting, shooting, harming, wounding, or killing.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered or threatened species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. These activities often include such prohibited actions as capture and collection. Our regulations implementing section 10(a)(1)(A) for these permits are found in the Code of Federal Regulations at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

Proposed activities in the following permit requests are for the recovery and enhancement of propagation or survival of the species in the wild. The ESA requires that we invite public comment before issuing these permits. Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
TE–66228D ..	Andrew Ford, Vallejo, California.	• California tiger salamander (Santa Barbara County and Sonoma County Distinct Population Segments (DPSs)) (*Ambystoma californiense*).	CA	Survey, capture, handle, and release.	New.
TE–67250D ..	Margaret Scampavia, Oakland, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • Vernal pool tadpole shrimp (*Lepidurus packardi*).	CA	Survey, capture, handle, release, and collect vouchers.	New.
TE–19822D ..	Sarah Richardson, Rancho Cordova, California.	• Least Bell's vireo (*Vireo bellii pusillus*).	CA	Monitor nests	Amend.
TE–68516D ..	Sheri Mayta, Ventura, California.	• Southwestern willow flycatcher (*Empidonax traillii extimus*).	CA, NV, AZ	Play taped vocalizations	New.
TE–68514D ..	Adam DeLuna, Orange, California.	• Southwestern willow flycatcher (*Empidonax traillii extimus*).	CA, NV	Play taped vocalizations	New.
TE–068799 ...	Mikael Romich, Redlands, California.	• San Bernardino Merriam's kangaroo rat (*Dipodomys merriami parvus*).	CA	Mark (Ear tag)	Amend.
TE–68599D ..	Zoological Society of San Diego, San Diego, California.	• Quino checkerspot butterfly (*Euphydryas editha quino*). • Laguna Mountains skipper (*Pyrgus ruralis lagunae*).	CA	Pursue, capture, handle, remove adults from the wild, euthanize, transport all life stages, captive rear, and release.	New.
TE–68734D ..	Kyla Garten, Sacramento, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*).	CA	Survey, capture, handle, release, and collect vouchers.	New.
TE–56034B ...	Joseph Huang, Woodland, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • Vernal pool tadpole shrimp (*Lepidurus packardi*).	CA	Survey, capture, handle, release, and collect vouchers.	Amend.
TE–12771D ..	Lynn Sweet, Palm Desert, California.	• Triple-ribbed milk-vetch (*Astragalus tricarinatus*).	CA	Collect tissue, seeds, and whole plants.	Amend.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

If we decide to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register.**

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Peter Erickson,

Acting Chief of Ecological Services, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2020–03818 Filed 2–25–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2018–N131; FXES11130300000–189–FF03E00000]

Endangered and Threatened Wildlife and Plants; Draft Recovery Plan for the Eastern Massasauga Rattlesnake

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and request for public comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the draft recovery plan for the threatened eastern massasauga rattlesnake. We request review and comment on this draft recovery plan from local, State, and Federal agencies, and the public.

DATES: In order to be considered, comments must be received on or before March 27, 2020.

ADDRESSES: *Document availability:* You may obtain a copy of the draft recovery plan by one of the following methods:

- *U.S. Mail:* U.S. Fish and Wildlife Service; Chicago Ecological Services Field Office, Attention: Louise Clemency; 230 South Dearborn, Suite 2398, Chicago, IL 60604.
- *Telephone:* Louise Clemency, 312–216–4720.
- *Internet:* Download the document at the Service's Midwest Region website at *https://www.fws.gov/midwest/Endangered/reptiles/eama/index.html.*

Comment Submission: You may submit comments by one of the following methods:

- *Mail or Hand-Delivery:* Submit written comments to the above U.S. mail address.
- *Fax:* 312–837–1788, Attention: Louise Clemency. Please include ''Eastern Massasauga DRP'' in the subject line.
- *Email: louise_clemency@fws.gov.* Please include ''Eastern Massasauga DRP'' in the subject line.

For additional information about submitting comments, see Availability of Public Comments in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Louise Clemency, by one of the methods in **ADDRESSES.**

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the draft recovery plan for the threatened eastern massasauga rattlesnake (*Sistrurus catenatus,* ''EMR'') for public review and comment. The draft recovery plan includes objective, measurable criteria and management actions as may be necessary for removal of the species from the Federal List of Endangered and Threatened Wildlife. We request review and comment on this draft recovery plan from local, State, and Federal agencies, and the public.

Recovery Planning

Section 4(f) of the Endangered Species Act of 1973, as amended (Act), requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species. Also pursuant to section 4(f) of the Act, a recovery plan must, to the maximum extent practicable, include (1) a description of site-specific management actions as may be necessary to achieve the plan's goals for the conservation and survival of the species; (2) objective, measurable criteria that, when met, would support a determination under section 4(a)(1) that the species should be removed from the List of Endangered and Threatened Species; and (3) estimates of the time and costs required to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

The Service has revised its approach to recovery planning. The revised process is intended to reduce the time needed to develop and implement recovery plans, increase recovery plan relevancy over a longer timeframe, and add flexibility to recovery plans so they can be adjusted to new information or circumstances. A recovery plan will include statutorily required elements (objective, measurable criteria, site-specific management actions, and estimates of time and costs), along with a concise introduction and our strategy for how we plan to achieve species recovery. The recovery plan is supported by a separate Species Status Assessment. The essential component to flexible implementation under this recovery process is producing a separate working document called the Recovery Implementation Strategy (implementation strategy). The implementation strategy steps down from the more general description of actions in the recovery plan to detail the specific, near-term activities needed to implement the recovery plan. The implementation strategy will be adaptable by being able to incorporate new information without having to concurrently revise the recovery plan, unless changes to statutory elements are required. The implementation strategy will be developed following publication of the final recovery plan and will be made available on the Service's website at that time.

Species Background

The EMR is a small pit viper that occurred historically in 10 States (Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, and Wisconsin) and in Ontario, Canada. It is believed that populations have been extirpated in at least two States (Minnesota and Missouri). The species is impacted by a number of threats. The loss of habitat was historically, and continues to be, the threat with greatest impact to the species, either through loss of habitat to development or through changes in habitat structure due to vegetative succession. Poaching, either by persecution or illegal collection for the pet trade, is also a continuing threat. Disease, new or increasingly prevalent, is another emerging threat to the EMR. Additionally, this species is vulnerable to the effects of climate change through increasing intensity of winter droughts and increasing risk of summer floods,

particularly in the southwestern part of its range. (Refer to the Species Status Assessment Report (Szymanski et al. 2016) for a full discussion of the species' biology and threats.) Under the Act, the Service added the eastern massasauga rattlesnake as a threatened species to the Federal List of Endangered and Threatened Wildlife on September 30, 2016 (81 FR 67193).

Recovery Plan

Recovery Strategy

The recovery strategy for the EMR includes addressing the threats of habitat loss due to development, conversion of habitat to agriculture, changes to land cover due to succession by invasive woody species, persecution or poaching, effects of climate change (flooding or drought), and emerging diseases. Maintaining healthy populations will require protecting sufficient quantity of high-quality habitat and the reduction or management of threats where these populations occur. To maximize use of limited resources, we need to identify, then focus management and protection on, specific populations that will ensure that the species' breadth of adaptive diversity is maintained. The strategy also includes increasing public tolerance and support for EMR conservation by working with landowners, partners, and the public. Lastly, successful recovery will necessitate an adaptive management approach. Using an adaptive management framework and monitoring during recovery implementation will allow us to evaluate how to best manage for suitable habitat conditions, protect against disease epidemics, and lessen the effects of climate change to ensure that the recovery actions are effective in recovering the EMR.

Recovery Criteria

The ultimate recovery goal is to remove the eastern massasauga rattlesnake from the Federal List of Endangered and Threatened Wildlife (delist) by ensuring the long-term viability of the species in the wild. In the recovery plan, we define the following delisting criteria based on the best available information on the species:

1. The probability of continued persistence over 50 years is 95 percent within each of 3 conservation units.

2. An adequate quantity and configuration of land is being managed and is expected to continue to be managed in a way that will support EMR populations such that a probability of persistence of 95 percent over 50 years in each of the 3 conservation units is maintained.

3. Threats from climate change and disease are addressed such that a probability of persistence of 95 percent over 50 years in each of the 3 conservation units is maintained.

The map showing the three species conservation units is available on the internet at *https://www.fws.gov/midwest/Endangered/reptiles/eama/index.html.*

Availability of Public Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

The authority for this action is section 4(f) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Lori H. Nordstrom,

Assistant Regional Director, Ecological Services, Midwest Region.

[FR Doc. 2020–03778 Filed 2–25–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–8104–02; 20X.LLAK944000.L14100000.HY0000.P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: The Bureau of Land Management (BLM) hereby provides constructive notice that it will issue an appealable decision approving conveyance of the surface and subsurface estates in certain lands to Ahtna, Incorporated, an Alaska Native regional corporation, pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA).

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the time limits set out in the **SUPPLEMENTARY INFORMATION** section.

ADDRESSES: You may obtain a copy of the decision from the Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, AK 99513–7504.

FOR FURTHER INFORMATION CONTACT: Matthew R. Lux, BLM Alaska State Office, 907–271–3176, or *mlux@blm.gov.* The BLM Alaska State Office may also be contacted via Telecommunications Device for the Deaf (TDD) through the Federal Relay Service at 1–800–877–8339. The relay service is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

SUPPLEMENTARY INFORMATION: As required by 43 CFR 2650.7(d), notice is hereby given that the BLM will issue an appealable decision to Ahtna, Incorporated. The decision approves conveyance of the surface and subsurface estates in certain lands pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*). The lands are located in the vicinity of Chitina, Alaska, and are described as:

Mineral Survey No. 2325, Alaska.

Containing 61.653 acres.

The decision addresses public access easements, if any, to be reserved to the United States pursuant to Sec. 17(b) of ANCSA (43 U.S.C. 1616(b)), in the lands described above.

The BLM will also publish notice of the decision once a week for four consecutive weeks in the ''Anchorage Daily News'' newspaper.

Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until March 27, 2020 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4 shall be deemed to have waived their rights. Notices of appeal transmitted by facsimile will not be accepted as timely filed.

Matthew R. Lux,

Land Law Examiner, Adjudication Section.

[FR Doc. 2020–03850 Filed 2–25–20; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14929–A; F–14929–A2; 20X–LLAK–944000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: The Bureau of Land Management (BLM) hereby provides constructive Notice that it will issue an appealable decision approving conveyance of the surface estate in certain lands to Askinuk Corporation (Askinuk), for the Native village of Scammon Bay, pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA). As provided by ANCSA, the BLM will convey a portion of the subsurface estate in the same lands to Calista Corporation when the BLM conveys the surface estate to Askinuk.

DATES: Any party claiming a property interest in these lands may appeal the decision in accordance with the requirements of 43 CFR part 4 within the time limits set out in the **SUPPLEMENTARY INFORMATION** section.

ADDRESSES: You may obtain a copy of the decision from the BLM Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, AK 99513–7504.

FOR FURTHER INFORMATION CONTACT: Eileen Ford, phone: 907–271–5715, or email at *eford@blm.gov.* The BLM may be contacted via Telecommunications Device for the Deaf (TDD) through the Federal Relay Service at 1–800–877–8339. The relay service is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

SUPPLEMENTARY INFORMATION: As required by 43 CFR 2650.7(d), Notice is hereby given that the BLM will issue an appealable decision to Askinuk. The decision approves conveyance of the surface estate in certain lands pursuant to ANCSA (43 U.S.C. 1601, *et seq.*). As provided by ANCSA, a portion of the subsurface estate in the same lands will be conveyed to Calista Corporation when the surface estate is conveyed to Askinuk. The lands are located in the vicinity of Scammon Bay, Alaska, and are described as:

Seward Meridian, Alaska

T. 20 N., R. 88 W.,
Secs. 14 and 15.
Containing 768.64 acres.
T. 20 N., R. 90 W.,
Secs. 5 and 6.
Containing 97.06 acres.
T. 22 N., R. 90 W.,
Sec. 27.
Containing 12.89 acres.
T. 20 N., R. 91 W.,
Sec. 1.
Containing 23.91 acres.
Aggregating 902.50 acres.

The decision addresses public access easements, if any, to be reserved to the United States pursuant to Sec. 17(b) of ANCSA (43 U.S.C. 1616(b)), in the lands described above.

The BLM will publish the Notice of the decision once a week for four consecutive weeks in the ''The Delta Discovery'' newspaper.

Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until March 27, 2020 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

3. Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4 shall be deemed to have waived their rights. Notices of appeal transmitted by facsimile will not be accepted as timely filed.

Eileen Ford,

Land Transfer Resolution Specialist, Adjudication Section.

[FR Doc. 2020–03845 Filed 2–25–20; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14835–A; F–14835–A2; 20X.LLAK944000.L14100000.HY0000.P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: The Bureau of Land Management (BLM) hereby provides constructive notice that it will issue an appealable decision approving conveyance of the surface estate in certain lands to Atmautluak Limited, for the Native village of Atmautluak, pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA). As provided by ANCSA, the BLM will convey the subsurface estate in the same lands to Calista Corporation when the BLM conveys the surface estate to Atmautluak Limited.

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the time limits set out in the **SUPPLEMENTARY INFORMATION** section.

ADDRESSES: You may obtain a copy of the decision from the Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, AK 99513–7504.

FOR FURTHER INFORMATION CONTACT: Bettie Shelby, BLM Alaska State Office, 907–271–5596, or *bshelby@blm.gov*. The BLM Alaska State Office may also be contacted via Telecommunications Device for the Deaf (TDD) through the Federal Relay Service at 1–800–877–8339. The relay service is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

SUPPLEMENTARY INFORMATION: As required by 43 CFR 2650.7(d), notice is hereby given that the BLM will issue an appealable decision to Atmautluak Limited. The decision approves conveyance of the surface estate in certain lands pursuant to ANCSA (43 U.S.C. 1601, *et seq.*). As provided by ANCSA, the subsurface estate in the same lands will be conveyed to Calista Corporation when the surface estate is conveyed to Atmautluak Limited. The lands are located in the vicinity of Atmautluak, Alaska, and are described as:

Seward Meridian, Alaska

T. 8 N., R. 74 W.,
Secs. 15 and 22.
Containing approximately 130 acres.
T. 9 N., R. 79 W.,
Sec. 18.
Containing 623.64 acres.
T. 9 N., R. 80 W.,
Sec. 13.
Containing 578.53 acres
Aggregating approximately 1,332 acres.

The decision addresses public access easements, if any, to be reserved to the United States pursuant to Sec. 17(b) of ANCSA (43 U.S.C. 1616(b)), in the lands described above.

The BLM will also publish notice of the decision once a week for four consecutive weeks in ''The Bristol Bay

Times & The Dutch Harbor Fisherman'' newspaper.

Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until March 27, 2020 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4 shall be deemed to have waived their rights. Notices of appeal transmitted by facsimile will not be accepted as timely filed.

Bettie J. Shelby,

Land Law Examiner, Adjudication Section.

[FR Doc. 2020–03843 Filed 2–25–20; 8:45 am]

BILLING CODE 4310–JA–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–618–619 and 731–TA–1441–1442 (Final)]

Carbon and Alloy Steel Threaded Rod From China and India; Supplemental Schedule for the Final Phase of Countervailing Duty and Antidumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: February 18, 2020.

FOR FURTHER INFORMATION CONTACT: Kristina Lara ((202) 205–3386), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: Effective August 7, 2019, the Commission established a general schedule for the conduct of the final phase of its investigations on carbon and alloy steel threaded rod (''threaded rod'') from China, India, Taiwan, and Thailand,[1] following a preliminary determination by the U.S. Department of Commerce (''Commerce'') that imports of threaded rod from Thailand were being sold at less than fair value (LTFV) in the United States.[2] Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of August 27, 2019 (84 FR 44916). The hearing was held in Washington, DC, on October 15, 2019, and all persons who requested the opportunity were permitted to appear in person or by counsel. On October 21, 2019, Commerce issued a final affirmative determination of sales at LTFV and critical circumstances with respect to imports of threaded rod from Thailand.[3] The Commission issued its final affirmative determination regarding LTFV imports of threaded rod from Thailand on December 5, 2019. On December 9, 2019, Commerce issued its final affirmative determination that imports of threaded rod from Taiwan were being sold at LTFV in the United States.[4] The Commission issued its final affirmative determination regarding LTFV imports of threaded rod from Taiwan on January 23, 2020.

On February 18, 2020, Commerce issued its final affirmative determinations that imports of threaded rod were being sold in the United States at less than fair value (''LTFV''), and were being subsidized by the governments of China and India.[5] Accordingly, the Commission currently is issuing a supplemental schedule for its antidumping and countervailing duty investigations on imports of threaded rod from China and India.

This supplemental schedule is as follows: The deadline for filing supplemental party comments on Commerce's final antidumping and countervailing duty determinations is February 27, 2020. Supplemental party comments may address only Commerce's final antidumping and countervailing duty determinations regarding imports of threaded rod from China and India. These supplemental final comments may not contain new factual information and may not exceed five (5) pages in length. The supplemental staff report in the final phase of these investigations regarding subject imports from China and India will be placed in the nonpublic record on March 12, 2020; and a public version will be issued thereafter.

For further information concerning these investigations see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: February 21, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–03875 Filed 2–25–20; 8:45 am]

BILLING CODE 7020–02–P

[1] 84 FR 44916, August 27, 2019.

[2] 84 FR 38597, August 7, 2019.

[3] 84 FR 56162, October 21, 2019.

[4] 84 FR 67258, December 9, 2019.

[5] 85 FR 8818, February 18, 2020, 85 FR 8821, February 18, 2020, 85 FR 8828, February 18, 2020, and 85 FR 8833, February 18, 2020.

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1145 (Second Review)]

Steel Threaded Rod From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

1930 (''the Act''), that revocation of the antidumping duty order on steel threaded rod from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on July 1, 2019 (84 FR 31341) and determined on October 4, 2019 that it would conduct an expedited review (85 FR 2147, January 14, 2020).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on February 20, 2020. The views of the Commission are contained in USITC Publication 5019 (February 2020), entitled *Steel Threaded Rod from China: Investigation No. 731–TA–1145 (Second Review).*

By order of the Commission.

Issued: February 21, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–03822 Filed 2–25–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1435–1436 and 1439 (Final)]

Acetone From Belgium, Korea, and South Africa; Supplemental Schedule for the Final Phase of Antidumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: December 10, 2019.

FOR FURTHER INFORMATION CONTACT: Abu B. Kanu ((202) 205–2597), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: Effective July 29, 2019, the Commission established a general schedule for the conduct of the final phase of its investigations on acetone from Belgium, Korea, Singapore, South Africa, and Spain,[1] following a preliminary determination by the U.S. Department of Commerce (''Commerce'') that imports of acetone from Belgium, Korea, Singapore, South Africa, and Spain were being sold at less than fair value (LTFV) in the United States.[2] Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of August 26, 2019 (84 FR 44635). The hearing was held in Washington, DC, on October 21, 2019, and all persons who requested the opportunity were permitted to appear in person or by counsel. On October 21, 2019, Commerce issued a final affirmative determination of sales at LTFV with respect to imports of acetone from Singapore and Spain.[3] The Commission issued its final affirmative determination regarding LTFV imports of acetone from Singapore and Spain on December 5, 2019.

On February 13, 2020, Commerce issued its final affirmative determinations that imports of acetone from Belgium, Korea, and South Africa were being sold at LTFV in the United States.[4] Accordingly, the Commission currently is issuing a supplemental schedule for its antidumping investigations on imports of acetone from Belgium, Korea, and South Africa.

This supplemental schedule is as follows: The deadline for filing supplemental party comments on Commerce's final antidumping duty determination is February 28, 2020. Supplemental party comments may address only Commerce's final antidumping duty determination regarding imports of acetone from Belgium, Korea, and South Africa. These supplemental final comments may not contain new factual information and may not exceed five (5) pages in length. The supplemental staff report in the final phase of these investigations regarding subject imports from Belgium, Korea, and South Africa will be placed in the nonpublic record on March 10, 2020; and a public version will be issued thereafter.

For further information concerning these investigations see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: February 20, 2020.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2020–03820 Filed 2–25–20; 8:45 am]

BILLING CODE 7020–02–P

[1] 84 FR 44635, August 26, 2019.

[2] 84 FR 38005 and 84 FR 37990, August 5, 2019 and 84 FR 49999, 84 FR 50005, and 84 FR 49984, September 24, 2019.

[3] 84 FR 56171 and 84 FR 56166, October 21, 2019.

[4] 85 FR 8249, 85 FR 8252, and 85 FR 8247, February 13, 2020.

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Request for State or Federal Workers' Compensation Information

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) revision titled, ''Request for State or Federal Workers' Compensation Information'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995. Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before March 27, 2020.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201911-1240-002* (this link will only become active on the day following publication of this notice) or by contacting Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks approval under the PRA for revisions to the Request for State or Federal Workers' Compensation Information. Division of Coal Mine Workers' Compensation (DCMWC) beneficiaries have their monthly benefits reduced dollar for dollar for other benefits that they receive attributable to their black lung disability from State or Federal workers' benefits. The CM–905 request the amount of those workers' compensation benefits. This information collection is a revision, because Minor changes have been made to CM–905. Description of changes: Eliminated requirement for the miner's full social security number and requiring only the last four digits, added two options to file this form (mail or electronically submit through the COAL Mine Portal), provided updated language for the Privacy Act Statement, and provided updated language for the Notice.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB, under the PRA, approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240–0032. The current approval is scheduled to expire on February 29, 2020 however, the DOL notes that existing information collection requirements submitted to the OMB will receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 25, 2019 (84 FR 64935).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty-(30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1240–0032. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–OWCP.

Title of Collection: Request for State or Federal Workers' Compensation Information.

OMB Control Number: 1240–0032.

Affected Public: Federal Government; State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 6,000.

Total Estimated Number of Responses: 6,000.

Total Estimated Annual Time Burden: 1,500 hours.

Total Estimated Annual Other Costs Burden: $3,480.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: February 18, 2020.

Frederick Licari,

Departmental Clearance Officer.

[FR Doc. 2020–03767 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Cascades Job Corps College Career Academy Pilot Evaluation

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Office of the Assistant Secretary Policy Chief Evaluation Office (OS) sponsored information collection request (ICR) revision titled, ''Cascades Job Corps College Career Academy Pilot Evaluation,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995. Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before March 27, 2020.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202001-1290-002* (this link will only become active on the day following publication of this notice) or by contacting Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OS, Office of Management and Budget, Room 10235,

725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks approval under the PRA for revisions to the Cascades Job Corps College and Career Academy Pilot Evaluation. The Chief Evaluation Office of the U.S. Department of Labor (DOL) has commissioned an impact and implementation evaluation of the Cascades Job Corps College and Career Academy Pilot program. More specifically, this ICR is seeking a revision of previously approved ICR (1290–0012) for the data collection activities for the evaluation of the CCCA pilot. The OASP seeks approval in this submission for: (1) A baseline information form to support the impact study, (2) tracking data to support the planned 18-month follow-up survey, and (3) stakeholder interview and student focus group discussion guides to support the implementation study. This information collection is a revision, because this is an extension request with changes. We are requesting to add additional site visits for semi-structured interviews. Some of the data collection activities (*e.g.,* baseline information form) are no longer needed.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB, under the PRA, approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1290–0012. The current approval is scheduled to expire on February 29, 2020; however, the DOL notes that existing information collection requirements submitted to the OMB will receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on October 23, 2019 (84 FN 56841).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty-(30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1290–0012. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–OS.

Title of Collection: Cascade Job Corps College and Career Academy Pilot Evaluation.

OMB Control Number: 1290–0012.

Affected Public: Individuals or Households; Private Sector: Not-for-profit institutions; Private Sector: Businesses or other for-profits; State, local and tribal governments.

Total Estimated Number of Respondents: 242.

Total Estimated Number of Responses: 345.

Total Estimated Annual Time Burden: 65 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: February 19, 2020.

Frederick Licari,

Departmental Clearance Officer.

[FR Doc. 2020–03801 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–HX–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employee Benefit Plan Claims Procedure Under the Employee Retirement Income Security Act

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, ''Employee Benefit Plan Claims Procedure Under the Employee Retirement Income Security Act,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before March 27, 2020.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202001-1210-001* (this link will only become active on the day following publication of this notice) or by contacting Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–EBSA, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these

are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the ''Employee Benefit Plan Claims Procedure Under the Employee Retirement Income Security Act'' information collection. Employee Retirement Income Security Act (ERISA) Section 503 and accompanying regulations at 29 CFR 2560.503–1 require employee benefit plans to establish procedures for resolving benefit claims under the plan, including initial claims and appeal of denied claims. The regulation requires specific information to be disclosed at different stages of the claims process. It also requires claims denial notices to be provided within specific time-frames and to include specific information.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB under the PRA approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1210–0053.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on February 29, 2020. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on October 10, 2019 (84 FR 54642).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty-(30) days of publication of this notice in the **Federal Register.** In order to help ensure appropriate consideration, comments should mention OMB Control Number 1210–0053. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility:
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–EBSA.

Title of Collection: Employee Benefit Plan Claims Procedure Under the Employee Retirement Income Security Act.

OMB Control Number: 1210–0053.

Affected Public: Private Sector: Businesses or other for-profits, Not-for-profit institutions.

Total Estimated Number of Respondents: 6,223,774.

Total Estimated Number of Responses: 1,465,526,748.

Total Estimated Annual Time Burden: 1,627,422 hours.

Total Estimated Annual Other Costs Burden: $1,959,351,534.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: February 19, 2020.

Frederick Licari,

Departmental Clearance Officer.

[FR Doc. 2020–03807 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Walking-Working Surfaces Standard

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, ''Walking-Working Surfaces Standard,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before March 27, 2020.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201910-1218-003* (this link will only become active on the day following publication of this notice) or by contacting Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OSHA, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Frederick Licari Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Walking-Working Surfaces Standard (29 CFR part 1910, subpart D) information collection. OSHA is extending its general industry standards on walking-working surfaces (29 CFR part 1910, subpart D) to prevent and reduce workplace slips, trips, and falls, as well as other injuries and fatalities associated with walking-working surface hazards.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB under the PRA approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for

failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1218–0199.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on February 29, 2020. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 25, 2019 (84 FR 35888).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty-(30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1218–0199. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility:
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–OSHA.

Title of Collection: Walking-Work Surfaces Standard (29 CFR part 1910, subpart D).

OMB Control Number: 1218–0199.

Affected Public: Private Sector Business or other for-profits.

Total Estimated Number of Respondents: 750,000.

Total Estimated Number of Responses: 1,032,860.

Total Estimated Annual Time Burden: 498,640 hours.

Total Estimated Annual Other Costs Burden: $ 54,697,500.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: February 20, 2020.

Frederick Licari,

Departmental Clearance Officer.

[FR Doc. 2020–03817 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0043]

TUV SUD America, Inc.: Grant of Expansion of Recognition

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

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for TUV SUD America, Inc., as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on February 26, 2020.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

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

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration; telephone: (202) 693–2110 or email: *robinson.kevin@dol.gov.* OSHA's web page includes information about the NRTL Program (see *http://www.osha.gov/dts/otpca/nrtl/index.html*).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition of TUV SUD America, Inc. (TUVAM), as a NRTL. TUVAM's expansion covers the addition of one recognized testing and certification site to their NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements in Section 1910.7 of Title 29, Code of Federal Regulations (29 CFR 1910.7). Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition and is not a delegation or grant of government authority. As a result of recognition, employers may use products properly approved by the NRTL to meet OSHA standards that require testing and certification.

The agency processes applications by a NRTL for initial recognition, or for expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides its preliminary finding and, in the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL that details its scope of recognition. These pages are available from the agency's website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

TUVAM submitted an application, dated June 29, 2018 (OSHA–2007–0043–0027), to expand the recognition to include the addition of one recognized testing and certification site located at: TUV SUD Certification and Testing (China) Co. Ltd. Shanghai Branch 3–13, No. 151 Heng Tong Road, Shanghai 200070, P.R. China. OSHA staff performed a detailed analysis of the application and other pertinent information. OSHA staff also performed an on-site review of TUV SUD Shanghai's testing and certification facility on April 19–20, 2019 and recommended expansion of TUVAM's recognition to include this one site.

OSHA published the preliminary notice announcing TUVAM's expansion application in the **Federal Register** on July 19, 2019 (84 FR 34952). The agency requested comments by August 5, 2019, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant expansion of TUVAM's scope of recognition.

To obtain or review copies of all public documents pertaining to the TUVAM expansion application, go to *www.regulations.gov* or contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–3653, Washington, DC 20210. Docket No. OSHA–2007–0043 contains all materials in the record concerning TUVAM's recognition.

II. Final Decision and Order

OSHA staff examined TUVAM's expansion application, conducted a detailed on-site assessment, and examined other pertinent information. Based on review of this evidence, OSHA finds that TUVAM meets the requirements of 29 CFR 1910.7 for expansion of recognition, subject to the specified limitation and conditions. OSHA, therefore, is proceeding with this final notice to grant TUVAM's scope of recognition. OSHA limits the expansion of TUVAM's recognition to include the site at Shanghai, China as listed above. OSHA's recognition of this site limits TUVAM to performing product testing and certifications only to the test standards for which the site has the proper capability and programs, and for test standards in TUVAM's scope of recognition. This limitation is consistent with the recognition that OSHA grants to other NRTLs that operate multiple sites.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, TUVAM also must abide by the following conditions of the recognition:

1. TUVAM must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as a NRTL, and provide details of the change(s);

2. TUVAM must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and

3. TUVAM must continue to meet the requirements for recognition, including all previously published conditions on TUVAM's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the recognition of TUVAM, subject to these limitations and conditions specified above.

III. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on February 19, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03879 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2009–0041]

The Formaldehyde Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Formaldehyde Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by April 27, 2020.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2009–0041, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and the OSHA docket number (OSHA–2009–0041) for the Information Collection Request (ICR). All comments, including any personal information you provide, such as social security numbers and date of birth, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You also may contact Theda Kenney at the below phone number to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupationl injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The standard protects workers from the adverse health effects from occupational exposure to formaldehyde, including an itchy, runny, and stuffy

nose; a dry or sore throat; eye irritation; headaches; and cancer of the lung, buccal cavity (mouth), and pharynyx (throat). Formaldehyde solutions can damage the skin and burn the eyes.

The standard specifies a number of collections of information. The following is a brief description of the collection of information contained in the Formaldehyde Standard. The standard requires employers to conduct worker exposure monitoring to determine workers' exposure to formaldehyde, notify workers of their formaldehyde exposures, provide medical surveillance to workers, provide examining physicians with specific information, ensure that workers receive a copy of their medical examination results, maintain workers' exposure monitoring and medical records for specific periods, and provide access to these records by the affected workers, and their authorized representatives.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the collection of information (paperwork) requirements contained in the Formaldehyde Standard. The agency is requesting a 1,859 hour adjustment increase (from 238,435 hours to 240,294 burden hours). The agency is using fractions rather than decimals in its calculations, so this accounts for the change in the number of burden hours.

Type of Review: Extension of a currently approved collection.

Title: Formaldehyde Standard (29 CFR 1910.1048).

OMB Number: 1218–0145.

Affected Public: Businesses or other for-profits.

Number of Respondents: 86,320.

Frequency of Response: Various.

Total Responses: 906,101.

Average Time per Response: Various.

Estimated Total Burden Hours: 240,294.

Estimated Cost (Operation and Maintenance): $46,843,874.

IV. Public Participation—Submission of Comments on this Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile; or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for this ICR (Docket No. OSHA–2009–0041). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as your social security number and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on February 20, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03805 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2013–0017]

QAI Laboratories, Ltd. Application for Expansion of Recognition

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

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the application of QAI Laboratories, Ltd., for expansion of recognition as a Nationally Recognized Testing Laboratory (NRTL) and presents the agency's preliminary finding to grant the application.

DATES: Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before March 12, 2020.

ADDRESSES: Submit comments by any of the following methods:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2013–0017, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and OSHA

docket number (OSHA–2013–0017). OSHA places comments and other materials, including any personal information, in the public docket without revision, and these materials will be available online at *http://www.regulations.gov.* Therefore, the agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office.

Extension of comment period: Submit requests for an extension of the comment period on or before March 12, 2020 to the Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–3653, Washington, DC 20210, or by fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

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

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, phone: (202) 693–2110 or email: *robinson.kevin@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Notice of the Application for Expansion

OSHA is providing notice that QAI Laboratories, Ltd. (QAI), is applying for expansion of recognition as a NRTL. QAI requests the addition of one test standard to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by a NRTL for initial recognition and for an expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides a preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including QAI, which details the NRTL's scope of recognition. These pages are available from the OSHA website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

QAI currently has two facilities (sites) recognized by OSHA for product testing and certification, with headquarters located at: QAI Laboratories, Ltd., 3980 North Fraser Way, Burnaby, BC, Canada, V5J 5K5. A complete list of QAI's scope of recognition is available at *https://www.osha.gov/dts/otpca/nrtl/qai.html.*

II. General Background on the Application

QAI submitted an application, dated November 8, 2017 (OSHA–2013–0017–0012), to expand recognition to include one additional test standard. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to this application.

Table 1 lists the appropriate test standard found in QAI's application to expand for testing and certification of products under the NRTL Program.

TABLE 1—PROPOSED LIST APPROPRIATE TEST STANDARDS FOR INCLUSION IN QAI'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
AAMI ES60601–1	Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance (with amendments).

III. Preliminary Findings on the Application

QAI submitted an acceptable application for expansion of the scope of recognition. OSHA's review of the application file, and pertinent documentation, indicates QAI can meet the requirements prescribed by 29 CFR 1910.7 for expanding recognition to include the addition of this one test standard for NRTL testing and certification listed above. This preliminary finding does not constitute an interim or temporary approval of QAI's application.

OSHA welcomes public comment as to whether QAI meets the requirements of 29 CFR 1910.7 for expansion of recognition as a NRTL. Comments should consist of pertinent written documents and exhibits. Commenters needing more time to comment must submit a request in writing, stating the reasons for the request. Commenters must submit the written request for an extension by the due date for comments. OSHA will limit any extension to 10 days unless the requester justifies a longer period. OSHA may deny a request for an extension if the request is not adequately justified. To obtain or review copies of the exhibits identified in this notice, as well as comments submitted to the docket, contact the Docket Office at the above address. These materials also are available online at *http://www.regulations.gov* under Docket No. OSHA–2013–0017.

OSHA staff will review all comments to the docket submitted in a timely manner. After addressing the issues

raised by these comments, the agency will make a recommendation to the Assistant Secretary for Occupational Safety and Health whether to grant QAI's application for expansion of the scope of recognition. The Assistant Secretary will make the final decision on granting the application. In making this decision, the Assistant Secretary may undertake other proceedings prescribed in Appendix A to 29 CFR 1910.7.

OSHA will publish a public notice of the final decision in the **Federal Register**.

IV. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on February 19, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03883 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2009–0045]

Aerial Lifts Standard (29 CFR 1926.453); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget (OMB) approval of the information collection requirement contained in the Aerial Lift Standard. Employers who modify an aerial lift for uses other than those provided by the manufacturer must obtain a certificate from the manufacturer or equivalent entity certifying that the modification is in conformance with applicable American National Standards Institute (ANSI) standards and the OSHA Standard, and the equipment is as safe as it was prior to the modification.

DATES: Comments must be submitted (postmarked, sent, or received) by April 27, 2020.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2009–0045, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2009–0045) for the Information Collection Request (ICR). All comments, including any personal information you provide, such as social security numbers and dates of birth, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the below phone number to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires OSHA to obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The certification requirement specified in the Aerial Lifts Standard demonstrates that the manufacturer or an equally-qualified entity has assessed a modified aerial lift and found that it was safe for use by, or near, workers; and that it would provide workers with a level of protection at least equivalent to the protection afforded by the lift prior to modification.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

There are no program changes or adjustment associated with this ICR.

The agency is, therefore, using the above per response burden to maintain a time burden as close as is possible to the actual time of one hour (1 hour).

Type of Review: Extension of a currently approved collection.

Title: Aerial Lifts Standard in Construction.

OMB Number: 1218–0216.

Affected Public: Business or other for-profits.

Number of Respondents: 10.

Frequency of Response: On occasion.

Total Responses: 10.

Average Time per Response: 6 minutes.

Estimated Total Burden Hours: 1.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2009–0045). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, TTY (877) 889–5627.

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the website and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on February 20, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03804 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2020–0002]

National Advisory Committee on Occupational Safety and Health (NACOSH); Request for Nominations

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

ACTION: Request for nominations to serve on NACOSH.

SUMMARY: The Secretary of Labor requests nominations for membership on NACOSH.

DATES: Nominations for NACOSH membership must be submitted (postmarked, sent or received) by April 27, 2020.

ADDRESSES: You may submit nominations for NACOSH, which must include the docket number for this **Federal Register** notice (Docket No. OSHA–2020–0002), by one of the following methods:

Electronically: You may submit nominations, including attachments, electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the online instructions for making submissions.

Facsimile: If your nomination, including attachments, does not exceed 10 pages, you may fax it to the OSHA Docket Office at (202) 693–1648.

Regular mail, express delivery, hand delivery, messenger/courier service (hard copy): You may submit your materials to the OSHA Docket Office, Docket No. OSHA–2020–0002, Room N–3653, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone (202) 693–2350, TTY number is (877) 889–5627. OSHA's Docket Office accepts deliveries (hand deliveries, express mail, and messenger/courier service) from 10 a.m. to 3 p.m., ET.

FOR FURTHER INFORMATION CONTACT: *For press inquiries:* Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999, TTY (877–889–5627); email: *meilinger.francis2@dol.gov.*

For general information: Ms. Michelle Walker, Director, OSHA Technical Data Center, Directorate of Technical Support and Emergency Management; telephone: (202) 693–2350, TTY (877–889–5627); email: *walker.michelle@dol.gov.*

SUPPLEMENTARY INFORMATION: The Secretary of Labor (Secretary) invites interested individuals to submit nominations for membership on NACOSH.

The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651, 656) established NACOSH to advise, consult with, and make recommendations to the Secretary and the Secretary of Health and Human Services (HHS Secretary) on matters relating to the administration of the OSH Act. NACOSH is a continuing advisory committee of indefinite duration.

NACOSH operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2), implementing regulations (41 CFR part 102–3), the OSH Act, and OSHA's regulations on NACOSH (29 CFR part 1912a).

NACOSH is comprised of 12 members, all of whom the Secretary appoints. The terms of six NACOSH members expire on July 31, 2020, and the terms of the other six members expire on July 31, 2021. NACOSH members serve staggered terms, unless the member becomes unable to serve, resigns, ceases to be qualified to serve, or is removed by the Secretary. Accordingly, the Secretary will appoint six members to a two-year term. If a vacancy occurs before a term expires, the Secretary may appoint a new member who represents the same interest as the predecessor to serve the remainder of the unexpired term. The Committee shall meet at least two times a year (29 U.S.C. 656(a)(2)).

OSHA invites nominations for the following NACOSH positions:

- Two (2) public representatives;

- One (1) management representative;
- One (1) labor representative;
- One (1) occupational safety professional representative; and
- One (1) occupational health professional representative.

Pursuant to 29 CFR 1912a.2, the HHS Secretary designates both of the occupational health professional representatives and two of the four public representatives for the Secretary's consideration and appointment. OSHA will provide to HHS all nominations and supporting materials for the membership categories the HHS Secretary designates.

Any individual or organization may nominate one or more qualified persons for membership on NACOSH. Nominations must include:

- The nominee's name and contact information;
- The nominee's occupation or current position;
- The categories that the nominee is qualified to represent;
- The nominee's resume or curriculum vitae;
- Membership in relevant organizations and associations;
- A summary of the nominee's background, experience, and qualifications to serve on NACOSH;
- A list of articles or other documents the nominee has authored that indicates the nominee's experience in worker safety and health;
- A statement that the nominee has no conflicts of interest that would preclude membership on NACOSH; and
- A statement that the nominee is aware of the nomination and is willing to serve and regularly attend NACOSH meetings.

The Secretary will appoint NACOSH members on the basis of their experience and competence in the field of occupational safety and health (29 CFR 1912a.2). The information OSHA receives through this nomination process, in addition to other relevant sources of information, will assist the Secretary in appointing members to serve on NACOSH. In appointing NACOSH members, the Secretary will consider individuals nominated in response to this **Federal Register** notice, as well as other qualified individuals.

The U.S. Department of Labor (Department) is committed to equal opportunity in the workplace and seeks a broad-based and diverse NACOSH membership. The Department will conduct a public records check of nominees before their appointment using publicly available sources.

I. Public Participation, Submissions and Access to Public Record

You may submit nominations using one of the methods listed in the **ADDRESSES** section. Your submission must include the agency name and docket number for this **Federal Register** notice (Docket No. OSHA–2020–0002). Due to security-related procedures, receipt of submissions by regular mail may experience significant delay. Please contact the OSHA Docket Office for information about security procedures for making submissions by hand, express delivery, or messenger/courier service.

OSHA posts submissions without change at *http://www.regulations.gov.* Therefore, OSHA cautions interested parties about submitting personal information, such as social security numbers and birth dates. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection and copying, if permissible, at the OSHA Docket Office. Information on using *http://www.regulations.gov* to submit comments and access the docket is available on the website. Please contact the OSHA Docket Office for information about materials not available through the website and for assistance in using the internet to locate docket submissions.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This notice, as well as news releases and other relevant information, also are available on OSHA's web page at *http://www.osha.gov.*

Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice under the authority granted by 29 U.S.C. 656; 5 U.S.C. App. 2; 29 CFR part 1912a; 41 CFR part 102–3; and Secretary of Labor's Order No. 1–2012 (77 FR 3912 (1/25/2012)) and 04–2018 (6/1/2018).

Signed at Washington, DC, on February 20, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03806 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0015]

Crawler, Locomotive, and Truck Cranes; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget (OMB) approval of the information collection requirements contained in the Crawler, Locomotive, and Truck Cranes Standard (29 CFR 1910.180).

DATES: Comments must be submitted (postmarked, sent, or received) by April 27, 2020.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2010–0015, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and the OSHA docket number (OSHA–2010–0015) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the

docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney or Seleda Perryman at (202) 293–2222 to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone: (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of a continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, the reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act, or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The Standard specifies several paperwork requirements. The following sections describe who uses the information collected under each requirement, as well as how they use it. The purpose of each of these requirements is to prevent workers from using unsafe cranes and ropes, thereby reducing their risk of death or serious injury caused by a crane or rope failure during material handling.

(A) Inspection of and Certification Records for Cranes (§ 1910.180(d)(4) and (d)(6))

Paragraph 1910.180(d) specifies that employers must prepare a written record to certify that the monthly inspection of critical items in use on cranes (such as brakes, crane hooks, and ropes) has been performed. The certification record must include the inspection date, the signature of the person who conducted the inspection, and the serial number (or other identifier) of the inspected crane. Employers must keep the certificate readily available. The certification record provides employers, workers, and OSHA compliance officers with assurance that critical items on cranes have been inspected, and that the equipment is in good operating condition so that the crane and rope will not fail during material handling. These records also enable OSHA to determine that an employer is complying with the Standard.

(B) Rated Load Tests (§ 1910.180(e)(2))

This provision requires employers to make available written reports of load-rating tests showing test procedures and confirming the adequacy of repairs or alterations, and to make readily available any rerating test reports. These reports inform the employer, workers, and OSHA compliance officers of a crane's lifting limitations, and provide information to crane operators to prevent them from exceeding these limits and thereby causing crane failure.

(C) Inspection of and Certification Records for Ropes (§ 1910.180(g)(1) and (g)(2)(ii))

Paragraph (g)(1) requires employers to thoroughly inspect any rope in use at least once a month. The authorized person conducting the inspection must observe any deterioration resulting in appreciable loss of original strength and determine whether or not the condition is hazardous. Before reusing a rope that has not been used for at least a month because the crane housing the rope is shut down or in storage, paragraph (g)(2)(ii) specifies that employers must have an appointed or authorized person inspect the rope for all types of deterioration. Employers must prepare a certification record for the inspections required by paragraphs (g)(1) and (g)(2)(ii). These certification records must include the inspection date, the signature of the person conducting the inspection, and the identifier for the inspected rope; paragraph (g)(1) states that employers must keep the certificates ''on file where readily available,'' while paragraph (g)(2)(ii) requires that certificates ''be . . . kept readily available.'' The certification records assure employers, workers, and OSHA that the inspected ropes are in good condition.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

II. Proposed Actions

There are no adjustments or program changes associated with the information collection requirements in the Standard. The agency is requesting to retain its current burden hours of 30,511. The agency has determined that information collected by the agency during an investigation is not subject to the PRA under 5 CFR 1320.4(a)(2). Therefore, OSHA takes no burden or cost for disclosure of records.

Type of Review: Extension of a currently approved information collection.

Title: Crawler, Locomotive, and Truck Cranes (29 CFR 1910.180).

OMB Control Number: 1218–0221.

Affected Public: Businesses or other for-profits; Federal Government; State, Local, or Tribal government.

Number of Respondents: 34,994.

Frequency of Responses: Various.

Average Time per Response: Varies from 1 hour to conduct rated load tests to monthly to inspect ropes.

Estimated Total Burden Hours: 30,511.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number (Docket No. OSHA–2010–0015) for the ICR. You may supplement electronic submissions by uploading document files

electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Due to security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350 TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as their social security number and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website.

All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on February 20, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03803 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0042]

TUV Rheinland of North America, Inc.: Grant of Expansion of Recognition

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

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for TUV Rheinland of North America, Inc., as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on February 26, 2020.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

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

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor; telephone: (202) 693–2110; email: *robinson.kevin@dol.gov.* OSHA's website includes information about the NRTL Program (see *http://www.osha.gov/dts/otpca/nrtl/index.html*).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition of TUV Rheinland of North America, Inc. (TUVRNA) as a NRTL. TUVRNA's expansion covers the addition of one recognized testing standard to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition, and is not a delegation or grant of government authority. As a result of recognition, employers may use products properly approved by the NRTL to meet OSHA standards that require testing and certification.

The agency processes applications by a NRTL for initial recognition, or for expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides the preliminary finding and, in the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL that details the scope of recognition. These pages are available from the agency's website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

TUVRNA submitted two applications, one dated March 30, 2016 (OSHA–2007–0042–0030) and another dated April 19, 2017 (OSHA–2007–0042–0031), to expand the scope of recognition to include the addition of four recognized testing and certification sites and the addition of two test standards to its scope of recognition. OSHA preliminarily determined that OSHA should grant the applications for expansion.

OSHA published a **Federal Register** notice (83 FR 36625), July 30, 2018, announcing these applications, but referenced the incorrect title of one of the standards in the listing of appropriate test standards (UL 698A). OSHA further published a **Federal Register** notice (84 FR 26160), June 5, 2019, granting recognition for the four sites and the two additional standards requested in the application, but again referenced the incorrect title one of the standards in the listing of appropriate test standards (UL 698A). This notice is being issued to grant recognition to the correct title of the standard requested in TUVRNA's application for expansion of the NRTL scope of recognition (UL 698A).

OSHA published the preliminary notice announcing TUVRNA's expansion application, reflecting the correct title of the standard in the **Federal Register** on October 29, 2019 (84 FR 57886). The agency requested comments by November 13, 2019, and the agency did not receive any comments regarding the application. OSHA now is proceeding with this final notice to correct the title of the standard previously granted to TUVRNA's scope of recognition.

To obtain or review copies of all public documents pertaining to TUVRNA's application, go to *www.regulations.gov* or contact the Docket Office, Occupational Safety and

Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–3655, Washington, DC 20210; telephone: (202) 693–2350. Docket No. OSHA–2007–0042 contains all materials in the record concerning TUVRNA's recognition.

II. Final Decision and Order

OSHA staff examined TUVRNA's expansion application and examined other pertinent information. Based on a review of this evidence, OSHA finds that TUVRNA meets the requirements of 29 CFR 1910.7 for expansion of recognition, subject to the limitation and conditions listed below. OSHA, therefore, is proceeding with this final notice to grant expansion of TUVRNA's scope of recognition. OSHA limits the expansion of TUVRNA's scope of recognition to testing and certification of products for demonstration of conformance to the test standard listed in Table 1.

TABLE 1—LIST OF APPROPRIATE TEST STANDARD FOR INCLUSION IN TUVRNA'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 698A	Standard for Industrial Control Panels Relating to Hazardous (Classified) Locations.

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, a NRTL's scope of recognition does not include these products.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, TUVRNA must abide by the following conditions of the recognition:

1. TUVRNA must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as a NRTL, and provide details of the change(s);

2. TUVRNA must meet all the terms of the recognition and comply with all OSHA policies pertaining to this recognition; and

3. TUVRNA must continue to meet the requirements for recognition, including all previously published conditions on TUVRNA's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of TUVRNA, subject to the limitation and conditions specified above.

III. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on February 19, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03880 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2013–0021]

Cranes and Derricks in Construction; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements contained in the Cranes and Derricks in Construction Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by April 27, 2020.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2013–0021, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the OSHA Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and the OSHA docket number (OSHA–2013–0021) for the Information Collection Request (ICR). All comments, including any personal information you provide, such as social security numbers and dates of birth, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at (202) 693–2222 to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of a continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance process to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, the reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act, or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires OSHA to obtain such information with a minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining said information (29 U.S.C. 657).

The Cranes and Derricks standard's information collection requirements impose a duty on employers to produce and maintain records that implement controls and take other measures to protect workers from hazards related to cranes and derricks used in construction. Accordingly, construction businesses with workers who operate or work in the vicinity of cranes and derricks must have, as applicable, the following documents on file and available at the jobsite: Operator certifications, equipment ratings, employee training records, written authorizations from qualified individuals, and program qualification audits.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply—for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

The agency requests an overall adjustment burden hour increase of 15,750 hours (from 382,750 to 398,500 hours) and $156,112 in capital (operation and maintenance) costs (from $2,286,501 to $2,442,613). The burden hour increase is a result of both the agency's use of a different rounding methodology for calculating average burden hours, and the incorporation of previously-approved burden hours under OMB control number 1218–0270. For the same reason, and also due to inflation, the agency requests an adjustment increase in capital (operation and maintenance) costs.

Operator Qualification Final Rule (Non-Material Change)—A portion of the burden hour increase is an increase of 6,130 burden hours due to the incorporation of burden hours previously approved by OMB under OMB Control Number 1218–0270. This aspect of the ICR constitutes a non-material change as the collection of information associated with 29 CFR 1926.1427 remains the same as approved. For the same reason, a portion of the capital cost adjustment is due to the incorporation of a $571 decrease in costs previously approved by OMB under OMB Control Number 1218–0270. Under the currently approved OMB Control Number 1218–0261, the annual capital costs associated with 29 CFR 1926.1427 total $655. The final crane operator qualification final rule approved under OMB Control Number 1218–0270 estimates these costs be $84. This results in a net decrease for this ICR of $571.

Type of Review: Extension of a currently approved collection.

Title: Cranes and Derricks in Construction (29 CFR 1926, subpart CC).

OMB Control Number: 1218–0261.

Affected Public: Business or other for-profits.

Number of Respondents: 212,625.

Frequency: Annually; On occasion.

Average Time per Response: Various.

Estimated Number of Responses: 2,750,968.

Estimated Total Burden Hours: 398,500.

Estimated Cost (Operation and Maintenance): $2,442,613.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number (Docket No. OSHA–2013–0021) for the ICR. You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify electronic comments by your name, date, and the docket number so that the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350; TTY (877) 889–5627.

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on February 18, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03787 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2006–0040]

SGS North America, Inc.: Application for Expansion of Recognition

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

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the application of SGS North America, Inc., for expansion of the scope of recognition as a Nationally Recognized Testing Laboratory (NRTL) and presents the agency's preliminary finding to grant the application.

DATES: Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before March 12, 2020.

ADDRESSES: Submit comments by any of the following methods:

Electronically: You may submit comments and attachments electronically at: *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2006–0040, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries, (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2006–0040). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *https://www.regulations.gov.* Therefore, the agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

Extension of comment period: Submit requests for an extension of the comment period on or before March 12, 2020 to the Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–3653, Washington, DC 20210, or by fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

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

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, phone: (202) 693–2110 or email: *robinson.kevin@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Notice of the Application for Expansion

OSHA is providing notice that SGS North America, Inc. (SGS), is applying for expansion of current recognition as a NRTL. SGS requests the addition of one recognized testing and certification site to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by a NRTL for initial recognition and for an expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides the preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including SGS, which details the NRTL's scope of recognition. These pages are available from the OSHA website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

SGS currently has nine facilities (sites) recognized by OSHA for product testing and certification, with headquarters located at: SGS North America, Inc., 620 Old Peachtree Road, Suwanee, Georgia 30024. A complete list of SGS sites recognized by OSHA is available at *https://www.osha.gov/dts/otpca/nrtl/sgs.html.*

II. General Background on the Application

SGS submitted an application, dated October 16, 2017 (OSHA–2006–0040–0052) to expand recognition to include the addition of one recognized testing and certification site located at: SGS Consumer and Retail France, 135, Rue Rene Descartes- CS 30584, 13857 Aix en Provence Cedex 3, France. OSHA staff performed an on-site review of SGS France's testing facilities on July 23–24, 2018, in which the assessors found some nonconformances with the requirements of 29 CFR 1910.7. SGS addressed these nonconformances satisfactorily, and OSHA has made a preliminary decision to approve the application.

III. Preliminary Finding on the Application

SGS submitted an acceptable application for expansion of the scope of recognition. OSHA's review of the application files and detailed on-site assessments indicate that SGS can meet the requirements prescribed by 29 CFR 1910.7 for expanding recognition to include the addition of one recognized testing and certification site. This preliminary finding does not constitute an interim or temporary approval of SGS's application.

OSHA welcomes public comment as to whether SGS meets the requirements of 29 CFR 1910.7 for expansion of its recognition as a NRTL. Comments should consist of pertinent written documents and exhibits. Commenters needing more time to comment must submit a request in writing, stating the reasons for the request by the due date for comments. OSHA will limit any extension to 10 days unless the requester justifies a longer time period. OSHA may deny a request for an extension if it is not adequately justified. To obtain or review copies of the exhibits identified in this notice, as well as comments submitted to the docket, contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor, listed in **ADDRESSES**. These materials also are available online at *https://www.regulations.gov* under Docket No. OSHA–2006–0040.

OSHA staff will review all comments to the docket submitted in a timely manner. After addressing the issues raised by these comments, staff will make a recommendation to the Assistant Secretary for Occupational Safety and Health on whether to grant SGS's application for expansion of its scope of recognition. The Assistant Secretary will make the final decision on granting the application. In making this decision, the Assistant Secretary may undertake other proceedings prescribed in Appendix A to 29 CFR 1910.7. OSHA will publish a public notice of this final decision in the **Federal Register**.

IV. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on February 19, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03881 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0008]

Construction Fall Protection Systems Criteria and Practices, and Training Requirements; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend OMB approval of the information collection requirements contained in the Construction Standards on Fall Protection Systems Criteria and Practices, and Training Requirements.

DATES: Comments must be submitted (postmarked, sent, or received) by April 27, 2020.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2010–0008, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the OSHA Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and the OSHA docket number (Docket No. OSHA–2010–0008) for this Information Collection Request (ICR). All comments, including any personal information you provide, such as social security number and date of birth, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at (202) 693–2222 to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Office of Construction Services, Directorate of Construction, OSHA, U.S. Department of Labor, telephone: (202) 693–2020.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are understandable, and OSHA's estimate of the information collection burden is correct. The Occupational Safety and Health Act of 1970 (the OSH Act) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act, or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The Standards on Construction Fall Protection Systems Criteria and Practices (29 CFR 1926.502) and Training Requirements (29 CFR 1926.503) ensure that employers provide the required fall protection for their workers. Accordingly, these standards have the following paperwork requirements: Paragraphs (c)(4)(ii) and (k) of 29 CFR 1926.502, which specify

certification of safety nets and development of fall protection plans, respectively, and paragraph (b) of 29 CFR 1926.503, which requires employers to certify training records. The training certification requirement specified in paragraph (b) of 29 CFR 1926.503 documents the training provided to workers potentially exposed to fall hazards in construction. A competent person must train these workers to recognize fall hazards and in the use of procedures and equipment that minimize these hazards. An employer must verify compliance with this training requirement by preparing and maintaining a written certification record that contains the name or other identifier of the worker receiving the training, the date(s) of the training, and the signature of the competent person who conducted the training, or of the employer.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend approval of the collection of information requirements contained in the Construction Standards on Fall Protection Systems Criteria and Practices (29 CFR 1926.502) and Training Requirements. OSHA is requesting a burden hour increase, from 425,844 to 471,232 hours, a difference of 45,388 hours. The increase is primarily a result of a higher estimate of employers who must comply with the collections of information as well as the way the agency is now calculating burden hours. The hours are calculated using fractions instead of decimals, as the agency believes that it is easier for the public to follow this methodology.

Type of Review: Extension of a currently approved collection.

Title: Construction Fall Protection Systems Criteria and Practices (29 CFR 1926.502) and Training Requirements (29 CFR 1926.503).

OMB Control Number: 1218–0197.

Affected Public: Business or other for-profits; Federal Government; State, Local, or Tribal Government.

Number of Responses: 5,645,796.

Frequency of Recordkeeping: On occasion, annually.

Average Time per Response: Time per response ranges from 5 minutes (5/60 hour) to certify a safety net to 1 hour to develop a fall protection plan.

Estimated Total Burden Hours: 471,232.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation-Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number (Docket No. OSHA–2010–0008) for the ICR. You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your full name, date, and the docket number so the agency can attach them to your comments.

Due to security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, TTY (877) 889–5627.

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website.

All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on February 20, 2020.

Loren Sweatt,

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

[FR Doc. 2020–03802 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of Existing Collection; Comment Request

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. This information collection request (ICR) seeks approval under the PRA for the continued use of the revised Provider Enrollment Form (Form OWCP–1168). The form requests profile information on providers that enroll in one or more of OWCP's benefit programs so its billing contractor can pay them for services rendered to beneficiaries using its automated bill processing system. In addition to the enrollment form information collection, the OWCP bill processing contractor currently collects electronic data interchange (EDI) information from the

provider only if the provider chooses a data exchange submission method. Once the new OWCP–1168 form is in place, the existing EDI template will no longer be applicable. The current EDI template collects information that is duplicative to information collected on Form OWCP–1168, such as names, addresses, and NPI. Collecting EDI information with the enrollment information in one form will improve efficiency in collecting the information from providers, reduce the time required for processing by operational staff, and will significantly reduce errors associated with mismatching provider enrollments to their EDI information. This ICR will be submitted to OMB to allow for the continued use of the revised Provider Enrollment Form (Form OWCP–1168) and to incorporate regulatory updates implementing the Black Lung benefits Act which becomes applicable on April 26, 2020. A copy of the proposed information collection request can be obtained by contacting the office listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before April 27, 2020.

ADDRESSES: Anjanette Suggs, U.S. Department of Labor, 200 Constitution Ave. NW, Room S–3201, Washington, DC 20210, telephone/fax (202) 354–9660, Email *suggs.anjanette@dol.gov.* Please use only one method of transmission for comments (mail/delivery, fax, or email).

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Workers' Compensation Programs (OWCP) is the agency responsible for administration of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.,* the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.,* and the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384 *et seq.* These statutes require OWCP to pay for appropriate medical and vocational rehabilitation services provided to beneficiaries. In order for OWCP's billing contractor to pay providers of these services with its automated bill processing system, providers must ''enroll'' with one or more of the OWCP programs that administer the statutes by submitting certain profile information, including identifying information, tax I.D. information, and whether they possess specialty or sub-specialty training. Form OWCP–1168 is used to obtain this information from each provider. This ICR will be submitted to OMB as a follow-up to an emergency processing request that was submitted to OMB on February 14, 2020 which will allow for implementation of the revised form as soon as possible. This submission will request OMB approval to use the revised form for an additional three (3) years.

II. Review Focus

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* enhance the quality, utility and clarity of the information to be collected; and

* minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions

The Department of Labor seeks the approval of the extension of this currently approved information collection in order to carry out a wide range of automated bill ''edits'', such as the identification of duplicate billings, the application of pertinent fee schedules, utilization review, and fraud and abuse detection. The profile information is also used to furnish detailed reports to providers on the status of previously submitted bills.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title: Provider Enrollment Form.

OMB Number: 1240–0021.

Agency Number: OWCP–1168.

Affected Public: Businesses or other for-profit.

Total Respondents: 64,325.

Total Responses: 64,325.

Time per Response: 30 minutes.

Estimated Total Burden Hours: 32,163.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $37,309.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Anjanette Suggs,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2020–03789 Filed 2–25–20; 8:45 am]

BILLING CODE 4510–CR–P

OFFICE OF MANAGEMENT AND BUDGET

2017 North American Industry Classification System (NAICS)—Updates for 2022; Update of Statistical Policy Directive No. 8, Standard Industrial Classification of Establishments; and Elimination of Statistical Policy Directive No. 9, Standard Industrial Classification of Enterprises

AGENCY: Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President.

ACTION: Notice of solicitation for proposals to revise portions of NAICS for 2022, solicitation of comments on the update of Statistical Policy Directive No. 8, and solicitation of comments on the elimination of Statistical Policy Directive No. 9.

SUMMARY: The Office of Management and Budget OMB, through its Economic Classification Policy Committee (ECPC), is seeking comment on potential changes to the structure and content of the North American Industry Classification System (NAICS). There are seven parts in the **SUPPLEMENTARY INFORMATION** section below. Part I provides background on NAICS. Part II includes a solicitation of proposals for new and emerging industries. Part III solicits public comments on the NAICS treatment of Electronic Shopping in Retail Trade. Part IV asks for comments on the concept of internet Publishing and Broadcasting and the potential to eliminate the industry in NAICS 2022. Part V solicits comments on a proposed revision to OMB's Statistical Policy Directive No. 8, Standard Industrial Classification of Establishments. Part VI requests comments on the advisability of withdrawing OMB Statistical Policy Directive No. 9, Standard Industrial Classification of Enterprises. Finally, Part VII presents notification of a method to publicize corrections for errors and omissions that are identified in NAICS.

In soliciting comments about revising NAICS, the ECPC does not intend to

open the entire classification system for substantial change in 2022. The ECPC will consider public comments and proposals for changes or modifications that advance the goals of NAICS as outlined in Part I of the **SUPPLEMENTARY INFORMATION** section below.

DATES: To ensure consideration of comments on this Notice, comments must be provided in writing no later than 60 days from the publication date of this notice. Because of delays in the receipt of regular mail related to security screening, respondents are encouraged to send comments electronically (see **ADDRESSES**, below).

ADDRESSES: Submit comments through *www.regulations.gov*—a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type ''USBC–2020–0004'' (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments. Comments received by the date specified above will be included as part of the official record. Please include the Docket ID (USBC–2020–0004) and the phrase ''2017 North American Industry Classification System (NAICS)—Updates for 2022 Comments'' at the beginning of your comments. Please also indicate which questions described in the **SUPPLEMENTARY INFORMATION** of this notice are addressed in your comments.

Comments submitted in response to this notice may be made available to the public and subject to disclosure under the Freedom of Information Act. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket; however, *www.regulations.gov* does include the option of commenting anonymously. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

Electronic Availability: **Federal Register** notices are available electronically at *www.federalregister.gov/.* This document is also available on the NAICS website at *www.census.gov/naics.* This site contains previous NAICS United States **Federal Register** notices, ECPC Issues Papers, ECPC Reports, the structure and industry definitions for NAICS United States 2017, 2012, 2007, 2002, and 1997, and related documents.

Public Review Procedure: All comments and proposals received in response to this notice will be available for public inspection. OMB will publish all ECPC recommendations for changes to NAICS for 2022 resulting from this notice in the **Federal Register** for review and comment prior to final action.

FOR FURTHER INFORMATION CONTACT: NAICS classification staff may be reached by email at *econ.naics2022@census.gov.* Please note: Communication through this email will not be included in the record for USBC–2020–0004. Comments should be submitted through *www.regulations.gov,* as described in the **ADDRESSES** section above.

For information about this request for comments, contact Kerrie Leslie, Office of Management and Budget, 9215 New Executive Office Building, 725 17th St. NW, Washington, DC 20503, telephone (202) 395–1093.

SUPPLEMENTARY INFORMATION: Under the authority of the *Budget and Accounting Procedures Act* of 1950 (31 U.S.C. 1104(d)) and the *Paperwork Reduction Act* of 1995 (44 U.S.C. 3504(e)), the Office of Management and Budget (OMB), through its Economic Classification Policy Committee (ECPC), is soliciting proposals from the public for changes to the structure and content of the North American Industry Classification System (NAICS) for inclusion in a potential 2022 revision. OMB, through the ECPC, is also soliciting comments on updating Statistical Policy Directive No. 8 and eliminating Statistical Policy Directive No. 9.

I. Background of NAICS

NAICS is a system for classifying establishments (individual business locations) by type of economic activity. Its purposes are: (1) To facilitate the collection, tabulation, presentation, and analysis of data relating to establishments; and (2) to promote uniformity and comparability in the presentation and analysis of statistical data describing the North American economy. Federal statistical agencies use NAICS to collect and/or publish data by industry. It is also widely used by State agencies, trade associations, private businesses, and other organizations.

Mexico's *Instituto Nacional de Estadística y Geografía* (INEGI), Statistics Canada, and the United States Office of Management and Budget (OMB), through the ECPC, collaborated on NAICS to make the industry statistics produced by the three countries comparable. NAICS is the first industry classification system developed in accordance with a single principle of aggregation—producing units that use similar production processes should be grouped together in the classification. NAICS also reflects changes in technology and in the growth and diversification of services in recent decades. Industry statistics presented using NAICS 2017 are extensively comparable with statistics compiled according to the latest revision of the United Nations' International Standard Industrial Classification (ISIC, Revision 4).

For these three countries, NAICS provides a consistent framework for the collection, tabulation, presentation, and analysis of industry statistics used by government policy analysts, by academics and researchers, by the business community, and by the public. Please note that NAICS is designed and maintained solely for statistical purposes to improve and keep current this Federal statistical standard. Consequently, although the classification may also be used for various nonstatistical purposes (*e.g.,* for administrative, regulatory, or taxation functions), the requirements of government agencies or private users that choose to use NAICS for nonstatistical purposes play no role in its development or revision.

Four principles that guide NAICS development are:

(1) NAICS is erected on a production-oriented conceptual framework. This means that producing units that use the same or similar production processes are grouped together in NAICS.

(2) NAICS gives special attention to developing production-oriented classifications for (a) new and emerging industries, (b) service industries in general, and (c) industries engaged in the production of advanced technologies.

(3) Time series continuity is maintained to the extent possible.

(4) The system strives for compatibility with the two-digit level of the International Standard Industrial Classification of All Economic Activities (ISIC, Rev. 4) of the United Nations.

The ECPC is committed to maintaining the principles of NAICS as it develops further refinements. NAICS uses a hierarchical structure to classify establishments from the broadest level to the most detailed level using the following format:

Sector	2-digit	Sectors represent the highest level of aggregation. There are 20 sectors in NAICS.
Subsector	3-digit	Subsectors represent the next, more detailed level of aggregation. There are 99 subsectors in NAICS.
Industry Group	4-digit	Industry groups are more detailed than subsectors. There are 311 industry groups in NAICS 2017.
NAICS Industry	5-digit	NAICS industries, in most cases, represent the lowest level of three-country comparability. There are 709 five-digit industries in NAICS 2017.
National Industry	6-digit	National industries are the most detailed level and represent the national level detail. There are 1,057 national industries in NAICS United States 2017.

To ensure the accuracy, timeliness, and relevance of the classification, NAICS is reviewed every five years to determine what, if any, changes are required. The 2022 review will be the fifth since OMB adopted NAICS in 1997. The ECPC recognizes the costs involved when implementing industry classification revisions in statistical programs and the costs for data users when there are disruptions in the availability of data. The ECPC also recognizes the economic, statistical, and policy implications that arise when the industry classification system does not identify and account for important economic developments. Balancing the costs of change against the potential for more accurate and relevant economic statistics requires significant input from data producers, data providers, and data users.

NAICS version	Date published	**Federal Register**
1997	April 9, 1997	62 FR 17288–17337.
2002	January 16, 2001	66 FR 3826–3827.
2007	May 16, 2006	71 FR 28532–28533.
2012	August 17, 2011	76 FR 51240–51243.
2017	August 8, 2016	81 FR 52584.

Over time, as the internet became an integral part of conducting business, two industries in NAICS were created (454111, Electronic Shopping, and 519130, Internet Publishing and Broadcasting and Web Search Portals) that delineate based on mode of delivery. As utilization of the internet evolved, the structure and coding of these industries in NAICS has also evolved. This leads the ECPC to request comments on the continued usefulness of the mode of delivery (online versus in store/print) as an industry delineation criterion in Sections III and IV.

II. New and Emerging Industries

NAICS is a dynamic industry classification. Every five years, the classification is reviewed to determine the need to identify new and emerging industries. The ECPC is soliciting public comments on the advisability of revising NAICS for new and emerging industries in 2022 and soliciting proposals for these new industries.

When developing proposals for new and emerging industries, please note that there are two separate economic classifications in the United States. NAICS, the industry classification, is the subject of this notice, while the North American Product Classification System (NAPCS) is a product classification. The NAPCS product system described below complements the NAICS industry system and provides an alternate way of classifying output.

NAICS classifies units according to their production function. NAICS industries group units undertaking similar activities using similar resources but does not necessarily group all similar products or outputs. NAPCS classifies the outputs of units, or in other words their products or transactions, within a demand-based conceptual framework. For example, the hypothetical product of a flu shot can be provided by a doctor's office, a hospital, or a walk-in clinic. Because these three units are classified to three different NAICS industries, data users who want information about all flu shots provided must be able to identify the individual products coming out of the units, which NAPCS is designed to do. Thus, in many cases, the need for specific statistical data can be met by aggregating product data across industries rather than by creating a new industry. This is particularly true with NAICS, which groups establishments into industries based on their primary production function. Proposals for new industries in NAICS for 2022 will be evaluated within the context of the industry classification system to determine the most appropriate resolution. For a detailed description of the NAPCS initiative, see the April 16, 1999, **Federal Register** notice (64 FR 18984–18989) available at *www.census.gov/napcs.*

Proposals for new industries will be evaluated using a variety of criteria. As previously mentioned, each proposal will be evaluated based on the application of the production function concept, its impact on comparability within North America and with other regions, and its impact on time series. For any proposals that cross three-country levels of agreement, negotiations with Canada and Mexico, our partners in NAICS, will also influence the ECPC's recommendations on those proposals. In addition, other criteria may affect recommendations for adoption. From a practical standpoint, industries must be of appropriate size. At the national level, this is generally not a major concern but there are a variety of statistical programs that produce industry data at the regional, State, metropolitan area, or even county or local level. Proposed industries must include a sufficient number of establishments so that Federal agencies can publish industry data without disclosing information about the operations of individual firms. The ability of government agencies to classify, collect, and publish data on the proposed basis will also be taken into account. Proposed changes must be such that they can be applied by agencies within their normal processing operations. Any recommendations for change forwarded by the ECPC for consideration will also take into account the cost of making the changes. These costs can be considerable and the

availability of funding to make changes is critical. The budgetary environment will be considered when the ECPC makes recommendations. As mentioned above, certain proposals may be more adequately addressed through the identification and collection of product data.

Proposals for new or revised industries should be consistent with the production-oriented conceptual framework incorporated into the principles of NAICS. When formulating proposals, please note that an industry classification system groups the economic activities of producing units, which means that the activities of similar producing units cannot be separated in the industry classification system.

Proposals must be in writing and include the following information:

(a) Specific economic activities to be covered by the proposed industry, the proposed industry's production processes, its specialized labor skills, and any unique materials used. This detail should demonstrate that the proposed industry will group establishments with similar production processes that are unique and clearly separable from the production processes of other industries.

(b) Relationship of the proposed industry to existing NAICS United States 2017 six-digit national industries.

(c) Documentation of the size and importance of the proposed industry in the U.S.

(d) Information about the proposed industry in Canada and Mexico if available.

Proposals will be collected, reviewed, and analyzed by the ECPC. As necessary, proposals for change will be negotiated with our partners in Canada and Mexico. When this process is complete, the OMB will publish a **Federal Register** notice that contains the ECPC recommendations for additional public comment prior to a final determination of changes to NAICS for 2022.

III. E-Commerce and Electronic Shopping in Retail Trade

The ECPC is soliciting comments on the current treatment of electronic shopping in NAICS and proposals for industry structure change in the Retail Trade sector. NAICS currently delineates Subsector 454, Nonstore Retailers, for establishments exclusively engaged in nonstore retail trade. Data users are increasingly interested in the growth of electronic shopping. However, NAICS Subsector 454 does not present a clear picture of all online retail trade activity because it does not include online sales of store retailers. The growth of e-commerce and the pervasive nature of electronic shopping creates confusion in classification and results in aggregate data that is hard to interpret and use for strategic business decisions, policy decisions, and analysis of changes to industry practices. NAICS Industry 45411, Electronic Shopping and Mail Order Houses, is defined as comprising units that sell exclusively from a nonstore format. This distinction is problematic based on changes in retail trade practices over the past decade. In short, the industry structure in retail trade does not necessarily result in all e-commerce retail revenue being included in nonstore retail. It also does not necessarily result in all store retail revenue being included in store retail.

Changes in the use of technology and the impacts on the usefulness of the resulting data require an evaluation of the industry structure in retail trade. Currently, store retail is delineated by broad product lines, such as groceries, apparel, hardware, etc. and by specialized stores versus general merchandise stores such as department stores. Store retail includes all transactions associated with the location—in-store customer transactions as well as online transactions credited to the store even if shipped directly from a distribution center to a customer.

The growth of online intermediaries performing functions such as storage, pick and pack, and billing on behalf of retailers creates additional problems. The expansion of these third party services using online platforms on behalf of stores further clouds the content and interpretation of data using the retail trade industry structure in NAICS broken out by store and nonstore.

Retailers perform an intermediary function to get a product from the producer to the consumer. It is no longer clear whether the store vs. nonstore distinction should be determinative for classification purposes. The increasing prevalence of omni-channel distribution and variations in reporting patterns result in significant ambiguity in the interpretation and use of the industry data.

Recent developments include pop up stores, delivery lockers, online ordering with in-store pick up, store inventory fulfillment of online orders, online orders in stores when an item is out of stock, and similar practices. Each of these cases presents ambiguity for classification of in store and nonstore data.

Any change to the current industry treatment will impact time series and potential uses of the resulting data presented using NAICS. While the sector level total will include all retail sales and will not change, the distribution of those sales at lower levels of aggregation will change. Changes to the content of store and nonstore retail will have an impact on industry metrics like same store sales on a year over year basis and total location sales. Changes could also affect retailers due to existing terms of leasing arrangements.

There are several possible changes to the retail trade structure to account for the blurring of modes of sale. The first is to redefine NAICS 45411 to include establishments primarily rather than exclusively engaged in online retail sales, with no further changes. This has the benefit of low disruption to the retail structure but will not necessarily clarify the content of the resulting data. Another option is to simply eliminate NAICS Industry 45411, and broadly use the NAICS industry structure for store retailers, maintaining separate industries for vending machine operators, fuel dealers, and other direct selling establishments. This approach would require a product or mode of sale inquiry below the industry level to identify and track online retail activity. Some programs that use NAICS could accommodate subindustry inquiries but major employment and productivity programs generally produce data at the industry level only.

IV. Internet Publishing and Broadcasting

NAICS 51931, internet Publishing and Broadcasting and Web Search Portals, includes a wide range of activities presenting content over the internet. This NAICS industry includes online publications, online video services, social media sites, and even data brokers. The classification is easy to implement but there is growing concern that distribution of content via the internet is no longer a useful industry classification delineation.

As more entities use various modes of content delivery including over the air, via wired telecommunications networks, and over wireless telecommunications networks, it is not clear that a separation of all activities exclusively providing content over the internet is appropriate. The rise of on-demand programming through apps, the move to cord cutting, and changes in the distribution mode of traditional newspapers and periodicals can result in data that is hard to interpret and can vary based on changes in business models. The ECPC is soliciting comments on the usefulness of NAICS

51931 and proposals for changes to the concept that underlies the existing information industries. The ECPC is requesting comments on whether the internet is still a relevant industry distinction or if internet distribution should be treated as a mode of delivery with a goal of consistent treatment in Sector 44–45, Retail Trade, and Sector 51, Information. As is the case for retail trade, any changes to the industry structure in Sector 51, Information, are expected to create possibly significant time series breaks.

V. OMB Statistical Policy Directive No. 8, Standard Industrial Classification of Establishments

The ECPC is soliciting public comments at the request of OMB on the advisability of formally updating Statistical Policy Directive No. 8, Standard Industrial Classification of Establishments, and seeking comments on the proposed text of the update. The current Statistical Policy Directive text mandates the use of the Standard Industrial Classification Manual, 1972, for the classification of establishments by type of industrial activity. Statistical Policy Directive No. 8 incorporates amendments and further revisions of the SIC. OMB adopted NAICS as the replacement for the SIC for statistical purposes in 1997. (62 FR 17288–17337) The SIC has not been amended or revised since 1987. The text of Statistical Policy Directive No. 8 is available for review at: *https://www.census.gov/eos/www/naics/federal_register_notices/fedregister.html.* It is also available for review as a supplementary document on *www.regulations.gov* within the same docket as this **Federal Register** Notice.

The ECPC proposes to update the text of Statistical Policy Directive No. 8 and is soliciting public comments on the proposed language included below:

Statistical Policy Directive No. 8

North American Industry Classification System; Classification of Establishments

The North American Industry Classification System (NAICS) is to be used to classify reporting establishments by types of industrial activity in which they are engaged. Details are presented in the North American Industry Classification System, United States, issued by the Office of Management and Budget as amended and revised in the future. Revisions are considered every five years in calendar years ending with 2 and 7.

1. Use for Federal Nonstatistical Program Purposes

NAICS shall not be used in the administration of any regulatory, administrative, or tax program unless the Secretary (Administrator) has first determined that the use of such industry definition is appropriate to the implementation of the program's objectives.

If the term ''North American Industry Classification System'' (NAICS) is to be used in the operative text of the law or regulation to define industry (or trade or commerce), language similar to the following should be used to assure sufficient flexibility: ''An industry or grouping of industries shall mean a North American Industry Classification System industry or grouping of industries as defined by the Office of Management and Budget subject to such modifications with respect to individual industries or groupings of industries as the Secretary (Administrator) may determine to be appropriate for the purpose of this Act (regulation).''. The use, interpretation, and application of NAICS for nonstatistical purposes is controlled by and defined by the agencies or regulations that use the statistical standard for those nonstatistical purposes.

2. Titles and Descriptions

The North American Industry Classification System, United States, manual includes titles and descriptions of the industries and an alphabetic index of illustrative activities classified to industries. It is available online at: *www.census.gov/naics.*

VI. OMB Statistical Policy Directive No. 9, Standard Industrial Classification of Enterprises

The ECPC proposes elimination of Statistical Policy Directive No. 9, Standard Industrial Classification of Enterprises. OMB presented the Enterprise Standard Industrial Classification of Enterprises in 1974. The classification is static and has not been updated or widely adopted over the past 45 years. NAICS United States does not include a similar variant for classification of enterprises. The current text of this policy directive is available for review at: *https://www.census.gov/eos/www/naics/federal_register_notices/fedregister.html.* It is also available for review as a supplementary document on *www.regulations.gov* within the same docket as this **Federal Register** Notice.

The ECPC is soliciting comments on the advisability of eliminating Statistical Policy Directive No. 9.

VII. Errors and Omissions In NAICS

No significant errors or omissions have been identified in NAICS 2017. Any errors or omissions that are identified in NAICS in the future will be corrected and posted on the official NAICS website at *www.census.gov/naics.*

Paul J. Ray,

Administrator, Office of Information and Regulatory Affairs.

[FR Doc. 2020–03797 Filed 2–25–20; 8:45 am]

BILLING CODE 3110–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

Meeting of National Council on the Humanities

AGENCY: National Endowment for the Humanities, National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given that the National Council on the Humanities will meet to advise the Chairman of the National Endowment for the Humanities (NEH) with respect to policies, programs and procedures for carrying out his functions; to review applications for financial assistance under the National Foundation on the Arts and Humanities Act of 1965 and make recommendations thereon to the Chairman; and to consider gifts offered to NEH and make recommendations thereon to the Chairman.

DATES: The meeting will be held on Thursday, March 19, 2020, from 10:00 a.m. until 12:00 p.m., and Friday, March 20, 2020, from 9:00 a.m. until adjourned.

ADDRESSES: On March 19, 2020, the meeting will be held at George Washington's Mount Vernon, Fred W. Smith National Library, 3600 Mount Vernon Memorial Highway, Mount Vernon, Virginia 22121. On March 20, 2020, the meeting will be held at Constitution Center, 400 7th Street SW, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, 4th Floor, Washington, DC 20506; (202) 606–8322; *evoyatzis@neh.gov.*

SUPPLEMENTARY INFORMATION: The National Council on the Humanities is meeting pursuant to the National

Foundation on the Arts and Humanities Act of 1965 (20 U.S.C. 951–960, as amended). The Committee meetings of the National Council on the Humanities will be held on March 19, 2020, as follows: The policy discussion session (open to the public) will convene at 10:00 a.m. until approximately 10:30 a.m., followed by the discussion of specific grant applications and programs before the Council (closed to the public) from 10:30 a.m. until 12:00 p.m. The following Committees will meet in meeting rooms at Mount Vernon:

Education Programs;
Federal/State Partnership;
Preservation and Access;
Public Programs; and
Research Programs.

The plenary session of the National Council on the Humanities will convene on March 20, 2020, at 9:00 a.m. in the Conference Center at Constitution Center. The agenda for the morning session (open to the public) will be as follows:

A. Minutes of Previous Meeting
B. Reports
1. Chairman's Remarks
2. Senior Deputy Chairman's Remarks
3. Presentation by guest speaker David S. Ferriero, 10th Archivist of the United States National Archives and Records Administration
4. Reports on Policy and General Matters
a. Education Programs
b. Federal/State Partnership
c. Preservation and Access
d. Public Programs
e. Research Programs

The remainder of the plenary session will be for consideration of specific applications and therefore will be closed to the public.

As identified above, portions of the meeting of the National Council on the Humanities will be closed to the public pursuant to sections 552b(c)(4), 552b(c)(6), and 552b(c)(9)(B) of Title 5 U.S.C., as amended. The closed sessions will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, and discussion of certain information, the premature disclosure of which could significantly frustrate implementation of proposed agency action. I have made this determination pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated April 15, 2016.

Please note that individuals planning to attend the public sessions of the meeting are subject to security screening procedures. If you wish to attend any of the public sessions, please inform NEH as soon as possible by contacting Carina Nixon at (202) 606–8323 or *gencounsel@neh.gov.* Please also provide advance notice of any special needs or accommodations, including for a sign language interpreter.

Dated: February 21, 2020.

Caitlin Cater,

Attorney-Advisor, National Endowment for the Humanities.

[FR Doc. 2020–03861 Filed 2–25–20; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0164]

Information Collection: Medical Use of Byproduct Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Medical Use of Byproduct Material.''

DATES: Submit comments by April 27, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0164. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* David Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0164 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–2019–0164. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2019–0164 on this website.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement and burden spreadsheet are available in ADAMS under Accession Nos. ML19344D378 and ML19344D379.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

Please include Docket ID NRC–2019–0164 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. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* 10 CFR part 35, ''Medical Use of Byproduct Material.''
2. *OMB approval number:* 3150–0010.
3. *Type of submission:* Extension.
4. *The form number, if applicable:* Not applicable.
5. *How often the collection is required or requested:* Reports of medical events, doses to an embryo/fetus or nursing child, or leaking source are reportable on occurrence. A specialty board certifying entity desiring to be recognized by the NRC must submit a one-time request for recognition and infrequently revise the information.
6. *Who will be required or asked to respond:* Physicians and medical institutions holding an NRC license authorizing the administration of byproduct material or radiation from this material to humans for medical use. A specialty board certification entity desiring to have its certifying process and board certificate recognized by NRC.
7. *The estimated number of annual responses:* 299,266 (292,182 reporting responses + 7,019 recordkeepers + 65 third party disclosure responses).
8. *The estimated number of annual respondents:* 7,021 (856 NRC licensees + 6,163 Agreement State licensees + 2 specialty board certification entity).
9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 1,166,694 hours (69,391 reporting + 1,097,177 recordkeeping + 127 third party disclosure).
10. *Abstract:* 10 CFR part 35, ''Medical Use of Byproduct Material,'' contains NRC's requirements and provisions for the medical use of byproduct material and for issuance of specific licenses authorizing the medical use of this material. These requirements and provisions provide for the radiation safety of workers, the general public, patients, and human research subjects. Part 35 contains mandatory requirements that apply to NRC licensees authorized to administer byproduct material or radiation to humans for medical use. These requirements also provide voluntary provisions for specialty boards to apply to have their certification processes recognized by the NRC so that their board certified individuals can use the certifications as proof of training and experience.

II. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?
2. Is the estimate of the burden of the information collection accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated at Rockville, Maryland, this 21st day of February 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–03825 Filed 2–25–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0085]

Information Collection: NRC Forms 366, 366A, and 366B, Licensee Event Report

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''NRC Forms 366, 366A, and 366B, Licensee Event Report.''

DATES: Submit comments by March 27, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Submit comments directly to the OMB reviewer at: OMB Office of Information and Regulatory Affairs (3150–0104), Attn: Desk Officer for the Nuclear Regulatory Commission, 725 17th Street NW Washington, DC 20503; email: *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID: NRC–2019–0085 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–2019–0085. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2019–0085 on this website.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *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.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML19294A208. The supporting statement and NRC Forms 366, 366A, and 366B, ''Licensee Event Report,'' are available in ADAMS under Accession No. ML19294A248.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@NRC.GOV.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information 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 OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that 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. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''NRC Forms 366, 366A, and 366B, Licensee Event Report.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on September 16, 2019 (84 FR 48650).

1. *The title of the information collection:* NRC Forms 366, 366A, and 366B, Licensee Event Report.

2. *OMB approval number:* 3150–0104.

3. *Type of submission:* Revision.

4. *The form number if applicable:* NRC Forms 366, 366A and 366B.

5. *How often the collection is required or requested:* As needed per 10 CFR 50.73, ''Licensee event report system.''

6. *Who will be required or asked to respond:* The holder of an operating license under 10 CFR part 50 or a combined license under 10 CFR part 52 (after the Commission has made the finding under section 52.103(g)).

7. *The estimated number of annual responses:* 350.

8. *The estimated number of annual respondents:* 98 (number of operating nuclear units in the U.S.).

9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* The total estimated burden for completing Licensee Event Reports is 28,000 hours (based on 80 hours for each of 350 reports).

10. *Abstract:* Part of the NRC's function is to license and regulate the operation of commercial nuclear power plants to ensure protection of public health and safety and the environment in accordance with the Atomic Energy Act of 1954 (the Act) as amended. In order for the NRC to carry out these responsibilities, licensees must report significant events in accordance with section 50.73, so that the NRC can evaluate the events to determine what actions, if any, are warranted to ensure protection of public health and safety or the environment. Section 50.73 requires reporting on NRC Forms 366, 366A, and 366B.

Dated at Rockville, Maryland, this 21st day of February 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–03826 Filed 2–25–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0051]

Environmental Considerations Associated With Micro-Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft interim staff guidance; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is soliciting public comment on its draft Interim Staff Guidance (ISG), ''Environmental Considerations Associated with Micro-reactors.'' The NRC staff is preparing for the environmental reviews of prospective design, license, and permit applications for advanced nuclear power reactors (advanced reactors), including micro-reactors. The purpose of this ISG is to modify existing guidance and provide supplemental guidance to assist the NRC staff in determining the scope and scale of environmental reviews of micro-reactor applications.

DATES: Submit comments by May 11, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received before this date.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0051. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *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: Jack Cushing, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–1424, email: *Jack.Cushing@nrc.gov* and Mallecia Sutton, Office of Nuclear Reactor Regulation, telephone: 301–415–0673, email: *Mallecia.Sutton@nrc.gov.* Both are staff of the 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–2020–0051 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–2020–0051.
- NRC's Agencywide Documents Access and Management System (ADAMS): You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The documents entitled, ''Micro-Reactor License Application COL–ISG–029, 'Environmental Considerations Associated with Micro-reactors,' '' and ''Regulatory Analysis for Draft Interim Staff Guidance (ISG) 029,'' are available in ADAMS under Accession No. ML20054B832.

• *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–2020–0051 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. Background

The purpose of this ISG is to modify existing guidance and provide supplemental guidance to assist the NRC staff in determining the scope and scale of environmental reviews of micro-reactor applications. The guidance highlights unique considerations for micro-reactors in each resource area typically covered in the staff's environmental review. The ISG also offers guidance on identifying considerations and approaches to simplify and shorten the environmental reviews for micro-reactors relative to the environmental reviews that the NRC has previously performed for other nuclear facilities, such as large light-water reactors (LWRs). The ISG outlines what the NRC staff considers to be an appropriate scope and level of detail for the specific aspects of an environmental review needed to document a micro-reactor licensing action. A micro-reactor may have some, but not necessarily all, of the following characteristics:

• Occupies only a small area of land, disturbs only previously disturbed lands, or both.

• Uses zero or only small quantities of resources, such as water or fuel.

• Releases zero or only small quantities of emissions to the environment.

• Avoids environmentally sensitive areas such as wetlands and floodplains.

• Avoids areas with cultural, historic, or environmental justice significance.

• Avoids habitat for threatened or endangered species.

• Uses mitigation to reduce impacts.

• Involves only low levels of employment for both construction and operation.

• Uses simpler designs than those for large LWRs, with limited interfaces with the exterior environment.

While the ISG is designed to aid the NRC staff in developing a micro-reactor environmental impact statement, the staff recognizes the value of the guidance as a supplemental source of insight into the NRC's environmental review process that can inform the development of an applicant's environmental report. Applicants should scale their level of effort appropriately when preparing Environmental Reports (ERs), commensurate with the significance of the impact on the resource area being addressed.

The scope of the ISG is limited to environmental review considerations specific to micro-reactors, such as the following:

- Pre-application interactions
- purpose and need for the proposed project
- size of the proposed project and resources used
- land use
- water resources
- terrestrial and aquatic ecology
- socioeconomics and environmental justice
- historic and cultural resources
- need for power and alternatives
- meteorology and air quality
- radiological and nonradiological health
- postulated accidents
- severe accident mitigation alternatives (SAMAs);
- acts of terrorism
- fuel cycle impacts, transportation of fuel and waste, and continued storage of spent fuel
- cumulative impact analysis
- consistency with safety licensing documents
- incorporation by reference

The NRC staff will continue to look for other opportunities to effectively streamline environmental reviews and work with prospective applicants to identify opportunities to streamline ERs and still meet the NRC's regulations.

III. Backfitting, Issue Finality, and Forward Fitting Discussion

The guidance in this draft ISG–029 clarifies how the NRC will approach environmental reviews for a micro-reactor application for combined license, early site permit, construction permit, operating license and limited work authorization. Issuance of this draft ISG, if finalized, would not constitute backfitting as defined in section 50.109 of title 10 of the *Code of Federal Regulations* (10 CFR) (the Backfit Rule) and as described in NRC Management Directive 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests;'' would not affect the issue finality of an approval under 10 CFR part 52; and would not constitute forward fitting as that term is defined and described in Management Directive 8.4. The staff's position is based upon the following considerations:

1. The draft ISG positions, if finalized, would not constitute backfitting or forward fitting or affect issue finality, inasmuch as the ISG would be internal guidance to NRC staff.

The ISG provides interim guidance to the staff on how to review an application for NRC regulatory approval in the form of licensing. Changes in internal staff guidance, without further NRC action, are not matters that meet the definition of backfitting or forward fitting or affect the issue finality of a part 52 approval.

2. Current or future applicants are not–with limited exceptions not applicable here–within the scope of the backfitting and issue finality regulations and forward fitting policy.

Applicants are not, with certain exceptions, covered by either the Backfit Rule or any issue finality provisions under 10 CFR part 52. This is because neither the Backfit Rule nor the issue finality provisions under 10 CFR part 52—with certain exclusions discussed below—were intended to apply to every NRC action which substantially changes the expectations of current and future applicants.

The exceptions to the general principle are applicable whenever an applicant references a 10 CFR part 52 license (*e.g.,* an early site permit) and/or NRC regulatory approval (*e.g.,* a design certification rule) with specified issue finality provisions or a construction permit under 10 CFR part 50. The staff does not, at this time, intend to impose the positions represented in the draft ISG section (if finalized) in a manner that would constitute backfitting or affect the issue finality of a part 52 approval. If, in the future, the staff seeks to impose a position in the draft ISG (if finalized) in a manner that constitutes backfitting or does not provide issue finality as described in the applicable issue finality

provision, then the staff would need to address the Backfit Rule or the criteria for avoiding issue finality as described in the applicable issue finality provision.

The Commission's forward fitting policy generally does not apply when an applicant files an initial licensing action for a new facility. Nevertheless, the staff does not, at this time, intend to impose the positions represented in the draft ISG section (if finalized) in a manner that would constitute forward fitting. If, in the future, the staff seeks to impose a position in the draft ISG (if finalized) in a manner that constitutes forward fitting, then the staff would need to address the forward fitting criteria in Management Directive 8.4.

Dated at Rockville, Maryland, this 21st day of February 2020.

For the Nuclear Regulatory Commission.

Joseph P. Doub,

Acting Chief, Environmental Review New Reactors Branch, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020–03856 Filed 2–25–20; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2020–97]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* February 28, 2020.

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, 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).:* CP2020–97; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 7 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* February 20, 2020; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* February 28, 2020.

This Notice will be published in the **Federal Register.**

Erica A. Barker,

Secretary.

[FR Doc. 2020–03819 Filed 2–25–20; 8:45 am]

BILLING CODE 7710–FW–P

[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).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88253; File No. SR–ICC–2019–010]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change, as Modified by Partial Amendment No. 1 and Partial Amendment No. 2, Relating to Amendments to the ICC Clearing Rules To Address Non-Default Losses, on an Accelerated Basis

February 20, 2020.

I. Introduction

On August 8, 2019, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend ICC's Clearing Rules (the ''Rules'') [3] to address treatment of losses not related to a Clearing Participant default. The proposed rule change was published for comment in the **Federal Register** on August 28, 2019.[4] The Commission received comments regarding the proposed rule change.[5]

On October 4, 2019, the Commission designated a longer period of time for Commission action on the proposed rule change until November 26, 2019.[6] On October 7, 2019, ICC filed a partial amendment (''Partial Amendment No. 1'') to modify the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Capitalized terms used but not defined herein have the meanings specified in the Rules.

[4] Self-Regulatory Organizations; ICE Clear Credit LLC; Proposed Rule Change, Security-Based Swap Submission, or Advance Notice Relating to the ICC Clearing Rules; Exchange Act Release No. 86729 (Aug. 22, 2019); 84 FR 45191 (Aug. 28, 2019) (SR–ICC–2019–010) (''Notice'').

[5] Comments are available at *https://www.sec.gov/comments/sr-icc-2019-010/sricc2019010.htm.*

[6] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change Relating to Amendments to the ICC Clearing Rules To Address Non-Default Losses; Exchange Act Release No. 87225 (Oct. 4, 2019); 84 FR 54712 (Oct. 10, 2019) (SR–ICC–2019–010).

change.[7] On November 25, 2019, the Commission published notice of Partial Amendment No. 1, solicited comments from interested persons on the proposed rule change as modified by Partial Amendment No. 1, and instituted proceedings under Section 19(b)(2)(B) of the Act[8] to determine whether to approve or disapprove the proposed rule change as modified by Partial Amendment No. 1.[9] On January 24, 2020, ICC filed Partial Amendment No. 2 to the proposed rule change.[10] Notice of Partial Amendment No. 2 was published in the **Federal Register** on February 3, 2020, and in that notice the Commission requested comments on the proposed rule change, as modified by Partial Amendments No. 1 and No. 2.[11] The Commission did not receive any comments in response to the Notice of Partial of Amendment No. 2.

For the reasons discussed below, the Commission is approving the proposed rule change, as modified by Partial Amendment No. 1 and Partial Amendment No. 2 (hereinafter, ''proposed rule change'') on an accelerated basis.

II. Background

The proposed rule change is principally designed to address and manage the risks posed to ICC by potential non-default loss events, including investment losses, custodial losses with respect to margin and General Guaranty Fund contributions, and other losses resulting from general business risk, operational risk, or other non-default scenarios, to ensure that ICC has a mechanism to fully allocate any such losses and thereby enhance its ability to continue orderly clearing operations or otherwise maintain its viability as a going concern in the event that such losses are realized.[12] To that end, the proposed rule change would define three exclusive categories of losses not related to a Clearing Participant default: (i) Investment Losses, (ii) Custodial Losses, and (iii) Non-Default Losses. In addition, with respect to the treatment of such losses, the proposed rule change would: (i) Define the resources of ICC that ICC would apply to cover each such category of losses; (ii) assign responsibility to Clearing Participants, in certain circumstances, to make contributions with respect to Investment Losses and Custodial Losses (but not Non-Default Losses); and (iii) in the event that ICC recovers funds related to Investment Losses or Custodial Losses, address the treatment of recoveries by ICC with respect to such losses. The proposed rule change would also make additional changes related to all three categories of losses, including changes to take into account the effect of the proposed rule change on other ICC rules.

A. Loss Categories

The proposed rule change would add to Rule 102 new definitions for ''Investment Losses'' and ''Non-Default Losses'' and revise the definition of ''Custodial Losses.''

Under the proposed rule change, Investment Losses would be defined as losses incurred or suffered by ICC in connection with the default of the issuer of any investment of Margin or General Guaranty Fund assets by ICC, or the default of the counterparty to any repurchase, reverse repurchase contract, or similar transaction used to invest or reinvest such Margin or General Guaranty Fund assets. The proposed rule change would also include as an Investment Loss change in value of investments due to market movements, but would exclude a Custodial Loss, a negative yield or interest rate on an investment, and a loss on a security or non-cash asset posted by a Clearing Participant as a Margin or Guaranty Fund contribution.

Currently, Rule 406(g) defines Custodial Losses as those arising out of or relating to the holding, investment, or use of the Client Omnibus Margin Account or assets credited thereto from time to time, and specifies that ICC shall not be liable for any such losses except to the extent that they result from the gross negligence or willful misconduct of ICC, or from the investment of such assets by ICC in its discretion within the meaning of CFTC Rule 1.29(b). The proposed rule change would move the definition of Custodial Losses to Section 102 of ICC's Rules (Definitions) and revise it to mean losses of Margin or General Guaranty Fund assets (including declines in the value thereof) as a result of (i) the insolvency or failure of a Custodian or (ii) the embezzlement or theft of such assets by any person (other than ICC or its employees or representatives). The proposed rule change would define a Custodian for this purpose as a bank or trust company, central bank, central securities depository or other third party settlement system used by ICC for the deposit, holding, custody or transfer of cash or securities. Additionally, because the proposed rule change would create a stand-alone definition of Investment Losses, as described above, the revised definition of Custodial Losses would specify that Custodial Losses would not include Investment Losses.

The proposed rule change would define Non-Default Losses to include losses incurred or suffered by ICC that are neither Investment Losses nor Custodial Losses and arise in connection with an event other than a Clearing Participant's default. The definition thus would capture losses from general business or operational risk that do not constitute Custodial Losses or Investment Losses.

B. Treatment of Losses

i. ICC Resources

The proposed rule change would require that, with respect to an Investment Loss or Custodial Loss, ICC would first apply any available Investment Loss Resources or Custodial Loss Resources, as applicable. ICC would determine the amount of such resources based on its assessment of its potential exposure to investment losses under its investment policies and procedures, and the ICC Board would periodically conduct a risk-based assessment of the appropriate level of Investment Loss Resources.[13] As an initial measure of its potential exposure to investment losses, ICC has taken into account components of the European Union capital requirements applicable to central counterparties (which are not directly applicable to ICC), in particular the capital requirements for credit, counterparty and market risks and operational and legal risks.[14] Based on its initial assessment of ICC's potential Investment Losses utilizing this methodology, ICC determined that its

[7] In Partial Amendment No. 1 to the proposed rule change, ICC provided additional details and analyses surrounding the proposed rule change in the form of a confidential Exhibit 3.

[8] 15 U.S.C. 78s(b)(2)(B).

[9] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change, as Modified by Partial Amendment No. 1, Relating to Amendments to the ICC Clearing Rules To Address Non-Default Losses; Exchange Act Release No. 87622 (Nov. 25, 2019); 84 FR 66041 (Dec. 2, 2019) (SR–ICC–2019–010).

[10] In Partial Amendment No. 2 to the proposed rule change, ICC modified the initial filing to (1) differentiate the treatment of investment losses in the Client Origin Account from the treatment of investment losses in the House Origin Account and (2) limit the allocation of investment losses to those Clearing Participants that have instructed, or are deemed to have instructed, ICC to invest the cash Initial Margin in the Client Origin Account.

[11] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Partial Amendment No. 2 to Proposed Rule Change Relating to Amendments to the ICC Clearing Rules to Address Non-Default Losses; Exchange Act Release No. 88064 (Jan. 28, 2020); 85 FR 6007 (Feb. 3, 2020).

[12] *See* Notice, 84 FR at 45193.

[13] *See* Notice, 84 FR at 45194.

[14] *See id.*

potential exposure to Investment Losses is $20 million, and therefore the proposed rule change would initially define Investment Loss Resources as $20 million of ICC's own assets designated by ICC as available to be applied to Investment Losses. Similarly, based on ICC's initial assessment of its potential Custodial Losses utilizing this methodology, ICC determined that its potential exposure to Custodial Losses is $32 million, and therefore the proposed rule change would initially define Custodial Loss Resources as $32 million of ICC's own assets designated by ICC as available to be applied to Custodial Losses. In either case, as noted, the ICC Board could modify the amount from time to time, and such determination would be risk-based in light of ICC's potential exposure to such losses.

Unlike Investment Losses and Custodial Losses, the proposed rule change would not define or place a cap on the specific ICC resources available to satisfy Non-Default Losses. Rather, proposed Rule 811(b) would require that Non-Default Losses, whatever the amount, be met from available ICC capital and other ICC assets (including available retained earnings, Investment Loss Resources, and Custodial Loss Resources). Thus, the proposed rule change would make ICC solely responsible for Non-Default Losses and would not allocate Non-Default Losses to Participants. Similarly, proposed Rule 811(b) would prohibit ICC from covering Non-Default Losses with ICC contributions to default resources or with Clearing Participant contributions to Margin, General Guaranty Fund, or Assessments.

ii. Responsibility of Clearing Participants

Unlike Non-Default Losses, for which ICC would be solely responsible, in the event Investment Loss Resources are insufficient to cover an Investment Loss (an ''Investment Loss Shortfall''), ICC would have the right, under proposed Rule 811(d), to allocate the Investment Loss Shortfall to Clearing Participants (including any Defaulting Participants). In that event, the Clearing Participants would be obligated to make a contribution (an ''Investment Loss Contribution''), based on their pro rata share of the Investment Loss Shortfall, determined based on the methodology described below. Investment Loss Contributions could only be applied to Investment Loss Shortfalls (and not Custodial Loss Shortfalls). Under proposed Rule 811(e), a Clearing Participant's pro rata Investment Loss Contribution in respect of any event giving rise to an Investment Loss could not exceed its aggregate Initial Margin (both house and customer) and General Guaranty Fund contributions (its ''Participant IM/GF Contribution'').

The method for determining a Clearing Participant's Investment Loss Contribution would depend on whether the Investment Loss occurred with respect to the House Origin Account or Client Origin Account. In the case of an Investment Loss in the House Origin Account, a Clearing Participant's Investment Loss Contribution would be based on the proportion of its Participant IM/GF Contribution as compared to the aggregate Participant IM/GF Contributions for all Participants. In the case of an Investment Loss in the Client Origin Account, only those Clearing Participants that are ''Investing Participants'' (as defined below) would be obligated to make an Investment Loss Contribution. Specifically, each Investing Participant would be obligated to pay an Investment Loss Contribution equal to its pro rata share of the Investment Loss Shortfall, determined based on the proportion of its Participant IM/GF Contribution to the aggregate Participant IM/GF Contributions of all Investing Participants, rather than the aggregate Participant IM/GF Contributions of all Clearing Participants (as would be the case in the House Origin Account). In the event of simultaneous Investment Losses for the House Origin Account and Client Origin Account, ICC would apply available Investment Loss Resources pro rata based on the amount of such Investment Losses. Thus, with respect to an Investment Loss Shortfall in the Client Origin Account, only those Clearing Participants that are Investing Participants would be required to contribute to the shortfall, rather than all Clearing Participants, and, moreover, each Investing Participant's pro rata share of the shortfall would be determined by the ratio of its Participant IM/GF Contribution to the aggregate Participant IM/GF Contributions of all Investing Participants.

Proposed Rule 402(k) would define ''Investing Participant'' as any Clearing Participant that (1) has instructed ICC to invest the cash Initial Margin in its Client Origin Account or (2) is deemed to have instructed ICC to invest the cash Initial Margin in its Client Origin Account. As provided in proposed Rule 402(k), a Clearing Participant would be required to instruct ICC whether ICC should invest cash Initial Margin. If instructed to invest, ICC would invest the cash in accordance with its Rules and investment policies procedures and applicable law. If instructed not to invest, ICC would hold the cash in a deposit account with a Custodian in accordance with ICC's policies and procedures. If a Clearing Participant does not provide an instruction, then (i) for U.S. dollar cash, the Clearing Participant would be deemed to have instructed ICC not to invest such cash, and (ii) for cash in other (non U.S. dollar) currencies, the Clearing Participant would be deemed to have instructed ICC to invest such cash. Thus, the term Investing Participant and therefore responsibility for an Investment Loss Shortfall in the Client Origin Account would apply to any Clearing Participant that instructs ICC to invest cash Initial Margin or that makes no instruction with respect to cash Initial Margin in currencies other than U.S. dollars.

Likewise, in the event that Custodial Loss Resources are insufficient to cover a Custodial Loss (a ''Custodial Loss Shortfall''), ICC would have the right, under proposed Rule 811(f), to allocate the Custodial Loss Shortfall to all Clearing Participants (including any Defaulting Participants). The proposed rule change would give ICC the right to allocate Custodial Loss Shortfalls to Clearing Participants in the same fashion as ICC would allocate Investment Loss Shortfalls in the House Origin Account. In other words, each Clearing Participant would be obligated to make a contribution based on its pro rata share of the Custodial Loss Shortfall, determined based on the proportion of its Participant IM/GF Contribution as compared to the aggregate Participant IM/GF Contributions for all Participants. In the event of a Custodial Loss where the Custodian is a central bank, however, proposed Rule 811(f) would make the entire Custodial Loss as a Custodial Loss Shortfall subject to allocation to Clearing Participants (as opposed to first applying Custodial Loss Resources). As discussed in the Notice, ICC believes such an approach is justified by the remote nature of such a failure by a central bank and the preference among regulators and Clearing Participants for central bank custody.[15] Finally, as with Investment Losses, a Clearing Participant's pro rata contribution in respect of any event giving rise to a Custodial Loss could not exceed its Participant IM/GF Contribution.

iii. Recoveries by ICC

Proposed Rule 811(l) would provide a ''reverse waterfall'' for allocation of any recoveries ICC obtains with respect to an Investment Loss or Custodial Loss

[15] Notice, 84 FR at 45195.

allocated to Clearing Participants. Under the proposed rule, after deduction of expenses of ICC, ICC would provide the recoveries to the parties that bore the loss (whether ICC, Clearing Participants, or both) in the reverse order from which they were initially applied. The proposed rule change would also set out ICC's obligations to seek recoveries in respect of Investment Losses and Custodial Losses, generally using the same degree of care as it exercises with respect to its own assets that are not subject to allocation under proposed Rule 811.

C. Additional Changes

Proposed Rule 811(u) would contain a general disclaimer by ICC of losses resulting from the holding, deposit, custody, transfer, or investment of Margin, General Guaranty Fund contributions and Assessment Contributions, except as otherwise provided in Rule 811, and provided that Rule 811 would not limit any liability of ICC for its own gross negligence or willful misconduct. The proposed rule change would relatedly amend Rule 406 to remove an existing disclaimer for custodial losses, which would be superseded by the new provisions in the proposed rule change.

Proposed Rule 811 would also address certain procedures for notices to Participants of the use of Investment Loss Resources and Custodial Loss Resources and of required Loss Contributions in respect of Investment Losses and Custodial Losses. The proposed rule would also define the timing and manner of collection of Loss Contributions (including through offset against obligations of ICC to return margin or other assets), and for currency conversions as necessary. The proposed rule would specify that the requirement to make Loss Contributions would not reduce or otherwise affect other obligations of a Clearing Participant to make payments or deliveries to ICC under the Rules, or otherwise limit ICC's netting, setoff and other rights under the Rules. In particular, the proposed rule would separate obligations to make Loss Contributions from any obligation to make an Assessment Contribution and would specify that the limitations on Assessments under the Rules would not apply to liabilities for Loss Contributions. The proposed rule would similarly explain that use of the Loss Contribution procedures would also not be deemed to constitute an ICE Clear Credit Default under the Rules.

Finally, proposed Rule 811 would require ICC to disclose to Clearing Participants the amount of Custodial Loss Resources and Investment Loss Resources at least annually, and to notify Clearing Participants promptly following any changes in such amounts. Proposed Rule 811 would further specify that if such loss resources are applied as a result of a loss event, any replenishment of such resources by ICC would not reduce the amount of any Custodian Loss Shortfall or Investment Loss Shortfall (or resulting Loss Contributions) for that loss event. Finally, proposed Rule 811 would explicitly limit ICC's liability for Custodial Losses or Investment Losses to the amount of designated Custodial Loss Resources or Investment Loss Resources, as applicable, from time to time.

III. Statutory Standards

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.[16] The Commission addresses in its review of the proposed rule change the following relevant provisions of the Exchange Act and the rules and regulations thereunder applicable to registered clearing agencies:

- Section 17A(b)(3)(D) of the Exchange Act requires, in part, that the rules of ICC provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.[17]
- Section 17A(b)(3)(F) of the Exchange Act requires, in part, that the rules of ICC be designed to promote the prompt and accurate clearance and settlement of securities transactions, to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible, and to protect investors and the public interest.[18]
- Rule 17Ad–22(d)(3) under the Exchange Act requires that ICC establish, implement, maintain and enforce written policies and procedures reasonably designed to hold assets in a way that minimizes risk of loss or of delay in its access to them.[19]
- Rule 17Ad–22(d)(8) under the Exchange act requires that ICC establish, implement, maintain and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent to fulfill the public interest requirements in Section 17A of the Act applicable to clearing agencies, to support the objectives of owners and participants, and to promote the effectiveness of ICC's risk management procedures.[20]

IV. Discussion and Commission Findings

After considering the entire record, and for the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) and (D) of the Act[21] and Rules 17Ad–22(d)(3) and 17Ad–22(d)(8) thereunder.[22]

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 ICC 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 ICC or for which it is responsible, and, in general, to protect investors and the public interest.[23] Based on its review of the record, the Commission finds the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act.

The Commission believes that the proposed rule change as a whole would help enhance ICC's ability to manage non-default losses generally, and more specifically to continue operating as a going concern in the event that it incurs potential operational, general business risk, or other non-default losses by, among other things, ensuring that ICC's Rules clearly and transparently identify, define and address specific categories of potential non-default risks that ICC will attempt to assess and cover. For example, ICC has assessed its potential exposure to Investment, Custodial, and Non-Default Losses—taking into account relevant components of the European Union capital requirements applicable to central counterparties, including the capital requirements for credit, counterparty, market, operational, and legal risks—to determine an initial measure of ICC's exposure to such risks, and has selected and set its level of Investment Loss Resources and Custodial Loss Resources to be commensurate with those measures.[24] At the same time, ICC

[16] 15 U.S.C. 78s(b)(2)(C).

[17] 15 U.S.C. 78q–1(b)(3)(D).

[18] 15 U.S.C. 78q–1(b)(3)(F).

[19] 15 U.S.C. 17Ad–22(d)(3).

[20] 15 U.S.C. 17Ad–22(d)(8).

[21] 15 U.S.C. 78q–1(b)(3)(F), (D).

[22] 17 CFR 240.17Ad–22(d)(3) and (d)(8).

[23] 15 U.S.C. 78q–1(b)(3)(F).

[24] *See* Notice, 84 FR at 45194.

proposes to designate the specific ICC resources that would be used to cover such losses and the process for replenishing such resources should such losses materialize. Similarly, with respect to Non-Default Losses, ICC proposes to designate that such losses be met from available ICC capital and other ICC assets and to prohibit the use of ICC contributions to default resources or Clearing Participant contributions to Margin, General Guaranty Fund, or Assessments to cover such losses. In addition, ICC also proposes to periodically conduct risk-based assessments of the appropriate level of ICC resources designed to fully cover such potential losses and to reserve the ability to adjust such resources as needed.[25] Correspondingly, ICC proposes to create new definitions for Investment Losses and Non-Default Losses and the term Custodian, and modify the existing definition of Custodial Losses to ensure consistency with the above descriptions. The Commission did not receive any comments on these aspects of the proposal.

The proposed rule change would also limit ICC's liability for Custodial Losses or Investment Losses in various ways. For example, the proposed rule change would specify that ICC's liability for Custodial and Investment Losses would be limited to the amount of the designated Custodial Loss Resources or Investment Loss Resources, respectively, and would clarify that ICC would not be liable for losses resulting from the holding, deposit, custody, transfer, or investment of Margin, General Guaranty Fund contributions, and Assessment Contributions, absent ICC's own gross negligence or willful misconduct. As such, the proposed rule change is designed to align the limitation of ICC's liability for Custodial and Investment Losses with the amount that ICC has determined is sufficient to fully cover its potential exposure to such losses.

As discussed in more detail in the Notice, ICC views potential loss scenarios where Investment or Custodial Losses could exceed applicable ICC resources (*i.e.,* an Investment Loss Shortfall or Custodial Loss Shortfall), as extreme and therefore remote.[26] Nevertheless, by stipulating that ICC may only allocate Investment Loss Shortfalls in the House Origin Account and Custodial Loss Shortfalls to Clearing Participants and Investment Loss Shortfalls in the Client Origin Account to Investing Participants (up to their Participant IM/GF Contribution), the proposed rule change is designed to allow ICC to plan for, and fully allocate Investment Losses and Custodial Losses that materialize as a result of, remote and unprecedented, but potentially extreme, loss events that could exceed ICC's designated Investment Loss and Custodial Loss Resources.[27] The Commission believes that this aspect of the proposed rule change also would enhance ICC's ability to fully cover its potential exposure to potential Investment and Custodial Losses, including such losses that could exceed ICC's available Investment Loss and Custodial Loss Resources.

Relatedly, the proposed rule change would enhance ICC's ability to replenish the resources available to satisfy Investment Losses and Custodial Losses in the event that such Losses materialize by putting in place a process for collecting and using Loss Contributions, defining the timing and manner of notices to Participants on the amount and use Loss Contributions, and defining the timing and manner of collection of Loss Contributions, which ICC could, in turn, use to satisfy Investment Loss Shortfalls and Custodial Loss Shortfalls. The proposed rule change also would define ICC's responsibility for, and the standard of care it would be required to utilize in, seeking recoveries from Investment Losses and Custodial Losses, and how ICC would allocate such recoveries.

Finally, the Commission believes that various aspects of the proposed rule change would help to ensure that Non-Default Losses, Investment Losses, and Custodial Losses would not affect ICC's ability to cover losses arising from the default of a Clearing Participant. In particular, the proposed rule change would: (i) Specify that Loss Contributions would not reduce or otherwise affect other obligations of a Clearing Participant to make payments or deliveries to ICC under the Rules, or otherwise limit ICC's netting, setoff and other rights under the Rules; (ii) separate a Clearing Participant's obligation to make Loss Contributions from any obligation to make an Assessment Contribution; (iii) specify that the limitations on Assessments under the Rules would not apply to liabilities for Loss Contributions; and (iv) clarify that action by ICC under proposed Rule 811 (specifying ICC's treatment of Non-Default Losses, Investment Losses, and Custodial Losses) would not be deemed to constitute an ICE Clear Credit Default under the Rules. The Commission believes that these provisions will help ensure that ICC's treatment and allocation of losses not arising from the default of a Clearing Participant do not hinder ICC's ability to cover and fully allocate losses arising from the default of one or more Clearing Participants.

Taken together, the Commission believes that the various components of the proposed rule change discussed above would enhance ICC's ability to manage the specific categories of general business risk, operational risk, and other non-default scenarios that ICC has identified and assessed, which in turn would reduce the risk that ICC would be unavailable to clear and settle security-based swap transactions and therefore is consistent with promoting prompt and accurate clearance and settlement of such transactions. Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of Section 17A(b)(3)(F) of the Act.[28]

B. Consistency With Section 17A(b)(3)(D) of the Act

Section 17A(b)(3)(D) of the Act requires that the rules of ICC provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.[29] As discussed below, based on its review of the record, the Commission finds that ICC's proposed rule change—as relevant here, the proposal to allocate Investment Losses and Custodial Losses to Clearing Participants in the event that such Losses exceed ICC's Investment Loss and Custodial Loss Resources—is consistent with Section 17A(b)(3)(D) of the Exchange Act.[30]

As noted, the purpose of the proposed rule change as a whole is to ensure that ICC has resources sufficient to recover operations and continue as a going concern in the vent that it incurs non-default losses. To that end, as discussed above, ICC has assessed its potential exposure to Investment, Custodial, and Non-Default Losses—taking into account relevant components of the European Union capital requirements applicable to central counterparties, including the capital requirements for credit, counterparty, market,

[25] *See Id.*

[26] Notice, 84 FR at 45195.

[27] Notice, 84 FR at 45193–45194. As discussed in more detail below, one commenter expressed the belief that ICC's Clearing Participants should not be responsible for Investment Losses and Custodial Losses but rather ICC should ensure adequate capitalization to address all non-default losses, including Investment Losses and Custodial Losses. The Commission discusses and addresses this comment below in Section 0.

[28] 15 U.S.C. 78q–1(b)(3)(F).

[29] 15 U.S.C. 78q–1(b)(3)(D).

[30] *Id.*

operational, and legal risks [31]—and designated specific ICC resources in the form of $20 million in Investment Loss Resources and $32 million in Custodial Loss Resources that ICC believes should be sufficient to cover such potential Losses. The Commission did not receive any comments on this aspect of the proposed rule change. Based on our review of the record, the Commission believes that ICC's efforts to determine its reasonable potential exposure to Investment and Custodial Losses are reasonable.

As discussed above, the proposed rule change would make ICC's Clearing Participants responsible for any amount of Investment Losses and Custodial Losses beyond ICC's contributions of $20 million and $32 million respectively, and solely responsible for any amount of Custodial Loss where the Custodian is a central bank. ICC views the potential risk of such Losses as remote, but intends this aspect of the proposed rule change as necessary to allow it to ''plan for remote and unprecedented, but potentially extreme, types of loss event[s] . . . . '' [32]

One commenter, the Futures Industry Association (''FIA''), submitted a comment letter generally expressing the belief that ICC's Clearing Participants should not be responsible for Investment Losses and Custodial Losses but rather ICC should ensure adequate capitalization to address all non-default losses, including Investment Losses and Custodial Losses.[33] The FIA suggests this is appropriate because it believes that Investment Losses and Custodial Losses are under the exclusive control and governance of ICC.[34] As evidence, the FIA points to ICC's investment policy and its relationships with, and oversight of, Custodians, which the FIA maintains are determined and approved by ICC without the involvement of Clearing Participants.[35] In support of its argument the FIA also contends that ''participants are provided with a specified return on collateral posted and do not directly receive the gain from ICC's investment of funds.'' [36]

ICC disputes the FIA's characterization and offers, as evidence, the regulations applicable to ICC as a registered clearing agency.[37] ICC maintains that these regulations dictate how ICC may invest Margin and Guaranty Fund assets, by requiring that ICC hold such assets in a manner that minimizes the risk of loss or delay in access and only invest in instruments and counterparties with minimal credit, market and liquidity risk.[38] ICC further explains that its investment and custodial policies are reviewed and approved by ICC's Risk Committee, which is made up predominantly of representatives of ICC's Clearing Participants, and ICC's Board of Managers, which includes representatives of Clearing Participants.[39] Similarly, ICC represents that ICC's procedures for the monitoring of ICC's Custodians, investment counterparties and depositories, are subject to review by ICC's Risk Committee.[40] In response to the FIA's contention that participants are provided with a specified return on collateral posted, ICC asserts that the majority of the investment yield and depository interest received related to such custodial and investment activity is credited to Clearing Participants and therefore ICC effectively acts as an agent for the Clearing Participants and their clients.[41] Thus, ICC maintains that, in taking custody and investing Margin and Guaranty Fund assets, ICC essentially is acting on behalf of Clearing Participants.[42]

Based on our review of the record, the Commission does not agree with the FIA's characterization of Investment Losses and Custodial Losses as under the exclusive control and governance of ICC. As an initial matter, the Commission notes that ICC's ability to invest Margin and Guaranty Fund assets is subject to the requirements of Exchange Act Rule 17Ad–22(d)(3), which requires that ICC''[h]old assets in a manner that minimizes risk of loss or of delay in its access to them; and invest assets in instruments with minimal credit, market and liquidity risks.'' [43] Moreover, ICC invests pursuant to its policies and procedures, which must be filed with and approved by the Commission pursuant to Section 19(b)(1) of the Exchange Act [44] and Rule 19b–4 thereunder,[45] and which, once approved, ICC must comply with under Section 19(g) [46] of the Exchange Act.[47] Specifically, under ICC Rule 502, ICC may not modify its policies and procedures regarding investment of Initial Margin and Guaranty Fund assets without consulting the Risk Committee,[48] and under ICC Rule 503, a majority of the Risk Committee consists of representatives of Clearing Participants.[49] Taken together, in the Commission's view, these factors limit how and where ICC may invest its Clearing Participants' Initial Margin and Guaranty Fund assets.

The FIA also states its belief that ICC has a duty of care to its clearing members and that ICC should not be able to pass through losses that are within the sole control of ICC.[50] As an initial matter, with respect to the FIA's assertion that ICC owes Clearing Participants a duty of care, the Commission notes that ICC is subject to the requirements of Section 17A(b)(3)(F) of the Act, which requires that ICC's Rules be designed to, among other things, assure the safeguarding of securities and funds which are in ICC's custody or control or for which it is responsible,[51] as well as the requirements of Rule 17Ad-22(d)(3), which requires ICC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to hold assets, including Clearing Participants' securities and funds, in a way that minimizes risk of loss or of delay in its access to them, and to invest assets in instruments with minimal credit, market, and liquidity risks.[52] As discussed in more detail below, the Commission believes that ICC's proposal is consistent with these

[31] *See* Notice, 84 FR at 45194.

[32] Notice, 84 FR at 45194.

[33] *See* letter from Jacqueline Mesa, Chief Operating Officer & Senior Vice President of Global Policy, Futures Industry Association, dated September 18, 2019, to Vanessa Countryman, Secretary, Commission (''FIA Letter'') at 2.

[34] FIA Letter at 2.

[35] FIA Letter at 1, 2.

[36] FIA Letter at 1.

[37] *See* letter from Stanislav Ivanov, President, ICC, dated October 15, 2019, to Vanessa Countryman, Secretary, Commission (''ICC Letter'') at 1.

[38] ICC Letter at 1.

[39] ICC Letter at 2.

[40] ICC Letter at 2.

[41] ICC Letter at 2.

[42] ICC Letter at 2.

[43] 17 CFR 240.17Ad–22(d)(3).

[44] 15 U.S.C. 78s(b)(1).

[45] 17 CFR 240.19b–4.

[46] 15 U.S.C. 78s(g).

[47] *See, e.g.,* Exchange Act Release No. 87859 (Dec. 26, 2019); 85 FR 157 (Jan. 2, 2020) (SR–ICC–2019–012); Exchange Act Release No. 84312 (Sep. 28, 2018); 83 FR 50124 (Oct. 4, 2018) (SR–ICC–2018–009); Exchange Act Release No. 78566 (Aug. 12, 2016); 81 FR 55254 (Aug. 18, 2016) (SR–ICC–2016–009); Exchange Act Release No. 76733 (Dec. 22, 2015); 80 FR 81384 (Dec. 29, 2015) (SR–ICC–2015–017); Exchange Act Release No. 74456 (Mar. 6, 2015); 80 FR 13055 (Mar. 12, 2015) (SR–ICC–2015–002); Exchange Act Release No. 72762 (Aug. 5, 2014); 79 FR 46896 (Aug. 11, 2014) (SR–ICC–2014–12).

[48] *See* ICC Rule 502(b) and (c) (''ICE Clear Credit shall not take nor permit to be taken any of the following actions without prior consultation with the Risk Committee . . . Modify the ICE Provisions that relate to . . . the application, or the use, rehypothecation or investment, of Margin and . . . Modify the ICE Provisions that relate to . . . the use, rehypothecation or investment of Collateral on deposit in the General Guaranty Fund . . . .'').

[49] *See* ICC Rule 503(a) regarding appointment of nine Participant Appointees.

[50] FIA Letter at 2.

[51] 15 U.S.C. 78q–1(b)(3)(F).

[52] 17 CFR 240.17Ad–22(d)(3).

requirements. Further, as discussed above, in the Commission's view, where and how ICC may invest Margin and Guaranty Fund assets is subject to applicable Exchange Act requirements and Rules and ICC's own Rules, and therefore the Commission does not agree with the FIA's characterization of Investment Losses and Custodial Losses as under the exclusive control and governance of ICC.

Finally, the FIA states that it ''is unclear . . . why ICC's own funds would not be used first'' in case of a Custodial Loss resulting from a central bank acting as Custodian.[53] In response, ICC points to international standards, which encourage clearing houses to fully utilize central bank services.[54] Moreover, as ICC explained in the Notice, ''[w]ith respect to Custodial Losses arising from a central bank custodial failure, ICC believes that such a scenario is extremely remote, and entirely outside of its control.'' [55] The Commission recognizes ICC's point that clearing agencies may be encouraged in various ways to utilize central bank services when available and believes that ICC's position that a scenario involving Custodial Losses arising from a central bank custodial failure could be extremely remote is reasonable, and on that basis finds ICC's view on this point compelling.[56] Accordingly, the Commission believes that ICC's proposal to allocate to Clearing Participants all Custodial Losses arising from a central bank acting as custodian without first utilizing ICC's Loss Resources is reasonable.

In the Commission's view, because ICC uses Initial Margin and Guaranty Fund assets to manage the risks associated with clearing security-based swap transactions, it is vital to the ongoing operation of ICC that ICC have the ability to quickly replenish any Margin and Guaranty Fund assets depleted by Investment Losses and Custodial Losses. Based on its review of the record, the Commission finds the specific allocation of the Investment Losses and Custodial Losses that could potentially result from the investment of such assets between ICC and its Clearing Participants to be reasonable because ICC would be assuming liability commensurate with the risks associated to it with investment of the Margin and Guaranty Fund assets. As discussed above, ICC has assessed its potential exposure to Investment, Custodial, and Non-Default Losses—taking into account relevant components of the European Union capital requirements applicable to central counterparties, including the capital requirements for credit, counterparty, market, operational, and legal risks—to determine an initial measure of ICC's exposure to such risks, and has selected and set its level of Investment Loss, Custodial Loss, and Non-Default Loss Resources to be commensurate with those measures.[57] As noted above, based on its review of the record, the Commission believes that ICC's efforts to determine its reasonable potential exposure to Investment and Custodial Losses are reasonable. At the same time, ICC proposes to designate the specific ICC resources that would be used to cover such losses and the process for replenishing such resources should such losses materialize. In addition, ICC also proposes to periodically conduct risk-based assessments of the appropriate level of ICC resources designed to fully cover such potential losses and to reserve the ability to adjust such resources as needed.[58] It would only be in the event that ICC incurred Investment or Custodial Losses that exceed ICC's Investment Loss or Custodial Loss Resources—an eventuality that ICC views as remote—that ICC would have the discretion to require Clearing Participants to make an Investment Loss Contribution or Custodial Loss Contribution. And, as noted above, in that event each Clearing Participant's Loss Contribution could not exceed that Clearing Participant's IM/GF Contribution. In the Commission's view, ICC's proposal to use its own resources to absorb Investment and Custodial Losses up to the amounts that ICC has determined represent reasonable assessments of such potential Losses, and to allocate Investment and Custodial Losses to Clearing Participants on a pro rata basis based on relevant Initial Margin and Guaranty Fund assets only in the event that such Losses exceed ICC's Resources, represents an appropriate and reasonable allocation of potential contingent non-default losses to Clearing Participants.

Finally, as discussed above, the proposed rule change would allocate Investment Losses and Custodial Losses to Clearing Participants based on their participation in the investment of cash Initial Margin and their share of the total Initial Margin and Guaranty Fund assets. Moreover, each Clearing Participant's liability for an Investment Loss or Custodial Loss exceeding ICC's initial contributions could not exceed that Participant's aggregate contributions to the Guaranty Fund and the Initial Margin provided by the Participant, for both the House Origin Account and Client Origin Account. The Commission believes this allocation is equitable because it would distribute the losses based on each Clearing Participant's share of the Margin and Guaranty Fund assets that were depleted by the Investment Losses and Custodial Losses, and each Clearing Participant's liability could not exceed the total amount it contributed to Margin and the Guaranty Fund. Thus, the Commission believes this should help to ensure that Clearing Participants only contribute to the recovery from such losses in amounts commensurate with their contribution to Margin and Guaranty Fund assets in the first instance. Finally, in limiting the allocation of Investment Losses in the Client Origin Account to those Clearing Participants that have instructed, or are deemed to have instructed, ICC to invest cash Initial Margin, the Commission believes that the proposed rule change would help to ensure that only those Clearing Participants that have participated in an investment would contribute to the recovery of losses suffered on that investment.

For the reasons discussed above, the Commission believes that the proposed rule change is consistent with the requirement that ICC's rules provide for the equitable allocation of fees. Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of Section 17A(b)(3)(D) of the Act.[59]

C. Consistency With Rule 17Ad–22(d)(3)

Rule 17Ad–22(d)(3) requires that ICC establish, implement, maintain and enforce written policies and procedures reasonably designed to hold assets in a way that minimizes risk of loss or of delay in its access to them.[60] The Commission believes that, in specifying that Clearing Participants must instruct ICC whether to invest cash Initial Margin in a Client Origin Account and that without an instruction to invest, ICC would (i) not invest US dollar cash and (ii) invest cash in other currencies in accordance with its rules and procedures, the proposed rule change would provide a procedure reasonably designed for ICC to hold cash Initial Margin in a Client Origin Account that minimizes risk of loss and of delay in access to such cash Initial Margin.

[53] FIA Letter at 2.

[54] ICC Letter at 1.

[55] Notice, 84 FR at 45195.

[56] ICC Letter at 1.

[57] *See* Notice, 84 FR at 45194.

[58] *See Id.*

[59] 15 U.S.C. 78q–1(b)(3)(D).

[60] 15 U.S.C. 17Ad–22(d)(3).

Further, in limiting the allocation of Investment Losses in the Client Origin Account to those Clearing Participants that have instructed, or are deemed to have instructed, ICC to invest cash Initial Margin in the Client Origin Account, the Commission believes that the proposed rule change would help to minimize risk of loss and of delay in access to cash Initial Margin by providing a means for Clearing Participants to opt out responsibility for Investment Losses with respect to the Client Origin Account.

Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of Rule 17Ad–22(d)(3).[61]

D. Consistency With Rule 17Ad–22(d)(8)

Rule 17Ad–22(d)(8) requires that ICC establish, implement, maintain and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent to fulfill the public interest requirements in Section 17A of the Act applicable to clearing agencies, to support the objectives of owners and participants, and to promote the effectiveness of ICC's risk management procedures.[62]

The Commission believes that the proposed rule change, in providing that the ICC Board could modify the amount of Investment Loss Resources and Custodial Loss Resources from time to time, and specifying that such determination would be risk-based in light of ICC's potential exposure to such losses, would establish clear and transparent governance arrangements for determining the amount of such resources.

Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of Rule 17Ad–22(d)(8).[63]

V. Accelerated Approval of the Proposed Rule Change, as Modified by Partial Amendment No. 1 and Partial Amendment No. 2

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[64] to approve the proposed rule change prior to the 30th day after the date of publication of Partial Amendment No. 2 in the **Federal Register**. As discussed above, Partial Amendment No. 2 modifies the initial proposed rule change to (1) differentiate the treatment of Investment Losses in the Client Origin Account from the treatment of Investment Losses in the House Origin Account and (2) limit the allocation of Investment Losses to those Clearing Participants that have instructed, or are deemed to have instructed, ICC to invest cash Initial Margin in the Client Origin Account. In so doing, Partial Amendment No. 2 provides for a more clear and comprehensive understanding of the treatment of Investment Losses and the impact of the proposed rule change on Clearing Participants, which helps to improve the Commission's review of the proposed rule change for consistency with the Act.

For similar reasons as discussed above, the Commission finds that Partial Amendment No. 2 is designed to help assure the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds which are in the custody or control of ICC, consistent with Section 17A(b)(3)(F) of the Act,[65] and the equitable allocation of reasonable dues, fees, and other charges among ICC's Clearing Participants, consistent with the Section 17A(b)(3)(D) of the Act.[66] Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Partial Amendment No. 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Exchange Act.[67]

VI. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change, as modified by Partial Amendment No. 1 and Partial Amendment No. 2, is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) and (D) of the Act[68] and Rules 17Ad–22(d)(3) and (d)(8) thereunder.[69]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[70] that the proposed rule change, as modified by Partial Amendment No. 1 and Partial Amendment No. 2 (SR–ICC–2019–010), be, and hereby is, approved on an accelerated basis.[71]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[72]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–03775 Filed 2–25–20; 8:45 am]

BILLING CODE 8011–01–P

[61] 15 U.S.C. 17Ad–22(d)(3).

[62] 15 U.S.C. 17Ad–22(d)(8).

[63] 15 U.S.C. 17Ad–22(d)(8).

[64] 15 U.S.C. 78s(b)(2).

[65] 15 U.S.C. 78q–1(b)(3)(F).

[66] 15 U.S.C. 78q–1(b)(3)(D).

[67] 15 U.S.C. 78s(b)(2).

[68] 15 U.S.C. 78q–1(b)(3)(F), (D).

[69] 17 CFR 240.17Ad–22(d)(3) and (d)(8).

[70] 15 U.S.C. 78s(b)(2).

[71] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[72] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 7:20 p.m. on Thursday, February 20, 2020.

PLACE: The meeting was held at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting was closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries attended the closed meeting. Certain staff members who have an interest in the matter were also present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matter at the closed meeting. This notice is being made publicly available at the earliest practicable time.

The subject matter of the closed meeting consisted of the following topic: Other matter relating to enforcement proceedings.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: February 21, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–03922 Filed 2–24–20; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88247; File No. SR–CboeBZX–2019–102]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3 Thereto, to List and Trade Shares of the ClearBridge Focus Value ETF Under BZX Rule 14.11(k)

February 20, 2020.

I. Introduction

On November 27, 2019, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the ClearBridge Focus Value ETF (''Fund'') under BZX Rule 14.11(k) (Managed Portfolio Shares).[3] The proposed rule change was published for comment in the **Federal Register** on December 17, 2019.[4] On December 16, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.[5] On January 31, pursuant to Section 19(b)(2) of the Act,[6] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[7] On February 13, 2020, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 1.[8] On February 19, 2020, the Exchange filed Amendment No. 3 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 2.[9] The Commission has received no comments on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 3 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, as Modified by Amendment No. 3

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

This Amendment No. 3 to SR–CboeBZX–2019–102 amends and replaces in its entirety Amendment No. 2 to the proposal, submitted on February 13, 2020, which amended and replaced in its entirety Amendment No. 1 to the proposal, submitted on December 16, 2019, which amended and replaced in its entirety the proposal as originally submitted on November 27, 2019. The Exchange submits this Amendment No. 2 [sic] in order to clarify certain points and add additional details to the proposal.

The Exchange received approval 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,[10] on December 16, 2019.[11] Rule 14.11(k)(2)(A) requires 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 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.[12] The investment adviser to the Trust will be Precidian Funds LLC (the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission recently approved the Exchange's proposed rule change to adopt BZX Rule 14.11(k) to permit the listing and trading of Managed Portfolio Shares. *See* Securities Exchange Act Release No. 87759 (December 16, 2019), 84 FR 70223 (December 20, 2019) (SR–CboeBZX–2019–047) (''Managed Portfolio Shares Order'').

[4] *See* Securities Exchange Act Release No. 87719 (December 11, 2019), 84 FR 68999 (''Notice'').

[5] Amendment No. 1 is available on the Commission's website at *https://www.sec.gov/comments/sr-cboebzx-2019-102/srcboebzx2019102-6634920-203299.pdf.*

[6] 15 U.S.C. 78s(b)(2).

[7] *See* Securities Exchange Act Release No. 88108, 85 FR 6987 (February 6, 2020). The Commission designated March 16, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[8] Amendment No. 2 is available on the Commission's website at *https://www.sec.gov/comments/sr-cboebzx-2019-102/srcboebzx2019102-6830764-208570.pdf.*

[9] Amendment No. 3 is available on the Commission's website at *https://www.sec.gov/comments/sr-cboebzx-2019-102/srcboebzx2019102-6839776-208722.pdf.*

[10] As defined in Rule 14.11(k)(3)(A), 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 (as defined below), 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 Commission) through a Confidential Account; (c) when aggregated into a Redemption Unit (as defined below), 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 (as defined below) for the benefit of the Authorized Participant; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.

[11] *See* Securities Exchange Act Release No. 87759 (December 16, 2019), 84 FR 70223 (December 20, 2019) (SR–CboeBZX–2019–047).

[12] The Trust is registered under the 1940 Act. On November 1, 2019, the Trust filed a registration statement on Form N–1A relating to the Fund (File No. 811–23487) (the ''Registration Statement''). In response to an application for exemptive relief (the ''Exemptive Application'') (File No. 812–14405), the Commission issued an order granting exemptive relief applicable to the Trust (''Exemptive Order'') under the 1940 Act on May 20, 2019 (Investment Company Act Release No. 33477). 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 Registration Statement. 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.''

''Adviser''). ClearBridge Investments, LLC (''ClearBridge'') and Western Asset Management Company, LLC (''Western Asset'' and, collectively with ClearBridge, the ''Sub-Advisers'') will be the Sub-Advisers to the Fund. 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''),[13] 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 Rule 14.11(a).

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.[14] 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.[15] Rule 14.11(k)(2)(D) is similar to Rule 14.11(c)(5)(A)(i), related to Index Fund Shares, except that 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. Rule 14.11(k)(2)(D) is also similar to Rule 14.11(i)(7), related to Managed Fund Shares, except that 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 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. Neither Sub-Adviser is registered as a broker-dealer, but each is affiliated with the Distributor, 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 of and changes to the Fund's portfolio and/or Creation Basket.

In the event (a) the Adviser or either 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 Creation Basket.

Any person related to the Adviser, the Sub-Advisers, or the Trust who makes decisions pertaining to the Fund's portfolio composition or that has access to information regarding the Fund's portfolio or changes thereto or the Creation Basket will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio or changes thereto and the Creation Basket.

Further, 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. Any person or entity who has access to information regarding the Fund's portfolio composition or changes thereto or the Creation Basket will be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the portfolio composition or changes thereto or the Creation Basket.

Description of the Fund

ClearBridge Focus Value ETF

The Fund's holdings will conform to the permissible investments as set forth in the Exemptive Application and Exemptive Order and the holdings will be consistent with all requirements in the Exemptive Application and Exemptive Order.[16]

[13] 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 (as defined in Rule 1.5(w)) by the Reporting Authority, as defined below.

[14] 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 (as defined below) 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.

[15] 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 and its related personnel as well as the Sub-Advisers 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 its fiduciary obligations 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 (i) adopts and implements 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) reviews, at least annually, the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designates an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above. The Fund will also comply with the requirements of Regulation Fair Disclosure, as provided in the Exemptive Application.

[16] Pursuant to the Exemptive Order, the permissible investments include only the following instruments that trade on a U.S. exchange contemporaneously with the Shares: ETFs and exchange-traded notes, common stocks, preferred stocks, American depositary receipts, real estate investment trusts, commodity pools, metals trusts, currency trusts, and futures for which the reference asset the Fund may invest in directly or, in the case of an index future, based on an index of a type of asset that the Fund could invest in directly; as well

The Fund seeks long-term capital appreciation. By employing fundamental research, in an effort to identify securities with attractive risk-adjusted returns, the Fund's portfolio management team constructs the portfolio on a bottom-up basis.

Investment Restrictions

The Fund will not purchase any securities that are illiquid investments at the time of purchase and the Fund's holdings will be consistent with all requirements described in the Exemptive Application and Exemptive Order.

The Shares of the Fund will conform to the initial and continued listing criteria under Rule 14.11(k). The Fund's holdings will be limited to and consistent with what is permissible under the Exemptive Order.

The Fund's investments will be consistent with its investment objective and will not be used to enhance leverage.

Creations and Redemptions of Shares

Creations and redemptions of the Shares will occur as described in Rule 14.11(k). More specifically, in connection with the creation and redemption of Creation Units [17] and Redemption Units,[18] 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'').[19] Authorized Participants (as defined in the Fund's Form N–1A filed with the Commission, ''AP'') will sign an agreement with an AP Representative [20] 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 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 (as described below) 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 (''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.

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.[21] On any given Business Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or a redemption, as the ''Creation Basket.''

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 Deposit Instruments. 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 Deposit Instruments have been acquired in the Confidential Account, the AP Representative would contribute the Deposit Instruments 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

as cash and cash equivalents (short-term U.S. Treasury securities, government money market funds and repurchase agreements).

[17] 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.

[18] 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.

[19] 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.

[20] 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, on behalf of the Authorized Participant, all consideration to or from the Investment Company in a creation or redemption. An AP Representative will not be permitted to disclose the Creation Basket to any person, including the Authorized Participants.

[21] 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.

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 determined on the Transmittal Date. As with all existing ETFs, if there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the ''Balancing Amount'').

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.[22] Other than the Balancing Amount, the Fund will substitute cash only under exceptional circumstances and as set forth under the Fund's policies and procedures governing the composition of Creation Baskets.

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. A transaction fee may also be imposed on redemption orders. 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 the Fund would instruct its custodian to deliver the Redemption Instruments to the appropriate Confidential Account. The Authorized Participant would direct the AP Representative on when that day to liquidate those securities. 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.[23] 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. Other than the Balancing Amount, the Fund will substitute cash only under exceptional circumstances and as set forth under the Fund's policies and procedures governing the composition of Creation Baskets.[24]

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.

Exchange-traded instruments 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. Other holdings of the Fund will generally be valued on the basis of independent pricing services, quotes obtained from brokers and dealers or price quotations or other equivalent indications of value provided by a third-party pricing service, reported net asset value, or at cost.

Availability of Information

The Fund's website (*www.leggmason.com/etfliterature*), 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, on a per Share basis for the Fund, the prior Business Day's NAV and the market closing price and a calculation of the premium and discount of the market closing price. The Fund's website will also disclose each day the median bid/ask spread for the Fund's most recent 30 days based on the National Best Bid (''NBB'') and National Best Offer (''NBO'') at the time of calculation of such NAV (the ''Bid/Ask Price'').[25] In addition, the Fund will provide any other information on its website regarding premiums/discounts that ETFs registered under the 1940 Act are required to provide or that are otherwise required under the Exemptive Order. 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 Rule 14.11(k)(3)(B) and as described further below, will be widely disseminated by

[22] 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 transacting in cash.

[23] The value of any positions not susceptible to in-kind settlement may be paid in cash.

[24] 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 transacting in cash.

[25] 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/or its service providers.

the Reporting Authority [26] 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 trade at the same time as the Fund 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. For purposes of the VIIV, securities held by the Fund will be valued throughout the day based on the mid-point between the disseminated current NBB and NBO. 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 the Fund's VIIV calculation will be publicly disclosed on the Fund's website.

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 Rule 14.11(k)(4)(B)(iii)(a) and (b), which set forth circumstances under which trading in the Shares of the Fund will be halted.

Specifically, 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 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.

Rule 14.11(k)(4)(B)(iii)(b) provides that, if the Exchange becomes aware that: (i) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the NAV 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 VIIV, the NAV, 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 Rule 14.11(k)(2)(B). The Exchange has appropriate rules in place to facilitate trading during all trading sessions in which the Shares will trade. 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.[28] A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange. The Exchange has obtained 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 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

[26] Rule 14.11(k)(3)(H) defines the term ''Reporting Authority'' in respect of a particular series of Managed Portfolio Shares as 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.

[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 calculation engines 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 Exemptive Application, 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.

[28] *See* 17 CFR 240.10A–3.

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 and the underlying exchange-traded instruments 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 and the underlying exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[29]

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 fiscal 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[30] in general and Section 6(b)(5) of the Act[31] 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 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 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 the 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 the Fund because the NAV 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. Neither Sub-Adviser is registered as a broker-dealer, but each is affiliated with the Distributor, a broker-dealer, and has implemented and will maintain a ''fire wall'' with respect to such affiliate 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 either 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 Creation Basket. Any person related to the Adviser, the Sub-Advisers, or the Trust who makes decisions pertaining to the Fund's portfolio composition or that has access to information regarding the Fund's portfolio or changes thereto or the Creation Basket will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio or changes thereto and the Creation Basket.

Further, 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

[29] For a list of the current members of ISG, *see www.isgportal.org.*

[30] 15 U.S.C. 78f.

[31] 15 U.S.C. 78f(b)(5).

with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket. Any person or entity who has access to information regarding the Fund's portfolio composition or changes thereto or the Creation Basket will be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the portfolio or changes thereto or the Creation Basket.

The Exchange further believes that Rule 14.11(k) is designed to prevent fraudulent and manipulative acts and practices related to the listing and trading of Managed Portfolio Shares because it provides 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 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 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.[32] 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 Rule 14.11(k)(4)(B)(iii)(b), which provides that if the Exchange becomes aware that: (i) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the NAV 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 VIIV, the NAV, 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's holdings will conform to the permissible investments as set forth in the Exemptive Application and Exemptive Order. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the underlying exchange-traded instruments 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 instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the underlying exchange-traded instruments 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 trade at the same time as the Fund 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 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–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 Rule 14.11(k)(4)(B)(iii)(a)

[32] *See* supra note 27.

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 Rule 14.11(k). The Fund's holdings will be limited to and consistent with what is permissible under the Exemptive Order. The Fund's investments will be consistent with its investment objective and will not be used to enhance leverage.

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 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. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with the Act and rules and regulations thereunder applicable to a national securities exchange.[33] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with Section 6(b)(5) of the Act,[34] which requires, among other things, that the Exchange's rules be 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 Commission believes that the proposal is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading in the Shares when a reasonable degree of certain pricing transparency cannot be assured. As such, the Commission believes the proposal is reasonably designed to maintain a fair and orderly market for trading the Shares. The Commission also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act, which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities.

Specifically, the Commission notes that the Exchange has obtained a representation from the issuer 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.[35] 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 high-speed line. In addition, the VIIV will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one-second intervals during Regular Trading Hours, and must be disseminated to all market participants at the same time.[36]

Moreover, the Fund's website will include a form of the prospectus and additional data relating to NAV and other applicable quantitative information for the Fund, including any information regarding premiums/discounts that ETFs registered under the 1940 Act are required to provide or that are otherwise required under the Exemptive Order. Such website and information will be publicly available at no charge.

The Commission also notes that the Exchange's rules regarding trading halts help to ensure the maintenance of fair and orderly markets for the Shares. Specifically, pursuant to its rules, the Exchange may consider all relevant factors in exercising its discretion to halt trading in the Shares, and 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 (1) the extent to which trading is not occurring in the securities and/or the financial instruments composing the portfolio; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[37] Trading in the Shares also will be subject to BZX Rule 14.11(k)(4)(B)(iii)(b), which sets forth additional circumstances under which trading in the Shares will be halted.

The Commission also believes that the proposal is reasonably designed to help prevent fraudulent and manipulative acts and practices. The Exchange represents that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Exchange states that the Adviser is not registered as a broker-dealer or affiliated with a broker-dealer. The Exchange states that neither Sub-Adviser is registered as a broker-dealer, but that each is affiliated with a broker-dealer and has implemented and will maintain a ''fire wall'' with respect to such broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the Fund's portfolio and Creation Basket. Further, the Commission notes that any person related to the Fund's investment adviser or to the Trust who makes decisions pertaining to the Fund's portfolio composition or has access to information regarding the Fund'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

[33] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[34] 15 U.S.C. 78f(b)(5).

[35] *See* BZX Rule 14.11(k)(4)(A)(ii).

[36] *See* BZX Rule 14.11(k)(4)(B)(i).

[37] *See* BZX Rule 14.11(k)(4)(B)(iii)(a).

Fund's portfolio or changes thereto or the Creation Basket.[38] In addition, any person or entity, including an AP Representative, custodian, Reporting Authority, distributor, or administrator, who has access to information regarding the Fund's portfolio composition or changes thereto or its Creation Basket, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Fund portfolio or changes thereto or the Creation Basket.[39] Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity must erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition of and/or changes to such Fund's portfolio or Creation Basket.[40] Finally, the Exchange represents that trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Managed Portfolio Shares,[41] and 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.

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. 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.[42]

In support of this proposal, the Exchange represents that:

(1) The Shares will conform to the initial and continued listing criteria under BZX Rule 14.11(k).

(2) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

(3) The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed, and may obtain trading information, regarding trading in the Shares, and the underlying exchange-traded instruments with other markets and other entities that are members of the ISG. In addition, the Exchange may obtain information regarding trading in the Shares and the underlying exchange-traded instruments from markets and other entities with which the Exchange has in place a comprehensive surveillance sharing agreement.

(4) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions in which the Shares trade.

(5) For initial and continued listing, the Fund will be in compliance with Rule 10A–3 under the Act.[43]

(6) The Fund's holdings will conform to the permissible investments as set forth in the Exemptive Application and Exemptive Order, and investments made by the Fund will be consistent with all requirements set forth in the Exemptive Application and Exemptive Order. The Fund's investments will be consistent with its investment objective and will not be used to enhance leverage.

The Exchange represents that all statements and representations made in the filing regarding: (1) The description of the portfolio or reference assets; (2) limitations on portfolio holdings or reference assets; (3) dissemination and availability of the VIIV, reference assets, and intraday indicative values; and (4) the applicability of Exchange rules constitute continued listing requirements for listing the Shares on the Exchange. In addition, the Exchange represents that the issuer 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 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 BZX Rule 14.12.

IV. Solicitation of Comments on Amendment No. 3 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 3 is consistent with the Exchange 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

[38] *See* BZX Rule 14.11(k)(2)(D). The Exchange represents that any person related to the Adviser, the Sub-Advisers, or the Trust who makes decisions pertaining to the Fund's portfolio composition or that has access to information regarding the Fund's portfolio or changes thereto or the Creation Basket will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio or changes thereto and the Creation Basket.

[39] *See* BZX Rule 14.11(k)(2)(E).

[40] *See id.* The Exchange represents that any person or entity who has access to information regarding the Fund's portfolio composition or changes thereto or the Creation Basket will be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the portfolio composition or changes thereto or the Creation Basket.

[41] *See* BZX Rule 14.11(k)(2)(C), which requires, as part of the surveillance procedures for Managed Portfolio Shares, the Fund's investment adviser to, upon request by the Exchange or the Financial Industry Regulatory Authority (''FINRA''), on behalf of the Exchange, make available to the Exchange or FINRA the daily portfolio holdings of each series of Managed Portfolio Shares.

[42] The Exchange represents that the Circular will discuss the following: (1) 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 fiscal quarter.

[43] *See* 17 CFR 240.10A–3.

submissions should refer to File Number SR–CboeBZX–2019–102, and should be submitted on or before March 18, 2020.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 3 in the **Federal Register**. In Amendment No. 3, the Exchange modified the description of the Fund's investments and conformed the description of BZX Rule 14.11(k) to the final rule approved in the Managed Portfolio Shares Order. Amendment No. 3 also provides other clarifications and additional information to the proposed rule change.[44] The changes and additional information in Amendment No. 3 assist the Commission in finding that the proposal is consistent with the Exchange Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[45] to approve the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[46] that the proposed rule change (SR–CboeBZX–2019–102), as modified by Amendment No. 3, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[47]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–03770 Filed 2–25–20; 8:45 am]

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[44] *See* Amendment No. 3, *supra* note 9.

[45] 15 U.S.C. 78s(b)(2).

[46] 15 U.S.C. 78s(b)(2).

[47] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88255; File No. SR–NYSEArca–2019–60]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 4 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 4, To List and Trade Shares of the KFA Global Carbon ETF Under NYSE Arca Rule 8.600–E

February 20, 2020.

On August 14, 2019, NYSE Arca, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the KFA Global Carbon ETF (''Fund'') under NYSE Arca Rule 8.600–E, which governs the listing and trading of Managed Fund Shares on the Exchange. The proposed rule change was published for comment in the **Federal Register** on August 29, 2019.[3] On September 12, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.[4] On October 10, 2019, pursuant to Section 19(b)(2) of the Exchange Act,[5] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[6] On October 22, 2019, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 1.[7] On November 22, 2019, the Commission published notice of Amendment No. 2 and instituted proceedings under Section 19(b)(2)(B) of the Act[8] to determine whether to approve or disapprove the proposed rule change.[9] On December 16, 2019, the Exchange filed Amendment No. 3 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 2.[10] On December 19, 2019, the Exchange filed Amendment No. 4 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 3.[11] The Commission has received no comment letters on the proposal. The Commission is publishing this notice to solicit comments on Amendment No. 4 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 4, on an accelerated basis.

I. The Exchange's Description of the Proposed Rule Change, as Modified by Amendment No. 4

The Exchange proposes to list and trade shares of the KFA Global Carbon ETF under NYSE Arca Rule 8.600–E (''Managed Fund Shares''). This Amendment No. 4 to SR–NYSEArca-2019–60 replaces SR–NYSEArca-2019–60 as originally filed and Amendments 1, 2 and 3 thereto and supersedes such filings in their entirety. The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86752 (Aug. 23, 2019), 84 FR 45557.

[4] Amendment No. 1 is available on the Commission's website at: *https://www.sec.gov/comments/sr-nysearca-2019-60/srnysearca201960-6117868-192147.pdf.*

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 87277, 84 FR 55658 (Oct. 17, 2019). The Commission designated November 27, 2019, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[7] Amendment No. 2 is available on the Commission's website at: *https://www.sec.gov/comments/sr-nysearca-2019-60/srnysearca201960-6324054-194703.pdf.*

[8] 15 U.S.C. 78s(b)(2)(B).

[9] *See* Securities Exchange Act Release No. 87589, 84 FR 65862 (Nov. 29, 2019).

[10] Amendment No. 3 is available on the Commission's website at: *https://www.sec.gov/comments/sr-nysearca-2019-60/srnysearca201960-6555837-200935.pdf.*

[11] Amendment No. 4 is available on the Commission's website at: *https://www.sec.gov/comments/sr-nysearca-2019-60/srnysearca201960-6567293-201062.pdf.*

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (''Shares'') of the KFA Global Carbon ETF (''Fund'') under NYSE Arca Rule 8.600–E, which governs the listing and trading of Managed Fund Shares [12] on the Exchange. The Fund will be an actively managed exchange-traded fund.

The Shares will be offered by KraneShares Trust (the ''Trust''), which was established as a Delaware statutory trust on February 3, 2012. The Trust is registered with the Securities and Exchange Commission (''SEC'' or ''Commission'') as an open-end management investment company.[13]

Krane Funds Advisors, LLC (''Krane'' or ''Adviser'') will serve as the investment adviser to the Fund. Climate Finance Partners LLC (''Sub-Adviser'') will serve as the non-discretionary investment sub-adviser to the Fund. SEI Investments Global Funds Services (''Administrator'') will serve as administrator for the Fund.

SEI Investments Distribution Co. (''Distributor''), an affiliate of the Administrator, will serve as the Fund's distributor. Brown Brothers Harriman & Co. (''BBH'') will serve as custodian and transfer agent for the Fund.

Commentary .06 to Rule 8.600–E provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect and maintain a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.[14] In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio. The Adviser and Sub-Adviser are not registered as broker-dealers, but the Adviser is affiliated with a broker-dealer, and has implemented and will maintain a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio. The Sub-Adviser is not affiliated with a broker-dealer. In the event (a) the Adviser or Sub-Adviser becomes registered as a broker-dealer or 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 will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

KFA Global Carbon ETF

Principal Investments

According to the Registration Statement, the Fund will seek to provide a total return that, before fees and expenses, exceeds that of the IHS Markit Global Carbon Index (the ''Index'') over a complete market cycle. The Index is designed to track the performance of liquid carbon credit futures contracts maturing within the next two calendar years.

More specifically, the Index is designed to track, and the Fund and the Fund's Subsidiary (as defined below), under normal market conditions,[15] intend to invest primarily in, liquid carbon credit futures contracts issued under the European Union Allowance (EUA), California Carbon Allowance (CCA), and Regional Greenhouse Gas Initiative (RGGI) regimes, and maturing within the next one to two calendar years. EUA futures are currently traded principally on ICE Futures Europe, and CCA futures and RGGI futures are currently traded principally on ICE Futures US. ICE Futures Europe, ICE Futures US and CME are members of the Intermarket Surveillance Group (''ISG''). As the global carbon credit market grows, as discussed below, additional liquid carbon credit contracts may enter the Index that are not issued under the EUA, CCA and RGGI regimes, and the Fund may invest in these additional carbon credit contracts. Any additional carbon credit futures contracts that enter the Index will have an average monthly trading volume for the six month look-back period prior to the annual rebalancing date that is a minimum of $10,000,000 as of November 30th of a given year, and will be traded on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. These additional liquid carbon credit contracts that may enter the Index in the future and the current liquid carbon credit contracts in the Index are referred to herein as ''Carbon Credit Futures.'' The Fund and the Subsidiary may invest in these additional Carbon Credit Futures; however, as noted above, the Fund and the Subsidiary, under normal market conditions, will primarily invest in carbon credit futures contracts issued under the EUA, CCA and RGGI regimes.

According to the Registration Statement, although the Fund will seek to maintain exposure to Carbon Credit Futures that are the same as those included in the Index, the Fund and the Subsidiary will be actively managed and will not be required to replicate the performance of the Index or to invest in the specific instruments in the Index. For example, while the Fund may hold the same Carbon Credit Futures that are

[12] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Rule 5.2–E(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[13] The Trust is registered under the 1940 Act. On June 11, 2019, the Trust filed with the Commission its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–180870 and 811–22698) (''Registration Statement''). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order upon which the Trust may rely, granting certain exemptive relief under the 1940 Act. *See* Investment Company Act Release No. 32455 (January 27, 2017) (File No. 812–14675).

[14] 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 and Sub-Adviser and their related personnel are 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 violation, 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.

[15] The term ''normal market conditions'' is defined in NYSE Arca Rule 8.600–E(c)(5).

included in the Index, the Fund also may hold liquid carbon credit futures issued under the carbon credit regimes included in the Index but which are not currently included in the Index solely because they have different maturity dates (''Non-Index Futures'') (collectively, Carbon Credit Futures and Non-Index Futures are ''Carbon Futures''), or hold different weightings of Carbon Credit Futures than the Index.

As of the last annual rebalancing date, November 30, 2019, the weighting of Carbon Credit Futures in the Index was, and the weighting of Carbon Credit Futures in the Fund (including the Subsidiary (as defined below)) would have been, as follows:

- European Union Allowance (EUA)—65%
- California Carbon Allowance (CCA)—25%
- Regional Greenhouse Gas Initiative (RGGI)—10%

Although, as described in more detail below, the Carbon Credit Futures in the Index are physically settled futures contracts, the Adviser does not anticipate that the Fund will hold Carbon Futures until expiry or take or make delivery of any physical commodities. Instead, the Adviser expects to roll each Carbon Future contract in the Fund's (or Subsidiary's (as defined below)) portfolio approximately two weeks prior to expiry. Thus, the Adviser expects to sell near to expiry Carbon Futures and reinvest the proceeds in new Carbon Futures to achieve the Fund's investment objective.

Other Investments

While the Fund, under normal market conditions, will invest primarily in Carbon Futures referenced above, the Fund may hold other securities and financial instruments, as described below.

Other than investing in Carbon Futures, the Fund, in seeking to achieve its investment objective, may invest up to 10% of its net assets in futures contracts that are not Carbon Futures, including interest rate futures and currency futures, and options on either Carbon Futures or other types of futures, including interest rate futures and currency futures.

The Fund may hold cash and cash equivalents.[16]

The Fund will seek to exceed the performance of the Index through the active management of a portfolio of debt instruments (other than cash equivalents). Such debt instruments in which the Fund intends to invest are government securities and corporate or other non-government fixed-income securities with maturities of up to 12 months.

The fixed income securities in which the Fund invests will comply with the generic listing requirements of Commentary .01(b) to Rule 8.600–E.

The Fund may invest in exchange-traded funds (''ETFs'')[17] and exchange-traded notes (''ETNs'').[18]

The Fund may hold investment company securities (including ETFs), consistent with the requirements of Section 12(d)(1) of the 1940 Act.

The Fund may invest up to 25% of its assets in a wholly-owned subsidiary (the ''Subsidiary''). The Fund will utilize the Subsidiary for purposes of investing in the Carbon Futures and other futures contracts and options on futures contracts. The Subsidiary is a corporation operating under Cayman Islands law that is wholly-owned and controlled by the Fund. The Subsidiary is advised by the Adviser and sub-advised by the Sub-Adviser. The Subsidiary has the same investment objective as the Fund and will follow the same investment policies and restrictions as the Fund. Accordingly, the Subsidiary will only invest in the same instruments as the Fund may invest in, as discussed herein, including Carbon Futures, other futures contracts and options on futures contracts, and cash and cash equivalents as margin or collateral with respect to its Carbon Futures and other futures contracts and options on futures contracts investments.

The Fund will conduct foreign currency exchange transactions to the extent necessary to purchase Carbon Futures and convert proceeds of sales of Carbon Futures into U.S. Dollars. The Fund will conduct such foreign currency transactions either on a spot (*i.e.,* cash) basis at the spot rate prevailing in the foreign currency exchange market, or through forwards and U.S. exchange-traded futures on foreign currencies.

The Exchange submits this proposal in order to allow the Fund to hold listed derivatives, in particular Carbon Futures, in a manner that does not comply with Commentary .01(d)(2) to Rule 8.600–E, as described below. While the Fund may invest up to 10% of its net assets in futures contracts that are not Carbon Futures and options on either Carbon Futures or other types of futures, these investments will comply with Commentary .01(d)(2) to Rule 8.600–E. Otherwise, the Fund will comply with all other listing requirements of Commentary .01 to NYSE Arca Rule 8.600–E on an initial and continued listing basis.

Description of the Index

According to the Registration Statement, the Index utilizes a rules-based methodology and is designed to track a portfolio of liquid, accessible carbon credit futures contracts with ''physical delivery'' of emission allowances issued under ''cap and trade'' regimes.[19]

The Index is provided by Markit Indices GmbH (the ''Index Provider''), a wholly-owned subsidiary of IHS Markit Ltd. The Index Provider is not affiliated with the Fund or Krane.[20] The Index Provider determines the components and the relative weightings of the components in the Index. The Index Provider may consult with the IHS Markit Global Carbon Index Advisory Committee to review potential changes to the Index rules and methodology. Any decision as to the eligibility or ineligibility of a Carbon Credit Future will be published and the Index rules

[16] For purposes of this filing, cash equivalents include the securities included in Commentary .01(c) to NYSE Arca Rule 8.600–E.

[17] For purposes of this filing, ''ETFs'' are Investment Company Units (as described in NYSE Arca Rule 5.2–E(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Rule 8.100–E); and Managed Fund Shares (as described in NYSE Arca Rule 8.600–E). All ETFs will be listed and traded in the U.S. on a national securities exchange. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged (*e.g.,* 2X, –2X, 3X or –3X) ETFs.

[18] ETNs are securities as described in NYSE Arca Rule 5.2–E(j)(6) (Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and Multifactor Index-Linked Securities). While the Fund may invest in inverse ETNs, the Fund will not invest in leveraged (*e.g.,* 2X, –2X, 3X or –3X) ETNs.

[19] According to the Registration Statement, in a typical ''cap and trade'' regime, a limit (or ''cap'') is set by a regulator, such as a government entity or supranational organization, on the total amount of specific greenhouse gases (''GHG''), such as CO_2, that can be emitted by regulated entities, such as manufacturers or energy producers. The regulator then may issue or sell individual ''emission allowances'' to regulated entities. These emission allowances are issued by the regulator to regulated entities, which may then buy or sell (''trade'') the emission allowances on the open market. The regulator may gradually reduce the market cap on emission allowances, thereby increasing the value of such allowances and forcing regulated entities to reduce their GHG emissions. A cap on emission allowances available to the market supports the value of those allowances and is intended to incentivize regulated entities to reduce their GHG emissions, because they are permitted to sell unneeded emission allowances for profit. Commodity futures contracts linked to the value of emission allowances are known as carbon credit futures.

[20] The Index Provider is not a broker-dealer or affiliated with a broker-dealer and has implemented and will maintain procedures designed to prevent the use and dissemination of material, nonpublic information regarding the Index.

will be updated accordingly. Additional information about the Index is available on the Index Provider's website, *www.ihsmarkit.com.*

As of July 31, 2019, eligible components of the Index include emission allowances issued under the European Union Emissions Trading System (EUA),[21] California Carbon Allowance (CCA) [22] and Regional Greenhouse Gas Initiative (RGGI) [23] ''cap and trade'' regimes. As the global carbon credit market grows, additional liquid carbon credit futures contracts may enter the Index that are not issued under the EUA, CCA and RGGI regimes. Any additional carbon credit futures contracts that enter the Index will have an average monthly trading volume for the six month look-back period prior to the annual rebalancing date that is a minimum of $10,000,000 as of November 30th of a given year, and will be traded on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Fund and the Subsidiary may invest in these additional Carbon Credit Futures. However, the Fund and the Subsidiary, under normal market conditions, will invest primarily in carbon credit futures issued under the EUA, CCA, and RGGI regimes.

The Fund's holdings in listed derivatives, including Carbon Futures, will comply with the requirements of Commentary .01(d)(1) to Rule 8.600–E.[24]

The Adviser represents that, as of November 30, 2019, the initial universe and weighting of Carbon Credit Futures in the Index was as follows:

Regional Component—Europe, Middle East and Africa

- European Union Allowance (EUA)—65%

Regional Component—Americas

- California Carbon Allowance (CCA)—25%
- Regional Greenhouse Gas Initiative (RGGI)—10%

The Adviser further represents that the Index allocated each of the EUA and CCA allowances to two Carbon Credit Futures with different expiration dates. Accordingly, according to the Adviser, the Fund's allocations to EUA and CCA Carbon Credit Futures, on a continuous basis, would similarly be to at least four different contracts (*e.g.,* two different contracts each with two different expiry dates).

The Commodities Futures Trading Commission (the ''CFTC'') has adopted certain requirements that subject registered investment companies and their advisers to regulation by the CFTC if a registered investment company invests more than a prescribed level of its net assets in CFTC-regulated futures, options and swaps, or if a registered investment company markets itself as providing investment exposure to such instruments. Due to the Fund's intended use of CFTC-regulated futures above the prescribed levels, it will be a ''commodity pool'' under the Commodity Exchange Act.

The Index is calculated on each full Securities Industry and Financial Markets Association (SIFMA) recommended U.S. trading day and the last calendar day of November. To convert the value of foreign carbon credit futures contracts to U.S. dollars, the Index utilizes foreign exchange spot rates from WM Reuters, using foreign exchange rates as of 4:00 p.m. London time for any day the Index is calculated. The Index was launched on July 25, 2019 with a base date of July 31, 2014 and a base value of 100. As of the most recent rebalancing date of November 30, 2018, the Index included five futures contracts with market capitalizations ranging from a minimum of $506 million for the RGGI program to a maximum of $29.463 billion for the EUA program. The average market capitalization of the futures of these programs was $10.916 billion. The largest Regional Components in the Index were Europe and the Americas (EUA (65%), CCA (25%) and RGGI (10%)).[25]

Other Restrictions

The Fund's and the Subsidiary's investments, including derivatives, will be consistent with the Fund's investment objective and will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2X or –3X) of the Index.

Use of Derivatives by the Fund

Investments in derivative instruments will be made in accordance with the Fund's investment objective and policies.

To limit the potential risk associated with such transactions, the Fund will enter into offsetting transactions or segregate or ''earmark'' assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees (the ''Board''). In addition, the Fund has included appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund's use of derivatives, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged.

Impact on Arbitrage Mechanism

The Adviser believes there will be minimal, if any, impact to the arbitrage mechanism as a result of the Fund's use of derivatives. The Adviser understands that market makers and participants should be able to value derivatives as long as the positions are disclosed with relevant information. The Adviser believes that the price at which Shares of the Fund trade will continue to be disciplined by arbitrage opportunities created by the ability to purchase or redeem Shares of the Fund at their net asset value (''NAV''), which should ensure that Shares of the Fund will not trade at a material discount or premium in relation to their NAV.

The Adviser does not believe there will be any significant impacts to the settlement or operational aspects of the Fund's arbitrage mechanism due to the use of derivatives.

[21] The EUA allowance is based on the ICE Futures ECX CFI Carbon Financial Instrument Futures Contract (''ECX CFI Futures''). ECX CFI Futures are standardized contracts developed by the European Climate Exchange (''ECX''). They are standardized contractual instruments for futures on deliverable carbon equivalent emissions allowances issued under the European Union Emissions Trading Scheme (''EU ETS''), which are listed and admitted to trading on ICE Futures Europe and the European Energy Exchange (EEX).

[22] CCA–CBL California Carbon Allowance Futures Contracts (''California Contracts'') are listed and traded on ICE Futures U.S and CME Globex (operated by CME Group, Inc. (''CME'')). The California Contracts allow for trading of physically delivered greenhouse gas emissions allowances. Each California Contract is an allowance issued by the California Air Resources Board (or a linked program) to emit one metric ton of CO_2 equivalent under California Assembly Bill 32 ''California Global Warming Solutions Act of 2006'' and its associated regulations, rules and amendments (collectively the ''California Cap and Trade Program'').

[23] RGGI-Regional Greenhouse Gas Initiative Futures are traded on ICE Futures U.S. They are monthly physically delivered contracts on RGGI CO_2 allowances.

[24] Commentary .01(d)(1) to Rule 8.600–E provides that, with respect to a fund's holdings in listed derivatives, in the aggregate, at least 90% of the weight of such holdings invested in futures, exchange-traded options, and listed swaps shall, on both an initial and continuing basis, consist of futures, options, and swaps for which the Exchange may obtain information via the ISG from other members or affiliates of the ISG or for which the principal market is a market with which the Exchange has a comprehensive surveillance sharing agreement. (For purposes of calculating this limitation, a portfolio's investment in listed derivatives will be calculated as the aggregate gross notional value of the listed derivatives).

[25] Sources: Intercontinental Exchange (*https://data.theice.com)* and IHS Markit OPIS (*https://indices.ihsmarkit.com/Carbonindex).*

Creation and Redemption of Shares

According to the Registration Statement, the Trust will issue and redeem Shares of the Fund only in ''Creation Units'' on a continuous basis through the Distributor at the NAV next determined after receipt, on any Business Day (as defined below), of an order in proper form. A ''Business Day'', as used herein, is any day on which the New York Stock Exchange (''NYSE'') is open for business. A Creation Unit is 50,000 Shares. The size of a Creation Unit is subject to change. Creation Units may be purchased and redeemed only by or through a Depository Trust Company (''DTC'') Participant that has entered into an Authorized Participant Agreement with the Distributor (an ''Authorized Participant'').

Purchases of Creation Units

The consideration for the purchase of Creation Units of the Fund will consist of an in-kind deposit of a designated portfolio of securities (or cash for all or any portion of such securities (''Deposit Cash'') (collectively, the ''Deposit Securities'')) and the Cash Component, which is an amount equal to the difference between the aggregate NAV of a Creation Unit and the Deposit Securities. Together, the Deposit Securities and the Cash Component constitute the ''Fund Deposit.''

The Custodian or the Administrator makes available through the National Securities Clearing Corporation (''NSCC'') on each Business Day, prior to the opening of the Exchange's Core Trading Session (normally 9:30 a.m., Eastern time (''E.T.''), the list of names and the required number of shares of each Deposit Security and Deposit Cash, as applicable, and the estimated amount of the Cash Component to be included in the current Fund Deposit. Such Fund Deposit is applicable, subject to any adjustments as described below, in order to effect purchases of Creation Units of the Fund until such time as the next-announced Fund Deposit is made available.

The Trust reserves the right to permit or require the substitution of an amount of cash to replace any Deposit Security under specified circumstances.

Cash purchases of Creation Units will be effected in essentially the same manner as in-kind purchases. The Authorized Participant will pay the cash equivalent of the Deposit Securities as Deposit Cash plus or minus the same Cash Component.

Placement of Purchase Orders

To initiate an order for a Creation Unit, an Authorized Participant must submit to the Distributor an irrevocable order in proper form to purchase Shares of the Fund on a Business Day generally before the time as of which that day's NAV is calculated. For a purchase order to be processed based on the NAV calculated on a particular Business Day, the purchase order must be received in proper form and accepted by the Trust prior to the time as of which the NAV is calculated (''Cutoff Time'').

Redemptions of Creation Units

The consideration paid by the Fund for the redemption of Creation Units consists of an in-kind basket of a designated portfolio of securities (or cash for all or any portion of such securities (''Redemption Cash'')) (collectively, the ''Fund Securities'') and the Cash Component, which is an amount equal to the difference between the aggregate NAV of a Creation Unit and the Fund Securities. Together, the Fund Securities and the Cash Component constitute the ''Fund Redemption.''

The Custodian or the Administrator will make available through NSCC on each Business Day, prior to the opening of the Exchange's Core Trading Session, the list of names and the number of shares of each Fund Security and Redemption Cash, as applicable, and the estimated amount of the Cash Component to be included in the current Fund Redemption. Such Fund Redemption will be applicable, subject to any adjustments as described below, for redemptions of Creation Units of the Fund until such time as the next-announced Fund Redemption is made available. The delivery of Fund Shares will be settled through the DTC system.

The identity and number of shares of the Fund Securities change pursuant to, among other matters, changes in the composition of the Fund's portfolio and as rebalancing adjustments and corporate action events are reflected from time to time. The composition of the Fund Securities may not be the same as the Deposit Securities.

The Trust reserves the right to permit or require the substitution of an amount of cash to replace any Redemption Security under circumstances specified in the Registration Statement.

Cash redemptions of Creation Units will be effected in essentially the same manner as in-kind redemptions. The Authorized Participant will receive the cash equivalent of the Fund Securities as Redemption Cash plus or minus the same Cash Component.[26]

Placement of Redemption Orders

To initiate a redemption order for a Creation Unit, an Authorized Participant must submit to the Distributor an irrevocable order in proper form to redeem Shares of the Fund on a Business Day generally before the time as of which that day's NAV is calculated. For a redemption order to be processed based on the NAV calculated on a particular Business Day, the order must be received in proper form and accepted by the Trust prior to the time as of which the NAV is calculated (''Cutoff Time''). A redemption request, if accepted by the Trust, will be processed based on the NAV as of the next Cutoff Time.

Application of Generic Listing Requirements

The Exchange is submitting this proposed rule change because the portfolio for the Fund will not meet all of the ''generic'' listing requirements of Commentary .01 to NYSE Arca Rule 8.600–E applicable to the listing of Managed Fund Shares. Specifically, the Fund's portfolio will meet all such requirements except for those set forth in Commentary .01(a)(1) with respect to the Fund's investments in non-exchange-traded investment company securities and Commentary .01(d)(2) with respect to the Fund's and the Subsidiary's Investments in Carbon Futures.[27]

In order to achieve its investment objective, under normal market conditions, the aggregate gross notional value of Carbon Futures may, in certain circumstances, approach 100% of the Fund (including gross notional values). As noted above, Commentary .01(d)(2) to Rule 8.600–E prohibits the Fund from holding listed derivatives based on any five or fewer underlying reference assets in excess of 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the portfolio (including gross notional exposures). The Exchange is proposing to allow the Fund to hold up to 100% of the weight of its portfolio

[26] The Adviser represents that, to the extent the Trust effects the creation or redemption of Shares wholly or partially in cash, such transactions will be effected in the same manner for all Authorized Participants.

[27] Commentary .01(d)(2) to Rule 8.600–E provides that, with respect to a fund's portfolio, the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the portfolio (including gross notional exposures).

(as measured by gross notional exposures) in Carbon Futures.

As discussed below, although the Fund will concentrate its holdings in listed derivatives that are based on a smaller number of reference assets than allowed under Commentary .01(d)(2), the Exchange believes that sufficient protections are in place to protect against market manipulation of the Shares and Carbon Futures and otherwise satisfy the purposes of Rule 8.600–E. The Exchange believes that Carbon Futures are not subject to the concentration risk that the rule is intended to address because of the liquidity of such futures.[28] The Exchange notes that the exchange markets for Carbon Futures are highly liquid, and therefore believes that trading in such futures is not readily susceptible to manipulation. In addition, at least 90% of the weight of listed derivatives utilized by the Fund would be traded on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement, and Carbon Futures are currently traded on ISG markets.[29]

The Exchange notes that the Commission has previously approved listing and trading on the Exchange under NYSE Arca Rule 8.204–E (Commodity Futures Trust Shares) of a trust with the investment objective of providing investment results that correspond generally to the performance of a basket of exchange-traded futures contracts for carbon equivalent emissions allowances issued under the European Union Emissions Trading Scheme (''EU ETS'').[30]

The Fund may invest in shares of investment company securities (other than ETFs), which are equity securities. Therefore, to the extent the Fund invests in shares of other non-exchange-traded open-end management investment company securities, the Fund will not comply with the requirements of Commentary .01(a)(1)(A) through (E) to NYSE Arca Rule 8.600–E (U.S. Component Stocks) with respect to its equity securities holdings.[31]

However, it is appropriate and in the public interest to approve listing and trading of Shares of the Fund notwithstanding that the Fund's holdings in such securities would not meet the requirements of Commentary .01(a)(1)(A) through (E) to Rule 8.600–E. Investments in other non-exchange-traded open-end management investment company securities will not exceed 20% of the total assets of the Fund. Such investments, which may include mutual funds that invest, for example, principally in fixed income securities, would be utilized to help the Fund meet its investment objective and to equitize cash in the short term. The Fund will invest in such securities only to the extent that those investments would be consistent with the requirements of Section 12(d)(1) of the 1940 Act and the rules thereunder.[32]

[28] The Adviser represents that these are currently the largest and most liquid futures markets on carbon offset credits: (1) Carbon credit futures on EUA: 1,269,401,000 contracts with open interest at a price of $23.21 as of November 30, 2018 translating to a $29.463 billion market capitalization. In addition, the average annual trading volume as of that date was $98.856 billion (with approximately $89 billion consisting of carbon credit futures with December expirations); (2) carbon credit futures on CCA: 178,800,000 contracts with open interest at a price of $15.55 as of November 30, 2018 translates to a $2.780 billion market capitalization. In addition, the average annual trading volume as of that date was $2.39 billion (with approximately $1.25 billion consisting of carbon credit futures with December expirations); and (3) carbon credit futures on RGGIs: 94,000,000 contracts with open interest at a price of $5.38 as of November 30, 2018 translates to a $506 million market capitalization. In addition, the average annual trading volume as of that date was $250 million (with approximately $182.9 million consisting of carbon credit futures with December expirations). Source: (*https://www.theice.com/microsite/usenvironmentalmonthlymarketreport*).

[29] The Exchange notes that the Commission has approved proposed rule changes by a national securities exchange to list and trade series of Managed Fund Shares that may hold listed derivatives on underlying reference assets that may not comply with provisions similar to those in Commentary .01(d)(2) to Rule 8.600–E. *See, e.g.,* Securities Exchange Act Release Nos. 80529 (April 26, 2017), 82 FR 20506 (May 2, 2017) (SR–BatsBZX–2017–14) (Order Granting Approval of a Proposed Rule Change to List and Trade Shares of the Amplify YieldShares Oil Hedged MLP Fund under BZX Rule 14.11(i)); 82906 (March 20, 2018), 83 FR 12992 (March 26, 2018) (SR–CboeBZX–2017–012) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the LHA Market State® Tactical U.S. Equity ETF under Rule 14.11(i)); 83014 (April 9, 2018), 83 FR 16150 (April 13, 2018) (SR–CboeBZX–2017–023) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the iShares Gold Strategy ETF Under Exchange Rule 14.11(i)); 83146 (May 1, 2018), 83 FR 20103 (May 7, 2018) (SR–CboeBZX–2018–029) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Allow the Horizons Cadence Hedged US Dividend Yield ETF, a Series of the Horizons ETF Trust I, to Hold Listed Options Contracts in a Manner that Does Not Comply with Rule 14.11(i), Managed Fund Shares). See also, Securities Exchange Act Release No. 85701 (April 22, 2019), 84 FR 17902 (April 26, 2019) (SR–CboeBZX–2019–016) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Allow the JPMorgan Core Plus Bond ETF of the J.P. Morgan Exchange-Traded Fund Trust to Hold Certain Instruments in a Manner that May Not Comply with Rule 14.11(i), Managed Fund Shares).

[30] *See* Securities Exchange Act Release No. 57838, (May 20, 2008), 73 FR 30649 (May 28, 2008) (SR–NYSEArca–2008–09) (Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Relating to the Listing and Trading of Shares of the AirShares EU Carbon Allowances Fund) (''AirShares Order''). The EU ETS is a ''cap and trade'' emissions trading program instituted by the European Union, in furtherance of the joint commitment of its member states under the Kyoto Protocol to achieve certain reductions in their emissions of greenhouse gases. The net assets of the AirShares EU Carbon Allowances Fund were to consist of long positions in ICE Futures ECX Carbon Financial Instrument Futures Contracts consisting of standardized contractual instruments for futures on deliverable EUAs issued under the EU ETS and developed by the European Climate Exchange. The Adviser represents that the European Union Emissions Trading System (EUA) referenced above is the same as the EU ETS referenced in the AirShares Order.

[31] Commentary .01(a) to Rule 8.600–E specifies the equity securities accommodated by the generic criteria in Commentary .01(a), namely, U.S. Component Stocks (as described in Rule 5.2–E(j)(3)) and Non-U.S. Component Stocks (as described in Rule 5.2–E(j)(3)). Commentary .01(a)(1) to Rule 8.600–E (U.S. Component Stocks) provides that the component stocks of the equity portion of a portfolio that are U.S. Component Stocks shall meet the following criteria initially and on a continuing basis: (A) Component stocks (excluding Derivative Securities Products and Index-Linked Securities) that in the aggregate account for at least 90% of the equity weight of the portfolio (excluding such Derivative Securities Products and Index-Linked Securities) each shall have a minimum market value of at least $75 million; (B) Component stocks (excluding Derivative Securities Products and Index-Linked Securities) that in the aggregate account for at least 70% of the equity weight of the portfolio (excluding such Derivative Securities Products and Index-Linked Securities) each shall have a minimum monthly trading volume of 250,000 shares, or minimum notional volume traded per month of $25,000,000, averaged over the last six months; (C) The most heavily weighted component stock (excluding Derivative Securities Products and Index-Linked Securities) shall not exceed 30% of the equity weight of the portfolio, and, to the extent applicable, the five most heavily weighted component stocks (excluding Derivative Securities Products and Index-Linked Securities) shall not exceed 65% of the equity weight of the portfolio; (D) Where the equity portion of the portfolio does not include Non-U.S. Component Stocks, the equity portion of the portfolio shall include a minimum of 13 component stocks; provided, however, that there shall be no minimum number of component stocks if (i) one or more series of Derivative Securities Products or Index-Linked Securities constitute, at least in part, components underlying a series of Managed Fund Shares, or (ii) one or more series of Derivative Securities Products or Index-Linked Securities account for 100% of the equity weight of the portfolio of a series of Managed Fund Shares; (E) Except as provided herein, equity securities in the portfolio shall be U.S. Component Stocks listed on a national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934; and (F) American Depositary Receipts (''ADRs'') in a portfolio may be exchange-traded or nonexchange-traded. However, no more than 10% of the equity weight of a portfolio shall consist of non-exchange-traded ADRs.

[32] The Commission has previously approved proposed rule changes under Section 19(b) of the Act for series of Managed Fund Shares that may invest in non-exchange traded investment company securities to the extent permitted by Section 12(d)(1) of the 1940 Act and the rules thereunder. *See, e.g.,* Securities Exchange Act Release No. 86362 (July 12, 2019), 84 FR 34457 (July 18, 2019) (SR–NYSEArca–2019–36 (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified

Continued

Because such securities must satisfy applicable 1940 Act diversification requirements, and have a net asset value based on the value of securities and financial assets the investment company holds, it is both unnecessary and inappropriate to apply to such investment company securities the criteria in Commentary .01(a)(1).

The Exchange notes that Commentary .01(a)(1)(A) through (D) to Rule 8.600–E exclude certain ''Derivative Securities Products'' that are exchange-traded investment company securities, including Investment Company Units (as described in NYSE Arca Rule 5.2–E(j)(3)), Portfolio Depositary Receipts (as described in NYSE Arca Rule 8.100–E)) and Managed Fund Shares (as described in NYSE Arca Rule 8.600–E)).[33] In its 2008 Approval Order approving amendments to Commentary .01(a) to Rule 5.2(j)(3) to exclude Derivative Securities Products from certain provisions of Commentary .01(a) (which exclusions are similar to those in Commentary .01(a)(1) to Rule 8.600–E), the Commission stated that ''based on the trading characteristics of Derivative Securities Products, it may be difficult for component Derivative Securities Products to satisfy certain quantitative index criteria, such as the minimum market value and trading volume limitations.'' The Exchange notes that it would be difficult or impossible to apply to mutual fund shares certain of the generic quantitative criteria (*e.g.,* market capitalization, trading volume, or portfolio criteria) in Commentary .01(a)(1) (A) through (D) applicable to U.S. Component Stocks. For example, the requirements for U.S. Component Stocks in Commentary .01(a)(1)(B) that there be minimum monthly trading volume of 250,000 shares, or minimum notional volume traded per month of $25,000,000, averaged over the last six months are tailored to exchange-traded securities (*i.e.,* U.S. Component Stocks) and not to mutual fund shares, which do not trade in the secondary market and for which no such volume information is reported. In addition, Commentary .01(a)(1)(A) relating to minimum market value of portfolio component stocks, Commentary .01(a)(1)(C) relating to weighting of portfolio component stocks, and Commentary .01(a)(1)(D) relating to minimum number of portfolio components are not appropriately applied to open-end management investment company securities; open-end investment companies hold multiple individual securities as disclosed publicly in accordance with the 1940 Act, and application of Commentary .01(a)(1)(A) through (D) would not serve the purposes served with respect to U.S. Component Stocks, namely, to establish minimum liquidity and diversification criteria for U.S. Component Stocks held by series of Managed Fund Shares.

Other than Commentary .01(a)(1) and (d)(2) to Rule 8.600–E, as described above, the Fund's portfolio will meet all other requirements of Rule 8.600–E.

Availability of Information

The Fund's website (*www.kraneshares.com*) will include 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) daily trading volume, the prior business day's reported closing price, NAV and midpoint of the bid/ask spread at the time of calculation of such NAV (the ''Bid/Ask Price''),[34] and a calculation of the premium and discount of the 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. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its website the Disclosed Portfolio as defined in NYSE Arca Rule 8.600–E(c)(2) that forms the basis for the Fund's calculation of NAV at the end of the business day.[35]

On a daily basis, the Fund will disclose the information required under NYSE Arca Rule 8.600–E(c)(2) to the extent applicable. The website information will be publicly available at no charge.

In addition, a basket composition file, which includes the security names and share quantities, if applicable, required to be delivered in exchange for the Fund's Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the Exchange via the NSCC. The basket represents one Creation Unit of the Fund. Authorized Participants may refer to the basket composition file for information regarding financial instruments that may comprise the Fund's basket on a given day.

Investors can also obtain the Trust's Statement of Additional Information (''SAI''), the Fund's Shareholder Reports, and the Fund's Forms N–CSR and N–CEN and Forms N–PORT, filed twice a year. The Fund's SAI and Shareholder Reports will be available free upon request from the Trust, and those documents and the Form N–PX, Form N–CEN and Form N–PORT (formerly Forms N–Q and N–SAR) may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.*

Intra-day and the closing settlement price information regarding carbon credit futures and other U.S. exchange-traded futures will be available from the exchange on which such instruments are traded and from major market data vendors. Spot currency prices and price information regarding currency forwards, debt instruments (other than cash equivalents) and cash equivalents also will be available from major market data vendors. Additionally, the Trade Reporting and Compliance Engine (''TRACE'') of the Financial Industry Regulatory Authority (''FINRA'') will be a source of price information for certain fixed income securities to the extent transactions in such securities are

by Amendment No. 3, to List and Trade Shares of JPMorgan Income Builder Blend ETF under NYSE Arca Rule 8.600–E).

[33] The Commission initially approved the Exchange's proposed rule change to exclude ''Derivative Securities Products'' (*i.e.,* Investment Company Units and securities described in Section 2 of Rule 8) and ''Index-Linked Securities (as described in Rule 5.2–E(j)(6)) from Commentary .01(a)(A)(1) through (4) to Rule 5.2–E(j)(3) in Securities Exchange Act Release No. 57751 (May 1, 2008), 73 FR 25818 (May 7, 2008) (SR–NYSEArca–2008–29) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Amend the Eligibility Criteria for Components of an Index Underlying Investment Company Units)(''2008 Approval Order''). *See also* Securities Exchange Act Release No. 57561 (March 26, 2008), 73 FR 17390 (April 1, 2008) (Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Amend the Eligibility Criteria for Components of an Index Underlying Investment Company Units). The Commission subsequently approved generic criteria applicable to listing and trading of Managed Fund Shares, including exclusions for Derivative Securities Products and Index-Linked Securities in Commentary .01(a)(1)(A) through (D), in Securities Exchange Act Release No. 78397 (July 22, 2016), 81 FR 49320 (July 27, 2016) (Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 7 Thereto, Amending NYSE Arca Rule 8.600–E To Adopt Generic Listing Standards for Managed Fund Shares). *See also* Amendment No. 7 to SR–NYSEArca–2015–110, available at *https://www.sec.gov/comments/sr-nysearca-2015-110/nysearca2015110-9.pdf.*

[34] The Bid/Ask Price of the Fund's Shares will be determined using the mid-point of the highest bid and the lowest offer on the Exchange 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.

[35] Under accounting procedures followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

reported to TRACE.[36] Price information regarding U.S. government securities and other cash equivalents generally may be obtained from brokers and dealers who make markets in such securities or through nationally recognized pricing services through subscription agreements. The Index price is available via Bloomberg and Reuters. The Index methodology and constituent list is available via IHS Markit's website (*https://indices.ihsmarkit.com*).

Quote and last-sale information for Carbon Futures, futures that are not Carbon Futures and options on futures are widely disseminated through major market data vendors and from the exchange on which they trade. ICE Futures US, ICE Futures Europe and CME also provide delayed futures information on current and past trading sessions and market news on their respective websites.

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. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Price information regarding non-exchange-traded investment company securities is available from major market data vendors.

Quotation and last sale information for the Shares, ETFs and ETNs will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the Portfolio Indicative Value (''PIV''), as defined in NYSE Arca Rule 8.600–E(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session.

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.[37] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Fund's Shares also will be subject to Rule 8.600–E(d)(2)(D) (''Trading Halts'').

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 NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m., E.T. in accordance with NYSE Arca Rule 7.34–E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

With the exception of the requirements of Commentary .01(a)(1) with respect to the Fund's investments in non-exchange-traded investment company securities and Commentary .01(d)(2) (with respect to listed derivatives) to Rule 8.600–E as described above in ''Application of Generic Listing Requirements,'' the Shares of the Fund will conform to the initial and continued listing criteria under NYSE Arca Rule 8.600–E. Consistent with NYSE Arca Rule 8.600–E(d)(2)(B)(ii), the Adviser will implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the Fund's portfolio. The Exchange represents that, for initial and continued listing, the Fund will be in compliance with Rule 10A–3 [38] under the Act, as provided by NYSE Arca Rule 5.3–E. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. The Fund's investments will be consistent with its investment goal and will not be used to provide multiple returns of a benchmark or to produce leveraged returns.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by FINRA on behalf of the Exchange, or by regulatory staff of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.[39]

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, ETFs, ETNs, certain futures and options on 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 in such securities and financial instruments from such markets and other entities.[40] In addition, the Exchange may obtain information regarding trading in such securities and financial instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing

[36] For fixed income securities that are not reported to TRACE, (i) intraday price quotations will generally be available from broker-dealers and trading platforms (as applicable) and (ii) price information will be available from feeds from market data vendors, published or other public sources, or online information services, as described above.

[37] *See* NYSE Arca Rule 7.12–E.

[38] 17 CFR 240.10A–3.

[39] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[40] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that certain Index components and holdings of the Fund may not be listed or traded on ISG exchanges.

requirements for listing the Shares of the Fund on the Exchange.

The issuer must notify 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 Act, the Exchange will monitor 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 NYSE Arca Rule 5.5–E (m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Early and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (4) how information regarding the PIV and the Disclosed Portfolio is disseminated; (5) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin 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 basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[41] that an exchange have rules that are 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, in general, to protect investors and the public interest.

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 NYSE Arca Rule 8.600–E notwithstanding that the Fund will not comply with the requirement in Commentary .01 (a)(1) and Commentary .01(d)(2) to Rule 8.600–E, as described herein.

The Exchange believes that sufficient protections are in place to protect against market manipulation of the Shares and Carbon Futures due to, among other matters (a) the liquidity and market capitalization of Carbon Futures, including EUA futures, CCA futures and RGGI futures,[42] and (b) surveillance by the Exchange and FINRA of the Shares and futures designed to detect violations of the federal securities laws and self-regulatory organization rules. The current Carbon Futures—*i.e.,* EUA futures, CCA futures, RGGI futures—trade in competitive auction markets with price, quote transparency and arbitrage opportunities. Any additional carbon credit futures contracts that enter the Index will have an average monthly trading volume for the six month look-back period prior to the annual rebalancing date that is a minimum of $10,000,000 as of November 30th of a given year, and will be traded on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Further, the Exchange believes that because the assets in the Fund's portfolio will be acquired in extremely liquid and highly regulated markets, the Shares are less readily susceptible to manipulation. EUA futures, CCA futures and RGGI futures are traded on ISG markets.

The Exchange believes that these factors, coupled with the highly regulated EUA, CCA and RGGI markets, are sufficiently great to deter fraudulent [sic] and market manipulation. The Exchange also believes that such liquidity is sufficient to support the creation and redemption mechanism.

The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, ETFs, ETNs, certain futures and options on 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 in such securities and financial instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in such securities and financial instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.

The Adviser and Sub-Adviser are not registered as broker-dealers, but the Adviser is affiliated with a broker-dealer, and has implemented and will maintain a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio. The Sub-Adviser is not affiliated with a broker-dealer.

The Exchange notes that the Commission has previously approved listing and trading on the Exchange under NYSE Arca Rule 8.204–E (Commodity Futures Trust Shares) of a trust with the investment objective of providing investment results that correspond generally to the performance of carbon credit futures on EUAs.[43] Other than cash and cash equivalents, the AirShares Trust sought investment exposure exclusively to carbon credit futures on EUAs. Thus, the Commission has already considered and approved for listing a product with the same types of assets in which the Fund will invest.

The Exchange notes that the Commission has approved proposed rule changes by a national securities exchange to list and trade series of Managed Fund Shares that may hold listed derivatives on underlying reference assets that may not comply with provisions similar to those in Commentary .01(d)(2) to Rule 8.600–E.[44] In addition, the Exchange believes that the listing and trading of Shares of the Fund would further an interest in the U.S. maintaining a competitive position in the global securities markets, which requires that U.S. participants respond to new developments and encourage the development of new products. Innovative financial vehicles such as the Fund will provide investors

[41] 15 U.S.C. 78f(b)(5).

[42] *See* note 28, *supra.*

[43] *See* note 30, *supra.*

[44] *See* note 29, *supra.*

greater access to U.S. markets. By providing a wide range of investors with a U.S. exchange-traded security that primarily invests in Carbon Futures, the Exchange believes that the listing of the Fund will benefit both investors and the markets.

As noted above, the Fund may invest in shares of non-exchange-traded investment company securities, which are equity securities. Therefore, to the extent the Fund invests in shares of non-exchange-traded open-end management investment company securities, the Fund will not comply with the requirements of Commentary .01(a)(1)(A) through (E) to NYSE Arca Rule 8.600–E (U.S. Component Stocks) with respect to its equity securities holdings.[45] The Exchange believes it is appropriate and in the public interest to approve listing and trading of Shares of the Fund notwithstanding that the Fund's holdings in such securities would not meet the requirements of Commentary .01(a)(1)(A) through (E) to Rule 8.600–E. Investments in non-exchange-traded open-end management investment company securities will not exceed 20% of the total assets of the Fund. Such investments, which may include mutual funds that invest, for example, principally in fixed income securities, would be utilized to help the Fund meet its investment objective and to equitize cash in the short term. The Fund will invest in such securities only to the extent that those investments would be consistent with the requirements of Section 12(d)(1) of the 1940 Act and the rules thereunder. Because such securities must satisfy applicable 1940 Act diversification requirements, and have a net asset value based on the value of securities and financial assets the investment company holds, it is both unnecessary and inappropriate to apply to such investment company securities the criteria in Commentary .01(a)(1). The Commission has previously approved proposed rule changes under Section 19(b) of the Act for series of Managed Fund Shares that may invest in non-exchange traded investment company securities to the extent permitted by Section 12(d)(1) of the 1940 Act and the rules thereunder.[46]

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 from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Intra-day and the closing settlement price information regarding carbon credit futures and other U.S. exchange-traded futures will be available from the exchange on which such instruments are traded and from major market data vendors. Spot currency prices and price information regarding currency forwards, debt instruments (other than cash equivalents) and cash equivalents also will be available from major market data vendors. Additionally, FINRA's TRACE will be a source of price information for certain fixed income securities to the extent transactions in such securities are reported to TRACE. Price information regarding U.S. government securities and other cash equivalents generally may be obtained from brokers and dealers who make markets in such securities or through nationally recognized pricing services through subscription agreements. The Index price is available via Bloomberg and Reuters. The Index methodology and constituent list is available via IHS Markit's website.

Quote and last-sale information for Carbon Futures, futures that are not Carbon Futures and options on futures are widely disseminated through major market data vendors and from the exchange on which they trade. ICE Futures US, ICE Futures Europe and CME also provide delayed futures information on current and past trading sessions and market news on their respective websites.

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. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Price information regarding non-exchange-traded investment company securities is available from major market data vendors.

Quotation and last sale information for the Shares, ETFs and ETNs will be available via the CTA. In addition, the PIV, as defined in NYSE Arca Rule 8.600–E(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session.

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to NYSE Arca Rule 8.600–E (d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, NAV, the PIV, the Disclosed Portfolio, and quotation and last sale information for the Shares.

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, through permitted use of an increased level of listed derivatives above that currently permitted by the generic listing requirements of Commentary .01(d)(2) to NYSE Arca Rule 8.600–E, and through investment in non-exchange-traded investment company securities (notwithstanding the requirements of Commentary .01(a)(1) to NYSE Arca Rule 8.600–E), 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 have ready access to information regarding the Fund's holdings, the PIV, the Disclosed Portfolio, and quotation and last sale information for the Shares.

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 will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace.

[45] *See* note 31, *supra.*

[46] *See* note 32, *supra.*

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. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 4, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[47] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 4, is consistent with Section 6(b)(5) of the Act,[48] which requires, among other things, that the Exchange's rules be 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.

According to the Exchange, other than Commentary .01(a)(1) with respect to the Fund's investments in non-exchange-traded investment company securities and Commentary .01(d)(2) with respect to the Fund's and the Subsidiary's investments in Carbon Futures, as described above, the Fund's portfolio will meet all other requirements of NYSE Arca Rule 8.600–E, and the Shares of the Fund will conform to the initial and continued listing criteria under NYSE Arca Rule 8.600–E.

With respect to the Fund's investments in shares of non-exchange-traded open-end management investment company securities, which will not comply with Commentary .01(a)(1) to NYSE Arca Rule 8.600–E,[49] the Commission notes that: (1) Such securities must satisfy applicable 1940 Act diversification requirements; and (2) the value of such securities is based on the value of securities and financial assets held by those investment companies.[50] In addition, the Exchange states that investments in non-exchange-traded open-end management investment company securities will not exceed 20% of the total assets of the Fund.[51] The Commission therefore believes that the Fund's investments in non-exchange-traded open-end management investment company securities would not make the Shares susceptible to fraudulent or manipulative acts and practices.[52]

With respect to the Fund's investments in Carbon Futures, which may be up to 100% of the weight of the portfolio (as measured by gross notional exposure), and will not comply with Commentary .01(d)(2) to NYSE Arca Rule 8.600–E,[53] the Commission notes that the Exchange has represented that the markets for Carbon Futures are sufficiently liquid and highly regulated.[54] In addition, the Exchange represents that at least 90% of the weight of listed derivatives utilized by the Fund will be traded on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement, and that all Carbon Futures are currently traded on ISG markets. The Exchange also represents 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. Moreover, the Exchange, represents that the Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed, and may obtain information regarding, trading in the Shares, ETFs, ETNs, certain futures and options on futures with other markets and other entities that are members of the ISG, and that the Exchange may obtain information regarding trading in such securities and financial instruments from markets and other entities with which the Exchange has in place a comprehensive surveillance sharing agreement. For the foregoing reasons, the Commission believes that the Fund's investments in Carbon Futures would not make the Shares susceptible to fraudulent or manipulative acts and practices.

The Exchange represents that all statements and representations made in the filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in the filing shall constitute continued listing requirements for listing the Shares of the Fund on the Exchange. In addition, 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 Act, the Exchange will monitor [55] 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 NYSE Arca Rule 5.5–E(m).

This approval order is based on all of the Exchange's representations, including those set forth above and in Amendment No. 4. For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 4, is consistent with Section 6(b)(5) of the Act [56] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Solicitation of Comments on Amendment No. 4 to the Proposed Rule Change

Interested persons are invited to submit written views, data, and arguments concerning whether Amendment No. 4 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

[47] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[48] 15 U.S.C. 78f(b)(5).

[49] *See supra* note 31.

[50] *See supra* Section II.A.2.

[51] *See id.*

[52] The Commission notes it has approved other exchange-traded funds that can hold non-exchange-traded open-end management investment company securities in a manner that does not comply with Commentary .01(a)(1) to Rule 8.600–E. *See, e.g.,* Securities Exchange Act Release No. 86362 (July 12, 2019), 84 FR 34457 (July 18, 2019) (SR–NYSEArca-2019–36).

[53] *See supra* note 27.

[54] The Exchange states that the carbon credit futures issued under the carbon credit regimes currently included in the Index (*i.e.,* carbon credit futures on EUA, CCA, and RGGI) trade on ISG markets and are currently the largest and most liquid futures markets on carbon offset credits. *See supra* note 28. In addition, the Exchange represents that any additional carbon credit futures contracts that enter the Index will have an average monthly trading volume for the six month look-back period prior to the annual rebalancing date that is a minimum of $10,000,000 as of November 30th of a given year, and will be traded on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[55] The Commission notes that certain proposals for the listing and trading of exchange-traded products include a representation that the exchange will ''surveil'' for compliance with the continued listing requirements. *See, e.g.,* Securities Exchange Act Release No. 77499 (April 1, 2016), 81 FR 20428, 20432 (April 7, 2016) (SR–BATS–2016–04). In the context of this representation, it is the Commission's view that ''monitor'' and ''surveil'' both mean ongoing oversight of compliance with the continued listing requirements. Therefore, the Commission does not view ''monitor'' as a more or less stringent obligation than ''surveil'' with respect to the continued listing requirements.

[56] 15 U.S.C. 78f(b)(5).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca-2019–60 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2019–60. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2019–60 and should be submitted on or before March 18, 2020.

V. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 4

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 4, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 4 in the **Federal Register**. The Commission notes that Amendment No. 4 clarified the investments of the Fund and the application of NYSE Arca Rule 8.600–E, Commentary .01 to the Fund's investments. Amendment No. 4 also provided other clarifications and additional information related to the proposed rule change. The changes and additional information in Amendment No. 4 assist the Commission in evaluating the Exchange's proposal and in determining that it is consistent with the Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[57] to approve the proposed rule change, as modified by Amendment No. 4, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[58] that the proposed rule change (SR–NYSEArca–2019–60), as modified by Amendment No. 4, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[59]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–03774 Filed 2–25–20; 8:45 am]

BILLING CODE 8011–01–P

[57] 15 U.S.C. 78s(b)(2).

[58] *Id.*

[59] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88254; File No. SR–FINRA–2019–027]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Amend FINRA Rule 12000 Series To Expand Options Available to Customers if a Firm or Associated Person Is or Becomes Inactive

February 20, 2020.

I. Introduction

On November 5, 2019, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rules 12100, 12202, 12214, 12309, 12400, 12601, 12702, 12801, and 12900 of the Code of Arbitration Procedure for Customer Disputes (''Customer Code'' or ''Code'') to expand a customer's options to withdraw an arbitration claim if a member or an associated person becomes inactive before a claim is filed or during a pending arbitration. In addition, the proposed amendments would allow customers to amend pleadings, postpone hearings, request default proceedings, and receive a refund of filing fees in these situations.

The proposed rule change was published for comment in the **Federal Register** on November 22, 2019.[3] The public comment period closed on December 13, 2019. The Commission received five comment letters in response to the Notice.[4] On February 11, 2020, FINRA responded to the comment letters received in response to the Notice.[5] On December 18, 2019, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to February 20, 2020.[6] This order approves the proposed rule change.

II. Description of the Proposed Rule Change [7]

Background

Firms and individuals whose FINRA registration has been terminated, suspended, cancelled, or revoked, or who have been expelled from FINRA are generally referred to as ''inactive,'' and are no longer FINRA members or associated with a FINRA member, although they may continue to operate in another area of the financial services industry where FINRA registration is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 87577 (Nov. 18, 2019), 84 FR 64581 (Nov. 22, 2019) (File No. SR–FINRA–2019–027) (''Notice'').

[4] *See* Letter from Steven B. Caruso, Maddox Hargett Caruso, P.C., dated November 19, 2019 (''Caruso Letter''); letter from Benjamin P. Edwards, Associate Professor of Law, University of Nevada, Las Vegas, December 11, 2019 (''Edwards Letter''); letter from Kevin M. Carroll, Managing Director and Associate General Counsel, SIFMA, December 12, 2019 (''SIFMA Letter''); letter from Samuel B. Edwards, President, Public Investors Arbitration Bar Association (''PIABA''), December 13, 2019 (''PIABA Letter''); and letter from Robin M. Traxler, Senior Vice President, Policy & Deputy General Counsel, Financial Services Institute (''FSI''), December 13, 2019 (''FSI Letter''). Comment letters are available on the Commission's website at *https://www.sec.gov.*

[5] *See* Letter from Mignon McLemore, Assistant General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, dated February 11, 2020 (''FINRA Letter''). The FINRA Letter is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA, at the Commission's website at *https://www.sec.gov/comments/sr-finra-2019-027/srfinra2019027-6796335-208356.pdf,* and at the Commission's Public Reference Room.

[6] *See* Letter from Mignon McLemore, Assistant General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, U.S. Securities and Exchange Commission, dated December 18, 2019.

[7] The subsequent description of the proposed rule change is substantially excerpted from FINRA's description in the Notice. *See* Notice, 83 FR at 64581–64583.

not required. Firms and individuals can become inactive prior to an arbitration claim being filed, during an arbitration proceeding, or subsequent to an arbitration award, and this status can be caused by FINRA action, such as when a firm or individual is suspended for failing to pay an award, or by the firm's or individual's own voluntary action.[8]

Current FINRA arbitration rules provide options to a customer when dealing with those members or associated persons that are inactive either at the time the claim is filed or at the time of the award. For example, when a customer claimant first files an arbitration claim, FINRA alerts, by letter, the customer claimant if the respondent, whether a member or an associated person, is inactive. FINRA also informs the claimant that awards against such members or associated persons have a much higher incidence of non-payment and that FINRA has limited disciplinary leverage over inactive members or associated persons that fail to pay arbitration awards. Thus, the customer knows before pursuing the claim in arbitration that collection of an award may be more difficult. In addition, upon learning that the member or associated person is inactive, a customer may determine to amend his or her claim to add other respondents from whom the customer may be able to collect should the claim go to award.

Proposed Rule Change

FINRA is proposing to amend the Customer Code to expand further the options available to customers in situations where a firm becomes inactive during a pending arbitration, or where an associated person becomes inactive either before a claim is filed or during a pending arbitration. In particular, FINRA is proposing to amend the Code to allow customers to amend pleadings, postpone hearings, request default proceedings and receive a refund of filing fees if the customer withdraws the claim under these situations.

A. Arbitrating Claims Against Inactive Members and Associated Persons

Currently, under FINRA Rule 12202 (Claims Against Inactive Members), a customer's claim against a firm whose membership is terminated, suspended, cancelled or revoked, or that has been expelled from FINRA, or that is otherwise defunct, is ineligible for arbitration unless the customer agrees in writing to arbitrate after the claim arises.[9] The Code does not address situations, however, where a member firm becomes inactive during a pending arbitration. In addition, the Code does not provide specific procedures for a customer to withdraw a claim against an associated person who becomes inactive before the customer files a claim or during a pending arbitration.

Accordingly, FINRA is proposing to amend FINRA Rule 12202 to expand a customer's option to withdraw a claim to situations where a member becomes inactive during a pending arbitration, or where an associated person becomes inactive either before a claim is filed or during a pending arbitration. Under the proposal, FINRA Rule 12202 would specify that a customer's claim against an associated person who is inactive at the time the claim is filed is ineligible for arbitration unless the customer agrees in writing to arbitrate after the claim arises. In addition, as amended Rule 12202 would specify that if a member or an associated person becomes inactive during a pending arbitration, FINRA would notify the customer of the status change, and provide the customer with 60 days to withdraw the claim(s) with or without prejudice.[10]

FINRA believes that similar to the current rules and procedures relating to claims filed against inactive members, the proposed amendments would allow the customer to evaluate the likelihood of collecting on an award and make an informed decision whether to proceed in arbitration, to file the claim in court or to take no action, regardless of whether the customer signed a predispute arbitration agreement.

In addition, FINRA is proposing to amend FINRA Rule 12100 (Definitions) to add definitions of ''inactive member'' and ''inactive associated person.'' Consistent with current Rule 12202, FINRA proposed to define an ''inactive member'' as a member whose membership is terminated, suspended, cancelled or revoked, that has been expelled or barred[11] from FINRA, or that is otherwise defunct.[12]

Under the proposed rule change, an ''inactive associated person'' would be defined as a person associated with a member whose registration is revoked, cancelled, or suspended, who has been expelled or barred from FINRA, or whose registration has been terminated for a minimum of 365 days.[13] Thus, if an associated person's registration is not revoked, cancelled, or suspended, the person has not been expelled or barred from FINRA, and the individual's registration has been terminated for less than one year, the individual would not be classified as terminated and, therefore, would not be deemed inactive.

FINRA believes the 365-day minimum termination requirement for associated persons would help ensure that enough time has elapsed to assume reasonably that the associated person has permanently left the securities industry. FINRA further believes that the proposed requirement would allow enough time for those associated persons who may have temporarily left the industry to return before the arbitration closes.[14]

B. Amending Pleadings

Currently, FINRA Rule 12309 (Amending Pleadings) limits a party's ability to amend a statement of claim, among other pleadings, after FINRA has appointed a panel to the case. Specifically, once FINRA appoints a panel to a case, a party can amend a pleading only if the arbitrators grant a party's motion to do so. Current FINRA Rule 12309 also provides that a party cannot add a new party to the case after arbitrator ranking lists are due to the Director of Arbitration until FINRA appoints the panel and the arbitrators grant a party's motion to add the new party.

[8] *See* FINRA Rule 9554 (Failure to Comply with an Arbitration Award or Related Settlement or an Order of Restitution or Settlement Providing for Restitution).

[9] If the customer notifies FINRA in writing that he or she does not want to proceed against the inactive member in FINRA's forum, FINRA deems the customer's agreement to submit to arbitration rescinded and sends the customer a full refund of any filing fee remitted.

[10] FINRA Rule 12702 (Withdrawal of Claims) provides that before a party answers a statement of claim, the claimant can withdraw the claim with or without prejudice. However, after a party submits an answer, the claimant can only withdraw the claim with prejudice unless the panel or the parties agree otherwise. FINRA is proposing to make a conforming change to FINRA Rule 12702 to provide that a customer can withdraw a claim without prejudice if the party that submitted an answer is an inactive member or inactive associated person. Withdrawal without prejudice would allow the customer to re-file the arbitration at a later date.

[11] FINRA is proposing to add ''or barred'' to the definition of an ''inactive member'' to capture that a member may be inactive due to a bar.

[12] The proposed rule change would amend the definition of ''member'' under the Customer Code, the Code of Arbitration Procedure for Industry Disputes (''Industry Code''), and in Article I of the By-Laws of FINRA Regulation, Inc. to conform the definition to the proposed definition of an ''inactive member'' as discussed below. FINRA believes the proposed changes would make the definition of ''member'' consistent in the FINRA rules that apply to FINRA's arbitration forum.

[13] *See* Proposed Rule 12100(r).

[14] As stated in the Notice, termination, in some cases, may be a voluntary action that can be of short duration. For instance, in FINRA's analysis of 2,054 customer cases closed by hearing, on the papers, or by stipulated award from 2014 to 2018, FINRA identified 78 cases where an associated person was not in the industry while the arbitration was pending but returned to the industry in fewer than 365 days. *See* Notice at note 25.

FINRA believes that a customer should be able to change his or her litigation strategy during a pending case once the customer learns that a firm or an associated person has become inactive. Accordingly, FINRA is proposing to amend FINRA Rule 12309 to provide that if FINRA notifies a customer that a firm or an associated person has become inactive during a pending arbitration, the customer may amend a pleading, including adding a new party, within 60 days of receiving such notice.[15]

C. Postponing Hearings

Currently, FINRA Rule 12601 (Postponement of Hearings) addresses when a scheduled hearing date can be postponed. Specifically, the parties can agree to postpone a hearing. In addition, a hearing can be postponed by FINRA in extraordinary circumstances, by the arbitrators at their discretion, or by the arbitrators upon a party's motion.

FINRA is proposing to amend FINRA Rule 12601 to provide that if FINRA notifies a customer that a firm or an associated person has become inactive and the scheduled hearing date is within 60 days of the date the customer receives the notice from FINRA, the customer may postpone the hearing date. FINRA believes that since the proposed amendment would provide a customer with 60 days to determine how to proceed after FINRA notifies the customer of the status change to inactive, it would be appropriate to allow the customer to postpone a scheduled hearing that falls within that time period.

In addition, FINRA currently assesses postponement fees against the parties for each postponement agreed to by the parties, or granted upon the request of one or more parties. FINRA also charges an additional fee of $600 per arbitrator if a postponement takes place within 10 days of a scheduled hearing date. The additional $600 per arbitrator fee is paid to the arbitrators to compensate them for the late adjournment.[16]

FINRA is proposing to amend FINRA Rule 12601 to provide that if FINRA notifies a customer that a firm or an associated person has become inactive and the scheduled hearing date is within 60 days of the date the customer receives the notice from FINRA, FINRA would not charge the customer a postponement fee or an additional fee of $600 per arbitrator if a customer chooses to postpone a scheduled hearing. FINRA also is proposing to amend FINRA Rule 12214 to provide that it would continue to pay the $600 honoraria to the arbitrators to compensate them for their time if a customer chooses to postpone a scheduled hearing within 10 days before it is scheduled because the customer learns that the firm or associated person has become inactive.

D. Default Proceedings

Currently, FINRA Rule 12801 (Default Proceedings) permits a claimant to request default proceedings against any respondent whose registration is terminated, revoked or suspended, and who failed to file an answer[17] to a claim within the time provided in the Code. A single arbitrator will decide the case based on the claimant's pleadings and other documentation.[18] The claimants must present a sufficient basis to support the making of an award.[19] The arbitrator may not issue an award based solely on the nonappearance of a party.[20]

As noted, the proposed amendments would define an inactive associated person as a person associated with a member whose registration is revoked, cancelled, or suspended, who has been expelled or barred from FINRA, or whose registration has been terminated for a minimum of 365 days. In the context of a default proceeding, FINRA believes that it would be appropriate to continue to allow a customer to request default proceedings against any terminated associated person who fails to answer a claim, regardless of how long the associated person has been terminated, consistent with the existing rule. Accordingly, FINRA is proposing to amend FINRA Rule 12801(a) to specify that a claimant may request a default proceeding against a terminated associated person who fails to file an answer within the time provided in the Code regardless of the number of days since termination.

E. Refunding Filing Fees

Currently, FINRA Rule 12900 (Fees Due When a Claim is Filed) specifies that if a claim is settled or withdrawn more than 10 days before the date that the hearing is scheduled to begin, a party paying a filing fee will receive a partial refund of the filing fee. The rule also provides that FINRA will not refund any portion of the filing fee if a claim is settled or withdrawn within 10 days of the date that the hearing is scheduled to begin.

FINRA is proposing to amend FINRA Rule 12900 to provide that FINRA would refund a customer's full filing fee if FINRA notifies a customer that a firm or an associated person has become inactive during a pending arbitration, and the customer withdraws the case against all parties within 60 days of the notification. FINRA would refund the filing fee even if the customer withdraws the case within 10 days of the date that the hearing is scheduled to begin.

F. Non-Substantive Changes

FINRA is proposing to amend the Code to update cross-references and make other non-substantive, technical changes to the rules impacted by the proposal.

III. Comment Summary

The Commission received five comment letters on the proposed rule change.[21] One commenter fully supported the proposed rule change.[22] Three of the commenters generally supported the proposed rule change, but suggested further changes to address unpaid arbitration awards and other matters.[23] The fifth commenter did not support the proposal, stating that the proposal did not do enough to address the issue of unpaid arbitration awards.[24]

Supporting the Proposal

Four commenters supported the proposed rule change as expanding the options available to customers in arbitration proceedings.[25] One commenter believes that the amendments in the proposed rule change ''address a scenario that is not currently addressed in FINRA rules and, as such, brings important clarity to the arbitration process.'' [26] Another commenter generally supported the proposed amendments ''to allow

[15] Proposed FINRA Rule 12309(d) would permit any party to file a response to an amended pleading, provided the response is filed and served within 20 days of receipt of the amended pleading, unless the panel determines otherwise. Thus, the newly-added party could file a response to the amended pleading for the panel or arbitrator to consider.

[16] *See* FINRA Rule 12214 (Payment of Arbitrators).

[17] A respondent must serve each party with a signed and dated Submission Agreement and answer specifying the relevant facts and available defenses to the statement of claim within 45 days of receipt of the statement of claim. *See* FINRA Rule 12303(a).

[18] *See* FINRA Rule 12801(b)(2)(B). No hearings are held in default proceedings unless the customer requests one. *See* FINRA Rule 12801(c).

[19] *See* FINRA Rule 12801(e)(1).

[20] *Id.* If the defaulting respondent files an answer before an award has been issued, the proceedings against this respondent will be terminated and the claim will proceed under the regular provisions of the Code. *See* FINRA Rule 12801(f).

[21] *See supra* note 4.

[22] *See* Caruso Letter.

[23] *See* FSI Letter, SIFMA Letter, and PIABA Letter.

[24] *See* Edwards Letter.

[25] *See* Caruso Letter, FSI Letter, SIFMA Letter, and PIABA Letter.

[26] FSI Letter.

customers to withdraw a claim, amend pleadings, postpone hearings, invoke expedited default proceedings, and receive a refund of filing fees'' as ''an appropriate expansion of claimant protections.'' [27] Another commenter believes the amendments would ''expand options for customers in pursuing and attempting to collect money awarded to them against industry respondents in arbitration proceedings,'' although it described these amendment as addressing ''minor problems.'' [28] Finally, one commenter believes that ''the proposed rule filing would enhance the ability of customers to evaluate the likelihood of collecting on an award and to make an informed decision whether to proceed in arbitration, to file the claim in court or to take no action.'' [29]

In addition, two commenters supported the proposed rule change because they believe it will help address unpaid arbitration awards.[30] One commenter noted that ''the proposed amendments recognize that most unpaid customer arbitration awards are rendered against firms or individuals whose FINRA registrations have either been terminated, suspended, cancelled or revoked, or who have been expelled from FINRA.'' [31] The commenter believes that addressing this recognition ''clearly serves to protect investors and the public interest by expanding the options available to customers with claims against brokerage firms and individual brokers who are unlikely to pay arbitration awards that may be issued against them.'' [32] Another commenter stated that its support of the proposed rule change was ''predicated on FINRA's stated purpose of the Proposal—namely, to facilitate 'dealing with those member firms or associated persons who are responsible for most unpaid awards—firms and associated persons who are no longer in business either at the time the claim is filed or at the time of the award.' '' [33] That commenter also stated that it ''agree[s] that the Proposal would probably help address the issue of unpaid arbitration awards.'' [34]

Proposal Is Insufficient

Three commenters stated that the proposal does not address the problem of unpaid arbitration awards in a meaningful way and urged FINRA to take further action.[35] One of these commenters stated that the proposal ''fails to address the major problem faced by victims of thinly capitalized broker-dealer firms: That judgements against them are often rendered valueless'' [36] and recommended FINRA establish a national recovery pool.[37] Another commenter claimed that the proposal ''nibble[s] around the edge of the issue'' and fails to ''require firms to acquire insurance to bear the costs of their operations or to maintain significant capital reserves.'' [38] A third commenter believed that the proposal does not ''improve investors' ability to collect arbitration awards against inactive FINRA members or reduce instances of unpaid arbitration awards by inactive FINRA members.'' [39]

In response, FINRA stated that the proposed rule change is ''intended to expand the options available to a customer when dealing with those members or associated persons that are inactive at the time a claim is filed or become inactive during a pending arbitration.'' [40] Accordingly, FINRA believes that a commenter's recommendation to create a national recovery pool is outside the scope of this proposal.[41] However, FINRA also stated that the proposal represents just ''one of the ways it is proceeding to implement additional steps to strengthen its rules relating to the important but complex topic of customer recovery.'' [42] FINRA noted that, in a separate proposed rule change, it is proposing amendments to its Membership Application Program (''MAP'') rules ''to create further incentives for the timely payment of awards.'' [43] Specifically, the MAP proposal would, among other things, ''prevent a member firm with substantial arbitration claims from avoiding payment of the claims should they go to award or result in a settlement by shifting its assets, which are typically customer accounts, or its managers or owners, to another firm and closing down.'' [44]

In addition, FINRA stated it welcomes continued dialogue about ''addressing the challenges of customer recovery across the financial services industry while directly informing the further enhancement of recovery in FINRA's forum[.]'' [45] For example, FINRA cited to its 2018 White Paper and ''additional data regarding the circumstances under which awards may be unpaid, along with a discussion of potential regulatory and legislative responses.'' [46]

For these reasons, FINRA declined to amend the proposal in response to these commenters.

Expand Proposal to Industry Code

One commenter recommended FINRA expand the proposed rule change to apply not only to customer cases but also to intra-industry cases (*i.e.,* disputes between or among members and associated persons).[47] The commenter stated that unpaid arbitration awards result from both customer and intra-industry cases and, therefore, ''the same arguments that FINRA makes in favor of expanding the options available to a customer claimant when dealing with inactive firms and associated persons apply equally to industry claimants.'' [48]

In response, FINRA acknowledged the commenter's concern but stated that at this time it has decided to focus its attention on customer cases and believes that ''providing customers with more control over the arbitration process when faced with a respondent that likely will not be able to pay an award furthers FINRA's goal of investor protection.'' [49] Accordingly, FINRA declined to amend the proposal in response to the commenter.

[27] SIFMA Letter.

[28] PIABA Letter.

[29] Caruso Letter.

[30] *See* Caruso Letter and SIFMA Letter.

[31] Caruso Letter.

[32] *Id.*

[33] SIFMA Letter.

[34] *Id.*

[35] *See* FSI Letter, PIABA Letter, and Edwards Letter.

[36] PIABA Letter.

[37] *See* PIABA Letter.

[38] Edwards Letter (urging the Commission to require FINRA to propose ''meaningful reforms'' regarding unpaid arbitration). Although the Commission acknowledges that this commenter and others are concerned that the proposed rule change does not sufficiently address the issue of unpaid arbitration awards, we note that FINRA is continuing to consider this issue as well as possible responses to further enhance customer recovery. *See* FINRA Letter.

[39] FSI Letter.

[40] FINRA Letter.

[41] *See* FINRA Letter.

[42] *Id.*

[43] FINRA Letter. *See* Exchange Act Release No. 87810 (Dec. 20, 2019), 84 FR 72088 (Dec. 30, 2019) (Notice of Filing of File No. SR–FINRA–2019–030).

[44] FINRA Letter at note 18.

[45] FINRA Letter.

[46] FINRA Letter. *See* FINRA's White Paper entitled *FINRA Perspectives on Customer Recovery* (February 8, 2018), *https://www.finra.org/sites/default/files/finra_perspectives_on_customer_recovery.pdf* and *https://www.finra.org/arbitration-mediation/statistics-unpaid-customer-awards-finra-arbitration.* In addition, FINRA has published a list of firms and associated persons responsible for unpaid arbitration awards. *See https://www.finra.org/arbitration-mediation/member-firms-and-associated-persons-unpaid-customer-arbitration-awards.* This information also appears on a firm's or individual's BrokerCheck record.

[47] *See* SIFMA Letter; *see also* FINRA Rule 13000 Series (Industry Code).

[48] SIFMA Letter.

[49] FINRA Letter. FINRA also noted, that it welcomes further discussions regarding the circumstances under which awards may be unpaid, along with potential solutions. *See* FINRA Letter; *see also supra* note 46 and accompanying text.

Proposal Creates Imbalance Between Claimants and Respondents

One commenter stated that the proposed rule change creates an imbalance between claimants and respondents. Specifically, the commenter expressed concern that because the proposal permits a claimant to amend its pleading to add a claim or party without the need for pre-approval by an arbitrator or panel, any newly added party would not be able to participate in the arbitrator panel selection process.[50] Similarly, the commenter stated that ''requiring an arbitrator or panel to grant a motion to add a party serves the important purpose of providing the party to be added with an opportunity to object to being added.'' [51] For these reasons, the commenter opposed the elimination of the existing motion requirement for adding a party or amending a pleading.[52]

In response, FINRA stated that the proposal would not change the panel selection process under the current rules.[53] Specifically, ''[i]f a panel grants a motion to amend a pleading to add a new party, the party to be added [currently] does not get to participate in the panel selection process.'' [54] However, FINRA would provide arbitrator disclosure reports of the sitting panelists [55] to any party added after a member or associated person becomes inactive; [56] and, if the party discovers a conflict, the party may file a motion to recuse the arbitrator.[57]

In addition, FINRA believes that ''it is appropriate to remove the requirement that a customer file a motion to amend a pleading after panel appointment if a respondent member firm or associated person has become inactive to help avoid additional costs and delay to the customer.'' [58] FINRA stated that the proposal would not change a party's ability to respond to an amended pleading by filing an answer and raising any available defenses under the current rules.[59] Accordingly, a party added under the proposal would still be able to respond to a pleading.

For these reasons, FINRA declined to amend the proposal in response to the commenter.

IV. Discussion and Commission Findings

After careful review of the proposed rule change and the comment letters, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.[60] Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,[61] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

Public Interest

The Commission agrees with FINRA and those commenters that support the proposed rule change that it will provide customers with expanded options and flexibility to change case strategy if FINRA notifies them that a member or associated person has become inactive during a pending arbitration. Specifically, the proposed rule change would make several modifications to FINRA's rules to address the situation where a member firm becomes inactive during a pending arbitration, allowing customers to amend pleadings, postpone hearings, request default proceedings, and receive a refund of filing fees in that situation. In addition, the proposed rule change would expand customers' options with respect to claims brought against associated persons. Specifically, the proposal would provide customers the same options during a case against inactive associated persons as they would have in a case against inactive members. It would also clarify the default rule to include an inactive associated person who does not answer a claim, regardless of the number of days since termination. As noted above, the Commission agrees that, similar to the current rules and procedures relating to claims filed against inactive members, these proposed changes would allow customers to evaluate the likelihood of collecting on an award and make an informed decision whether to proceed in arbitration, to file the claim in court or to take no action, regardless of whether the customer signed a predispute arbitration agreement.

With respect to one commenter's concern that the proposed rule change does not apply to intra-industry cases,[62] the Commission notes that FINRA welcomes continued dialogue about the challenges of addressing issues related to collecting unpaid arbitration awards in its forum.[63]

Similarly, the Commission acknowledges commenter's concern that the proposed rule change will create an imbalance in the arbitration process between claimants and respondents by: (1) Denying a newly added respondent the opportunity to participate in the arbitrator panel selection process, and (2) precluding a newly added respondent the opportunity to object to being added.[64] The Commission notes FINRA's belief that the proposed rule change does not create such an imbalance because existing rules already provide procedures that offer sufficient protections for respondents added to an arbitration after the panel is appointed, including respondents who would be added as a result of the proposed rule change. In particular, FINRA notes that under existing FINRA rules a newly added respondent would receive reports summarizing the arbitrators' backgrounds and provide respondent with the opportunity to seek recusal of any arbitrator with a conflict of interest. In addition, FINRA notes that the proposed rule change does not change a party's ability to respond to an amended pleading by filing an answer and raising any available defenses.[65]

The Commission acknowledges the commenter's concern that these are insufficient alternatives to respondents participating in the arbitrator selection process or having the ability to respond to a motion prior to being added as a party.[66] The Commission believes,

[50] *See* FSI Letter.

[51] FSI Letter.

[52] *See* FSI Letter.

[53] *See* FINRA Letter.

[54] FINRA Letter. *See generally* Part IV of the Customer Code (Appointment, Disqualification, and Authority of Arbitrators); *see also* Arbitrator Selection, *http://www.finra.org/arbitration-and-mediation/arbitrator-selection. See* FINRA Letter at note 8.

[55] An arbitrator disclosure report is a summary of the arbitrator's background and is provided to the parties to help them make informed decisions during the arbitrator selection process. Whenever a party is added to a claim, the panelists must update their disclosures or review them to ensure that further updates are not warranted. *See* FINRA Letter at notes 9 and 10; *see also* FINRA Rule 12405 (Disclosures Required of Arbitrator).

[56] *See* FINRA Letter.

[57] *See* FINRA Letter; *see also* FINRA Rule 12406 (Arbitrator Recusal).

[58] FINRA Letter.

[59] *See* FINRA Letter; *see also* FINRA Rule 12303 (Answering the Statement of Claim).

[60] In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[61] 15 U.S.C. 78*o*–3(b)(6).

[62] *See* SIFMA Letter.

[63] *See* FINRA Letter.

[64] *See* FSI Letter (stating ''Providing arbitrator disclosure reports of the sitting panelists to an added party and permitting an added party to raise any conflicts they find with the panel is not equivalent to participating in the panel selection process. . . . Permitting a claimant to submit a response to an amended pleading is not equivalent to providing an opportunity to be heard in response to a motion prior to being added as a party.'').

[65] *See* FINRA Letter.

[66] *See* FSI Letter.

however, that despite any potential imbalance it is important that claimants be able to add respondents upon learning that the member or associated person against which she bought the claim is inactive to help ensure that the claimant is able to collect should the claim go to award.[67] In addition, notwithstanding any potential imbalance, the Commission notes FINRA's position that the existing FINRA rules would provide respondents procedural protections in the limited circumstances in which such respondents would be added under to the proposal.

Finally, the Commission acknowledges several commenters' concerns that the proposed rule change will not, in their view, effectively resolve the problems related to unpaid arbitration awards and their proposed enhancements to the proposal, such as requiring a national recovery pool[68] or requiring firms to acquire insurance.[69] As FINRA noted, this the proposal represents only one step in the ongoing process of addressing these issues and that FINRA continues to evaluate further action.

Accordingly, because the proposed rule change will expand the options available to customers in pending arbitrations with claims against respondents who are unlikely to be able to pay, and promote consistency under FINRA's rules, the Commission believes that the proposed rule change is designed to protect investors and the public interest.

V. Conclusion

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act[70] that the proposal (SR–FINRA–2019–027), be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[71]

Jill M. Peterson,

Assistant Secretary.

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[67] *See* PIABA Letter (Supporting the aspect of the proposed rule change that would permit an amendment of the statement of claim, without leave of the arbitration panel because it would permit a customer claimant to pursue claims against potentially collectible respondents.

[68] *See* PIABA Letter.

[69] *See* Edwards Letter.

[70] 15 U.S.C. 78s(b)(2).

[71] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88248; File No. SR–LTSE–2020–04]

Self-Regulatory Organizations; Long-Term Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Annual Membership Fee

February 20, 2020.

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 February 10, 2020, Long-Term Stock Exchange, Inc. (''LTSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

LTSE proposes a rule change to establish an Annual Membership Fee.

The text of the proposed rule change is available at the Exchange's website at *https://longtermstockexchange.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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 is proposing to establish an Annual Membership Fee for Members[3] of the Exchange of $10,000. The Annual Membership Fee is proposed to be assessed on a calendar-year basis and will be due on or before December 31 of the prior year. For example, the Annual Membership Fee for calendar year 2021 will be due on or before December 31, 2020.

However, if a Member is pending a voluntary termination of rights as a Member pursuant to Rule 2.190 prior to the date any Annual Membership Fee for a given year will be due (*i.e.,* December 31) and the Member does not utilize the facilities of the Exchange while such voluntary termination of rights is pending, then the Member will not be obligated to pay the Annual Membership Fee for the upcoming calendar year. The Exchange believes this to be appropriate because there is ordinarily a 30-day waiting period before such resignation shall take effect.

The Annual Membership Fee for a firm that becomes a Member during a calendar year is proposed to be prorated (starting with the next calendar month) based upon the date the firm becomes a Member. For example, if a firm is approved as a Member on July 15, the prorated Annual Membership Fee assessed on such new Member would cover the months of August through December, *i.e.,* five months at $833 for a total of $4,165. Any Annual Membership Fees that are paid are proposed to be non-refundable.

As an inducement for firms to become Members of the Exchange as the Exchange completes the build-out of its trading platform and finalizes compliance with the conditions set forth in the Exchange's approval order,[4] the Exchange proposes to waive the 2020 Annual Membership Fee for any firm that submits its completed membership application prior to the commencement of trading operations. Additional information regarding the Exchange's readiness to commence trading operations and the anticipated start of trading will be announced on its website at *www.longtermstockexchange.com.*

The Exchange does not presently contemplate proposing any application

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means any registered broker or dealer that has been admitted to membership in the Exchange. A Member has the status of a Member of the Exchange as that term is defined in Section 3(a)(3) of the Act. Membership may be granted to a sole proprietor, partnership, corporation, limited liability company, or other organization that is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange. *See* LTSE Rule 1.160(w).

[4] *See* Securities Exchange Act Release No. 34–85828 (May 10, 2019), 84 FR 21841 (May 15, 2019) (File No. 10–234).

fees, trading fees, trading rights or trading permit fees, or so-called ''headcount'' fees.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act [5] in general, and furthers the objectives of Section 6(b)(4) of the Act [6] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act [7] because the proposed rule change is designed 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 is not designed to permit unfair discrimination between customer, issuers, brokers, and dealers.

The Exchange believes that the proposed Annual Membership Fee is reasonable because it is a de minimis expense in relation to the costs of operating a broker-dealer that routes and executes orders across the trading venues that comprise the national market system. The Exchange is offering a novel trading model—the Very Simply Market (''VSM'') [8]—in which all orders would be fully displayed and all trades would occur at displayed prices, thus dispensing with both the need for midpoint executions (*e.g.,* traders accessing non-displayed prices) and complex order types. The Exchange believes that the VSM also would appeal to market makers and other firms who, by virtue of the simple nature of the market, would be able to easily and effectively manage their quoting behavior. In view of these offerings, the Exchange believes that there is value in becoming a Member of the Exchange and that the proposed Annual Membership Fee is reasonable. Moreover, insofar as the Annual Membership Fee is an ''all-in'' fee (*i.e.,* LTSE does not charge—nor does LTSE presently contemplate charging—application fees, trading fees, trading rights fees, or trading permit fees), the Annual Membership Fee is lower than other national securities exchanges that charge such fees.[9] The Exchange also does not charge—nor does it presently contemplate charging—so-called ''headcount fees,'' *e.g.,* fees charged for each Form U–4 filed for registration of a representative or a principal or the transfer or re-licensing of such personnel,[10] further highlighting the reasonableness of the proposed Annual Membership Fee. The proposed Annual Membership Fee might be seen as relatively more reasonable for a Member that conducts more trading on LTSE, but the Exchange believes that the clarity and convenience of a fixed fee—in contrast to fees based on trading volume or the number or type of connections to the exchange—as well the amount of the fee, makes the proposed rule change reasonable.

The Exchange believes that the proposed Annual Membership Fee is not unfairly discriminatory because it would be assessed equally across all Members or firms that seek to become Members. The Exchange believes that the proposed Annual Membership Fee is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange.[11] The vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether membership in LTSE is appropriate and worthwhile, and no broker-dealer is required to become a member of the Exchange.[12]

The Exchange further believes that the proposed fees would be an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and are not unfairly discriminatory. As the Commission noted in its Concept Release Concerning Self-Regulation:

The Commission to date has not issued detailed rules specifying proper funding levels of [self-regulatory organization (''SRO'')] regulatory programs, or how costs should be allocated among the various SRO constituencies. Rather, the Commission has examined the SROs to determine whether they are complying with their statutory responsibilities. This approach was developed in response to the diverse characteristics and roles of the various SROs and the markets they operate. The mechanics of SRO funding, including the amount of revenue that is spent on regulation and how that amount is allocated among various regulatory operations, is related to the type of market that an SRO is operating. . . . Thus, each SRO and its financial structure is, to a certain extent, unique. While this uniqueness can result in different levels of SRO funding across markets, it also is a reflection of one of the primary underpinnings of the National Market System. Specifically, by fostering an environment in which diverse markets with diverse business models compete within a unified National Market System, investors and market participants benefit.[13]

The Exchange's proposed funding model relies primarily on issuers, who would pay listing fees,[14] and Members, who would pay annual membership fees. Thus, the proposed rule change has broker-dealers sharing in the costs of operating the Exchange. Over time, the Exchange can assess whether the apportionment of fees among its various constituencies, but the approach outlined in the proposed rule change aligns with a new exchange that is seeking to attract members amidst a highly competitive landscape. Indeed, for this reason, the Exchange proposes to waive the Annual Membership Fee for calendar year 2020 for any firm submitting a completed membership application before the Exchange

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] *See* Securities Exchange Act Release No. 34–87221 (October 3, 2019), 84 FR 54195 (October 9, 2019) (SR–LTSE–2019–02).

[9] For example, NYSE's annual trading license fee for member organizations ranges from $25,000 to $50,000 based on the number of trading licenses. *See* ''Price List 2020,'' New York Stock Exchange at 39 (last updated January 2, 2020), *https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.* Nasdaq's annual membership fee is $3,000 plus a monthly $1,250 trading rights fee (totaling $18,000 per year). *See* ''NASDAQ Membership Fees,'' Nasdaq, *http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2#membership. See also* Securities Exchange Act Release No. 34–81133 (July 12, 2017), 82 FR 32904 (July 18, 2017) (SR–NASDAQ–2017–065) (discussing the reasonableness of NASDAQ's fees).

[10] *See, e.g.,* ''NASDAQ Membership Fees,'' *supra* note 9 ($55 for each Form U–4 filed for the registration of a Representative or Principal, and $55 for each Form U–4 filed for the transfer or re-licensing of a Representative or Principal).

[11] For example, NYSE National lists only 52 firms in its membership directory, as compared to 148 firms listed as members of NYSE. *Compare* ''NYSE National Membership,'' *https://www.nyse.com/markets/nyse-national/membership* (last visited January 23, 2020), *with* ''NYSE Membership,'' *https://www.nyse.com/markets/nyse/membership* (last visited January 23, 2020).

[12] Neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.

[13] Securities Exchange Act Release No. 34–50700 (November 22, 2004), 69 FR 71255, 71267–68 (December 8, 2004) (File No. S7–40–04).

[14] *See* SR–LTSE–2020–03 (filed January 30, 2020) (on file with Commission). The Commission notes that, since the Exchange's filing of the instant proposed rule change, notice of the listing fees proposal has been published in the **Federal Register**. *See* Securities Exchange Act Release No. 88133 (February 6, 2020), 85 FR 8048 (February 12, 2019) (SR–LTSE–2020–03).

commences trading operations. While this incentive to attract members will reduce revenue from broker-dealer memberships in the short run, the Exchange believes that these incentives will encourage firms to consider becoming members and better position the Exchange for the long term.

Effective regulation is central to the proper functioning of the securities markets. Recognizing the importance of such efforts, Congress decided to require national securities exchanges to register with the Commission as self-regulatory organizations to carry out the purposes of the Act. The Exchange therefore believes that it is critical to ensure that regulation is appropriately funded. The Annual Membership Fee is expected to provide a source of funding towards the Exchange's total regulatory costs.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[15] the Exchange believes that the proposed rule change would not impose any burden on intermarket or intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the Exchange believes that the proposed rule change would promote and enhance intermarket competition by supporting the funding and operation of a national securities exchange that is focused principally on uniting bold ideas with patient capital and for companies and investors who measure success over years and decades, not financial quarters.[16] In this regard, the Exchange believes that there is broad acknowledgment that the number of new companies accessing the U.S. public capital markets is decreasing and has been for some time.[17] For example, the Commission's recent proposal on Amending the ''Accredited Investor'' Definition acknowledges this problem, but focuses instead on bringing more investors into the *private* markets.[18] The Exchange believes that its entry as a national securities exchange will help reinvigorate the public capital markets,[19] and in turn, promote intermarket competition given the wide number of venues in which a listed company's stock can trade.

The Exchange also believes that the proposed costs of membership will not impose an unnecessary or inappropriate burden on intermarket competition given the highly competitive market for execution venues, which includes not only the 13 other equities exchanges, but also off-exchange venues, including over 30 alternative trading systems trading NMS stocks.[20] The Exchange believes that the proposed rule change also will not burden intermarket competition given the many choices firms have regarding the national securities exchanges in which they choose to become members.[21] As noted above, neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.

Additionally, the Exchange believes that the Annual Membership Fee would not be an inappropriate burden on intramarket competition in particular, as it would be applied equally to all Members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposal has become effective pursuant to section 19(b)(3)(A) of the Act,[22] and Rule 19b–4(f)(2)[23] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–LTSE–2020–04 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–LTSE–2020–04. 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

[15] 15 U.S.C. 78f(b)(8).

[16] *See* Lananh Nguyen, ''Silicon Valley Exchange Says Wall Street Needs to Slow Down,'' Bloomberg (December 19, 2019), *https://www.bloomberg.com/news/articles/2019-12-19/long-term-stock-exchange-says-wall-street-needs-to-slow-down?sref=CDdNJ6yd;* Laurence Dodds, ''One Man's Quest to Challenge Wall Street with a New Silicon Valley Stock Exchange,'' The Telegraph (November 7, 2019), *https://www.telegraph.co.uk/technology/2019/11/07/one-mans-quest-challenge-wall-street-new-silicon-valley-stock/.*

[17] *See* Richard Henderson, ''The Incredible Shrinking Stock Market,'' Financial Times (June 26, 2019), *https://www.ft.com/content/0c9c0b64-9760-11e9-9573-ee5cbb98ed36;* Speech, Rick A. Fleming, ''Enhancing the Demand for IPOs'', NASAA 2017 Public Policy Conference (May 9, 2017), *available at https://www.sec.gov/news/speech/fleming-enhancing-demand-ipos-050917.*

[18] Amending the ''Accredited Investor'' Definition, Proposed Rule, Release Nos. 33–10734, 34–87784, 85 FR 2574, 2605 (January 15, 2020) (File No. S7–25–19) (''[T]he high-growth stage of the lifecycle of many issuers occurs while they remain private. Thus, investors that do not qualify for accredited investor status may not be able to participate in the high-growth stage of these issuers because it often occurs before they engage in registered offerings. Allowing more investors to invest in unregistered offerings of private firms thus may allow them to participate in the high-growth stages of these firms.'') (footnote omitted).

[19] *See* Order Approving Proposed Rule Change To Adopt Rule 14.425, Which Would Require Companies Listed on the Exchange To Develop and Publish Certain Long-Term Policies, Securities Exchange Act Release No. 34–86722 (August 21, 2019), 84 FR 44952 (August 27, 2019) (SR–LTSE–2019–01).

[20] *See* ''NMS Stock ATSs,'' U.S. Securities and Exchange Commission, *https://www.sec.gov/divisions/marketreg/form-ats-n-filings.htm#ats-n.*

[21] *See supra* note 11.

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f)(2).

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–LTSE–2020–04, and should be submitted on or before March 18, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–03769 Filed 2–25–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88251; File No. SR–FINRA–2020–005]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Amend the FINRA Code of Arbitration Procedure for Customer Disputes and the FINRA Code of Arbitration Procedure for Industry Disputes To Apply Minimum Fees to Requests for Expungement of Customer Dispute Information

February 20, 2020.

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 February 7, 2020, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and the Code of Arbitration Procedure for Industry Disputes (''Industry Code'') (together, ''Codes'') to apply minimum fees to requests for expungement of customer dispute information. The proposed rule change would amend Part IX (Fees and Awards) of the Codes to apply minimum filing fees to requests for expungement of customer dispute information, whether the request is made as part of the customer arbitration or the associated person files an expungement request in a separate arbitration (''straight-in request'').[3] The proposed rule change would also apply a minimum process fee and member surcharge to straight-in requests, as well as a minimum hearing session fee to expungement-only hearings.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

(a) Background and Discussion

I. Customer Dispute Information in the Central Registration Depository

Information regarding customer disputes involving associated persons is contained in the Central Registration Depository (''CRD®'') system, the central licensing and registration system used by the U.S. securities industry and its regulators.[4] FINRA operates the CRD system pursuant to policies developed jointly with NASAA. FINRA works with the SEC, NASAA, and other members of the regulatory community to ensure that information submitted and maintained in the CRD system is accurate and complete.

In general, the information in the CRD system is submitted by registered securities firms, brokers and regulatory authorities in response to questions on the uniform registration forms.[5] Among other things, these forms collect administrative, regulatory, criminal history, and disciplinary information about brokers, including customer complaints, arbitration claims and court filings made by customers (*i.e.,* ''customer dispute information''). FINRA, state and other regulators use this information in connection with their licensing and regulatory activities, and member firms use this information to help them make informed employment decisions.

Pursuant to rules approved by the SEC, FINRA makes specified current CRD information publicly available through BrokerCheck®.[6] BrokerCheck is part of FINRA's ongoing effort to help investors make informed choices about the brokers and broker-dealer firms with which they may conduct business. BrokerCheck maintains information on the approximately 3,600 registered broker-dealer firms and 628,000 registered brokers. BrokerCheck also provides the public with access to information about formerly registered broker-dealer firms and brokers.[7] In 2019 alone, BrokerCheck helped users conduct more than 40 million searches of firms and brokers.

The regulatory framework governing the CRD system and BrokerCheck has long contemplated the possibility of expunging certain customer dispute

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] FINRA is separately developing other changes to the current expungement framework, including codifying as rules the Notice to Arbitrators and Parties on Expanded Expungement Guidance (''Guidance''), *see https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance,* and establishing a roster of arbitrators with additional training and experience from which a panel would be selected to decide straight-in requests and expungement requests in settled customer arbitrations. *See Regulatory Notice* 17–42 (December 2017).

[4] The concept for CRD was developed by FINRA jointly with the North American Securities Administrators Association (''NASAA''), and NASAA and state regulators play a critical role in its ongoing development and implementation.

[5] The uniform registration forms are Form BD (Uniform Application for Broker-Dealer Registration), Form BDW (Uniform Request for Broker-Dealer Withdrawal), Form BR (Uniform Branch Office Registration Form), Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration), and Form U6 (Uniform Disciplinary Action Reporting Form).

[6] There is a limited amount of information in the CRD system that FINRA does not display in BrokerCheck, including personal or confidential information. A detailed description of the information made available through BrokerCheck is available at *http://www.finra.org/investors/about-brokercheck.*

[7] Formerly registered brokers, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or may seek to attain other positions of trust with potential investors. BrokerCheck provides information on more than 16,800 formerly registered broker-dealer firms and 567,000 formerly registered brokers. Broker records are available in BrokerCheck for 10 years after a broker leaves the industry, and brokers who are the subject of disciplinary actions and certain other events remain on BrokerCheck permanently.

information from these systems in limited circumstances, such as where the allegations made about the broker are factually impossible or clearly erroneous. The expungement framework seeks to balance the important benefits of disclosing information about customer disputes to regulators and investors with the goal of protecting brokers from the publication of false allegations against them.

A broker can seek expungement of customer dispute information by going through the FINRA arbitration process or directly to court (without first going through arbitration). Regardless of whether expungement of customer dispute information is sought directly through a court or through arbitration, FINRA Rule 2080 (Obtaining an Order of Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System), which was developed in close consultation with representatives of NASAA and state regulators, requires a broker-dealer firm or broker seeking expungement to obtain an order of a court of competent jurisdiction directing such expungement or confirming an award containing expungement relief. FINRA will expunge customer dispute information only after the court orders it to execute the expungement.[8]

II. Current Fee Structure in FINRA Arbitration

Under the Codes, if a customer files a claim in arbitration against an associated person and a firm, the customer is assessed a filing fee based on the claim amount.[9] The firm is assessed a member surcharge and a process fee based on the claim amount.[10] The member is assessed only one surcharge and one process fee per arbitration.[11] When the associated person answers the claim,[12] the associated person is not assessed a fee if he or she does not add a claim to the answer.[13]

If the parties do not settle the arbitration, the panel will hold at least one hearing to decide the customer arbitration and, at the conclusion of the hearing(s), issue an award. In the award, the panel will allocate the fees incurred by the parties during the arbitration, including each party's portion of the hearing session fees,[14] which are also based on the amount of the customer's claim.[15] If the parties settle, the panel will not issue an award.

(i) Current Fee Structure for Expungement Requests Made During a Customer Arbitration

Currently, even if the associated person's answer to a customer's claim includes a request for expungement, the associated person is not assessed a filing fee. The member, having been assessed the surcharge and process fee for the customer arbitration, will not incur additional charges because of the expungement request. If the customer's claim closes by award after a hearing,[16] the panel will decide the customer's claim and the expungement request (assuming the associated person pursues the request during the arbitration), and allocate the hearing session fees among the parties.

If the customer arbitration does not close by award after a hearing (*e.g.,* settles) and the associated person or requesting party, if it is an on-behalf-of request, continues to pursue the expungement request, the panel from the customer arbitration will hold a separate expungement-only hearing to decide the expungement request.[17] The hearing session fee for the expungement-only hearing will be based on the amount of the customer's claim. Under the Codes, fees for hearing sessions held solely to decide an expungement request must be charged to the party or parties requesting expungement.[18]

(ii) Current Fee Structure for a Straight-In Request

An associated person may request expungement by filing a straight-in request rather than requesting expungement during a customer arbitration. The straight-in request may be filed against a former or current firm or the customer.[19] A claim that does not request a dollar amount is considered a non-monetary or not specified claim (''non-monetary claim'') under the Codes. An expungement request is a non-monetary claim; thus, under the Codes, the associated person must pay a $1,575 filing fee, and the member named as a respondent or that employed the associated person at the time the dispute arose must pay a $3,750 process fee.[20] A member named as a respondent

[8] FINRA Rule 2080 also requires that firms and brokers seeking a court order or confirmation of the arbitration award containing expungement relief name FINRA as a party, and FINRA will challenge the request in court in appropriate circumstances. FINRA may, however, waive the requirement to name it as a party if it determines that the award containing expungement relief is based on affirmative judicial or arbitral findings that: (1) The claim, allegation or information is factually impossible or clearly erroneous; (2) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or (3) the claim, allegation, or information is false. In addition, FINRA has sole discretion ''under extraordinary circumstances'' to waive the requirement if the request for expungement relief and accompanying award are meritorious and expungement would not have a material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements. *See* FINRA Rule 2080.

[9] Customers, associated persons, and other non-members who file a claim, counterclaim, cross claim or third party claim must pay a filing fee. *See* FINRA Rule 12900(a)(1); *see also* FINRA Rule 13900(a)(1).

[10] A member surcharge is assessed against a member if, for example, the member files an arbitration claim, is named as a respondent in a claim, or employed, at the time the dispute arose, an associated person who is named as a respondent; the amount of the surcharge is based on the amount of the claim. *See* FINRA Rules 12901(a)(1)(B) and 12901(a)(1)(C) and FINRA Rules 13901(a)(2) and 13901(a)(3).

Further, each member that is a party to an arbitration claim in which more than $25,000 is in dispute, or that is non-monetary or not specified, is required to pay a process fee based on the amount or nature of the claim. If an associated person of a member is a party, the member that employed the associated person at the time the dispute arose is charged the process fee. *See* FINRA Rules 12903(a) and (b) and FINRA Rules 13903(a) and (b).

[11] Under the Codes, no member is assessed more than a single surcharge or process fee in any arbitration. *See* FINRA Rules 12901(a)(4) and 12903(b) and FINRA Rules 13901(d) and 13903(b).

[12] The respondent must answer the statement of claim within 45 days and may include other claims and remedies requested. *See* FINRA Rules 12303(a) and (b) and FINRA Rules 13303(a) and (b).

[13] For example, an associated person is permitted to file a claim against the claimant requesting relief. Such counterclaim would require the associated person to pay a filing fee. *See* FINRA Rule 12303(d); *see also* FINRA Rule 13303(d).

[14] Parties are charged hearing session fees for each hearing session, based on the customer's claim amount. In the award, the panel determines the amount of each hearing session fee that each party is required to pay. *See* FINRA Rules 12902 and 13902.

[15] FINRA makes all arbitration awards publicly available. *See https://www.finra.org/arbitration-mediation/arbitration-awards.*

[16] The term ''hearing'' means the hearing on the merits of an arbitration under Rule 12600. *See* FINRA Rule 12100(o).

[17] In 2009, the SEC approved amendments to Forms U4 and U5 to require, among other things, the reporting of allegations of sales practice violations made against unnamed persons. *See* Securities Exchange Act Release No. 59916 (May 13, 2009), 74 FR 23750 (May 20, 2009) (Order Approving SR–FINRA–2009–008). Specifically, Forms U4 and U5 were amended to add questions to elicit whether the applicant or registered person, though not named as a respondent or defendant in a customer-initiated arbitration, was either mentioned in or could be reasonably identified from the body of the arbitration claim as a registered person who was involved in one or more of the alleged sales practice violations. A party (typically, the firm) named in a customer arbitration may request expungement on-behalf-of an associated person who is a subject of, but not named in, the arbitration. Such on-behalf-of requests occur in customer-initiated arbitrations only.

[18] *See* FINRA Rules 12805(d) and 13805(d).

[19] FINRA notes, however, that straight-in requests filed against the customer are rare.

[20] *See supra* note 10. Some associated persons have independent contractor, rather than employment, relationships with their firms. In these circumstances, FINRA assesses applicable member surcharge or process fees against the firm at which

or that employed the associated person at the time the dispute arose would also be assessed a surcharge of $1,900.[21] These claims are decided by a three-person panel, unless the parties agree in writing to one arbitrator.[22] Further, the per-hearing session fee for a non-monetary claim is $1,125.

(iii) Concerns With Avoidance of the Current Fee Structure for Expungement Requests

As discussed above, an expungement request is a non-monetary claim and parties requesting expungement should pay the fees associated with such requests under the Codes. FINRA is concerned about practices to avoid fees applicable to expungement requests, particularly straight-in requests. For example, FINRA is aware that associated persons who file a straight-in request often add a small monetary claim (typically, one dollar) to the expungement request to reduce the fees assessed against the associated person and qualify for an arbitration heard by a single arbitrator.[23] Further, the small damages claim reduces the member fees that the forum assesses firms when an arbitration claim is filed. Thus, adding a claim for one dollar in a straight-in request against a member firm reduces the fees assessed to the associated person requesting expungement and member firm from $9,475 to $300.[24] Often, the associated person will subsequently drop the claim for one dollar.

Adding a small damages claim also changes the panel composition such that the straight-in request is heard by a single arbitrator rather than a three-person panel.[25] FINRA believes that most expungement requests should be decided by a three-person panel. Expungement requests may be complex to resolve, particularly straight-in requests where customers typically do not participate in the expungement hearing. Thus, having three arbitrators available to ask questions and request evidence would help ensure that a complete factual record is developed to support the arbitrators' decision at such expungement hearings.

To help ensure that parties requesting expungement pay the fees intended for such requests under the Codes, that the fees charged when expungement is requested are more consistent, and that more expungement requests are heard by a three-person panel, FINRA is proposing to amend the Codes to apply a minimum filing fee for all expungement requests, irrespective of whether the request is made as part of the customer arbitration or the associated person files a straight-in request, or the requesting party adds a small damages claim. The proposed rule change would also apply a minimum process fee and member surcharge to straight-in requests, as well as a minimum hearing session fee to expungement-only hearings held after a customer arbitration[26] or in connection with a straight-in request.[27]

(b) Proposed Amendments

I. Proposed Filing Fee

Under the proposed rule change, an associated person, or requesting party if it is an on-behalf-of request,[28] would be required to pay the filing fee for a non-monetary claim for an expungement request made during a customer arbitration[29] or filed as a straight-in request.[30] If the associated person or requesting party adds a monetary claim to the expungement request, the filing fee would be the fee for a non-monetary claim or the applicable filing fee based on the claim amount, whichever is greater.[31]

As discussed above, under the Codes, an expungement request that does not include a claim for damages is a non-monetary claim that is currently assessed a $1,575 filing fee and triggers a three-person panel. FINRA believes that all parties requesting expungement should pay the same minimum filing fee, and that parties should not be able to avoid the fee (or a three-person panel) simply by adding a small claim amount.

Accordingly, FINRA is proposing that the filing fee for non-monetary claims would be the minimum filing fee for all expungement requests, and that the minimum filing fee would apply to expungement requests in customer arbitrations as well as to straight-in requests.[32] A request for expungement is a claim that a party is requesting the arbitrators to decide. Under the Codes, if a party files a claim or adds a claim in an answer to a statement of claim, the respondent must pay all required filing fees. [33] As an expungement request is also a claim, the party requesting this relief should also pay a filing fee.

The proposed minimum filing fee is also commensurate with the additional

the associated person was associated at the time the dispute arose.

[21] *See supra* note 10; *see also supra* note 11.

[22] *See* FINRA Rules 12401(c) and 13401(c).

[23] Whether the claimant specifies damages, and the amount specified, determines the fees assessed in arbitration cases and whether a single arbitrator or a three-person panel will decide the case. *See* FINRA Rules 12401 and 13401. If the amount of the claim is $50,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 12800. If the amount of the claim is more than $50,000, but less than $100,000, exclusive of interest and expenses, the panel will consist of one arbitrator unless the parties agree in writing to three arbitrators. If the amount of a claim is more than $100,000, exclusive of interest and expenses, or is non-monetary, or if the claim does not request money damages, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.

[24] If an associated person files a straight-in request against a member firm, does not add a monetary claim, and assuming one prehearing conference and one hearing session on the merits, the associated person is assessed a filing fee of $1,575 and a hearing session fee of $2,250 ($1,125 for the prehearing conference and $1,125 for the hearing session on the merits). In addition, the respondent member firm is assessed a member surcharge of $1,900 and a process fee of $3,750. If the associated person adds a one dollar claim to the request, assuming one prehearing conference and one hearing session on the merits, the associated person is assessed a filing fee of $50 and a hearing session fee of $100 ($50 for the prehearing conference and $50 for the hearing session on the merits). The member firm is also assessed a member surcharge of $150 but no process fee. *See also infra* Item II.B. (discussing the economic impacts of the proposed rule change).

[25] *See supra* note 23.

[26] For example, under the current expungement process, if the customer arbitration settles, but an associated person seeks to pursue a request for expungement made during the customer arbitration, the panel from the customer arbitration will hold a separate expungement-only hearing to decide the expungement request and issue an award setting forth its decision on the expungement request. Under the proposed rule change, the associated person requesting expungement would be required to pay the minimum hearing session fee for this separate expungement-only hearing.

[27] The proposed rule change would apply to all members, including members that are funding portals or have elected to be treated as capital acquisition brokers (''CABs''), given that the funding portal and CAB rule sets incorporate the impacted FINRA rules by reference.

[28] *See supra* note 17.

[29] Under the proposed rule change, an associated person who requests expungement of customer dispute information during an industry arbitration would also be required to pay the filing fee for a non-monetary claim. However, these requests are rare.

[30] If the requesting party chooses to seek expungement in the customer arbitration, but later determines not to pursue the request and then files a straight-in request for expungement of the same customer dispute information, the requesting party would be required to pay the filing fee applicable to the straight-in request, notwithstanding previous payment of the filing fee applicable to the expungement request during the customer arbitration.

[31] *See* proposed Rules 12900(a)(3) and 13900(a)(3). An associated person could add a monetary or non-monetary claim to the expungement request. FINRA notes, however, that it is rare that significant dollar claims accompany expungement requests.

[32] Under the Codes, the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship. *See* FINRA Rules 12900(a)(1) and 13900(a)(1). The proposed rule change would make clear this provision applies to expungement requests. Information on how to request an arbitration fee waiver is available at *https://www.finra.org/arbitration-mediation/arbitration-fee-waivers.* In addition, in the award, the panel may order a party to reimburse another party for all or part of any filing fee paid. *See* FINRA Rules 12900(d) and 13900(d).

[33] *See* FINRA Rules 12303(d) and 13303(d).

steps that arbitrators should take when deciding an expungement request during a customer arbitration or in connection with a straight-in request. Regardless of whether expungement is decided during a customer arbitration or separately, FINRA Rules 12805 and 13805 require the panel to hold one or more recorded hearing sessions regarding the appropriateness of expungement, to review settlement documents and consider the amount of payments made to any party and any other terms and conditions of the settlement, and to make a determination as to whether any of the Rule 2080 grounds for expungement have been established. In addition, as described in the Guidance, arbitrators have a unique, distinct role when deciding whether to recommend a request to expunge customer dispute information from CRD. Accordingly, the Guidance directs arbitrators to ensure that they have all of the information necessary to make an informed and appropriate recommendation on expungement. The Guidance also directs arbitrators to request any documentary or other evidence they believe is relevant to the expungement request.

II. Proposed Member Surcharge for Straight-In Requests

The proposed rule change would apply a minimum member surcharge when an associated person files a straight-in request against either a customer or a member firm.[34] Under the proposed rule change, if an associated person files a straight-in request against a member firm, that firm would be assessed the member surcharge for a non-monetary claim under the Industry Code (currently $1,900).[35] The proposed member surcharge is consistent with what a member firm should pay today for a straight-in request without an additional small monetary claim filed against a member firm.[36]

The proposed rule change would also provide that, for straight-in requests filed against a customer, each member that employed the associated person at the time the customer dispute arose would be assessed the member surcharge for a non-monetary claim under the Customer Code (currently $1,900).[37]

If the associated person adds a separate claim for damages to the straight-in request against the customer or member firm, the member surcharge would be the non-monetary member surcharge or the applicable surcharge under the Codes, whichever is greater. Under the proposal, the surcharge would be due when the Director serves the Claim Notification Letter or the initial statement of claim under the Codes.[38]

III. Proposed Hearing Session Fees

The proposed rule change would apply the hearing session fee for a non-monetary claim heard by three arbitrators to each hearing session in which the sole topic is the determination of a request for expungement relief.[39] Thus, the proposed hearing session fee would apply when a customer arbitration does not close by award after a hearing (*e.g.,* settles) and there is a separate hearing session held after the customer arbitration to decide an expungement request that was made during the customer arbitration, and to straight-in requests.[40] If the requesting party adds a monetary claim to the expungement request, the hearing session fee would be the greater of the fee for a non-monetary claim with three arbitrators or the applicable hearing session fee under the Codes based on the claim amount.[41] In addition, consistent with the Codes today, the hearing session fee would be assessed against the party requesting expungement.[42]

IV. Proposed Process Fees for Straight-In Requests

The proposed rule change would apply a minimum process fee when an associated person files a straight-in request against either a customer or member firm. Under the proposed rule change, if an associated person files a straight-in request against a member firm, that firm would be assessed the process fee for a non-monetary claim under the Industry Code (currently $3,750).[43]

The proposed rule change would also clarify that, for straight-in requests filed against a customer, the member that employed the associated person at the time the customer dispute arose would be assessed the process fee for a non-monetary claim under the Customer Code (currently $3,750).[44]

If the associated person adds a separate claim for damages to the straight-in request against the customer or member firm, the process fee would be the non-monetary process fee or the applicable process fee under the Codes, whichever is greater.[45] The proposed process fee is consistent with what member firms should pay today for straight-in requests without an additional small monetary claim filed against a customer or member firm.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 60 days following publication of the *Regulatory Notice* announcing Commission approval of the proposed rule change.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[46] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 15A(b)(5) of the Act,[47] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

[34] *See supra* note 10 (discussing the member surcharge under the Codes today).

[35] *See* proposed Rule 13901(c). If the associated person files the straight-in request against another associated person, each firm that employed the respondent associated person at the time the dispute arose would be assessed the member surcharge for a non-monetary claim under the Industry Code. *See* FINRA Rule 13901(a)(3) and proposed Rule 13901(c).

[36] Consistent with how the member surcharge is assessed today, under the proposal, FINRA would not assess a member more than a single surcharge in any arbitration. *See also supra* note 11.

[37] *See* proposed Rule 12901(a)(3).

[38] *See* proposed Rules 12901(a)(5) and 13901(e).

[39] FINRA notes that the proposed $1,125 hearing session fee for expungement hearings would apply if a party requests expungement as part of a Simplified Arbitration and no hearings are held to decide the underlying customer claim, regardless of whether a single arbitrator or a panel hears the Simplified Arbitration.

[40] *See* proposed Rules 12900(a)(3) and 13900(a)(3); *see also supra* note 26. If an associated person requests expungement during a customer arbitration, the customer arbitration closes by award after a hearing, and the arbitrator or panel decides the expungement request during the customer arbitration, the hearing session fee would be based on the amount of the customer's claim.

[41] *See* proposed Rules 12902(a)(5) and 13902(a)(4).

[42] *See* proposed Rules 12902(a)(5) and 13902(a)(4).

[43] *See* proposed Rule 13903(c). If the associated person files the straight-in request against another associated person, the firm that employed the respondent associated person at the time the dispute arose would be assessed the process fee for a non-monetary claim under the Industry Code. *See* proposed Rules 13903(b) and 13903(c).

[44] *See* proposed Rule 12903(c).

[45] Consistent with how the process fee is assessed today, under the proposal, FINRA would not assess a member more than one process fee in any arbitration. *See also supra* note 11.

[46] 15 U.S.C. 78*o*–3(b)(6).

[47] 15 U.S.C. 78*o*–3(b)(5).

The proposed rule change represents an equitable allocation of reasonable dues and fees against those who would either file or be a party to an expungement request, as is currently intended. As an expungement request is a separate relief request that an arbitrator or panel must consider and decide, the filing fees and related member and forum fees should reflect the general complexity of these requests, as well as the time and effort needed to administer, consider and decide them. In addition, the fees should apply consistently to all parties requesting expungement.

The proposed rule change will close gaps in the fee structure that have emerged in the existing expungement process, such as where parties add small dollar claims to their expungement requests to significantly lower the fees associated with expungement requests and to have expungement requests considered and decided by a single arbitrator rather than a three-person panel. The proposed rule change will help ensure that parties requesting expungement pay the fees intended for such requests under the Codes and that the fees charged when expungement is requested are more consistent, irrespective of whether the request is made as a straight-in request or during an arbitration, or whether damages are included in the request. The proposed rule change should also result in more expungement requests being heard by a three-person panel. A three-person panel will help ensure a complete factual record to support the arbitrators' decision, particularly in straight-in requests that often do not include customer participation and can be complex to resolve.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet FINRA's regulatory objectives.

(a) Regulatory Need

FINRA is aware that parties requesting expungement are not always paying the fees intended for such requests under the Codes, particularly for straight-in requests. In addition, the current fee schedules under the Codes do not ensure that costs to the forum for administering expungement requests are being allocated to the party or parties requesting expungement and, as applicable, the member firms that employ them. The proposed rule change would help ensure that the fees for expungement requests are assessed, and that the costs borne by the forum to administer expungement requests are allocated, as intended, to those requesting expungement under the Codes.

(b) Economic Baseline

The economic baseline for the proposed rule change includes the provisions under the Codes that address the fees associated with expungement requests in FINRA arbitration. In general, the proposed rule change is expected to affect parties to an expungement request including associated persons and member firms. The proposed rule change may also affect other stakeholders of the forum, and users of customer dispute information contained in the CRD system and displayed through BrokerCheck.[48]

The customer dispute information contained in the CRD system is submitted by registered securities firms and regulatory authorities in response to questions on the uniform registration forms.[49] The information can be valuable to current and prospective customers to learn about the conduct of associated persons.[50] Current and prospective customers may not select or remain with an associated person or a member firm that employs an associated person with a record of customer disputes. Similarly, member firms and other companies in the financial services industry may use the information when making employment decisions.[51] In this manner, the customer dispute information contained in the CRD system (and displayed through BrokerCheck) may negatively affect the business and professional opportunities of associated persons but also provide for customer protections.

Any such negative impact on the business and professional opportunities of associated persons may be appropriate and consistent with investor protection, such as when the customer dispute information has merit. Any such negative impact may be inappropriate, however, such as when the customer dispute information is factually impossible, clearly erroneous, or false. Regardless of the merit, associated persons have incentive to remove customer dispute information from the CRD system and its public display through BrokerCheck.

An associated person or party on behalf of an associated person typically begins the process to remove customer dispute information from the CRD system by filing an expungement request in FINRA arbitration. FINRA is able to identify 5,732 expungement requests of customer dispute information filed from January 2016 through June 2019. More than one expungement request can be filed in a single arbitration, and multiple expungement requests may relate to the same customer complaint if the complaint relates to more than one associated person.

Under the Codes, a claim for expungement is considered a non-monetary claim, generally requiring fees in the middle of the range of potential fees that are assessed based on claim amount, and triggering a three-person panel. As described in more detail above and depending on the method that a party uses to request expungement, however, associated persons and member firms can be assessed fees less than what is intended for non-monetary claims.

Among the 5,732 expungement requests, 2,618 requests (46 percent) were filed during a customer or industry arbitration and 3,114 requests (54 percent) were filed as a straight-in

[48] Other stakeholders of the forum include FINRA, others member firms, and other forum participants. Users of customer dispute information include investors; member firms and other companies in the financial services industry; individuals registered as brokers or seeking employment in the brokerage industry; and FINRA, states, and other regulators.

[49] *See supra* note 4 and accompanying text (discussing the uniform registration forms and the information contained in the CRD system). The information includes matters, which may or may not have been previously adjudicated in FINRA arbitration or a court of competent jurisdiction.

[50] Recent academic studies provide evidence that the past disciplinary and other regulatory events associated with a firm or individual can be predictive of similar future events. *See* Hammad Qureshi and Jonathan Sokobin, Do Investors Have Valuable Information About Brokers? FINRA Office of the Chief Economist Working Paper, (August 2015); *see also* Mark Egan, Gregor Matvos, and Amit Seru, The Market for Financial Adviser Misconduct, Journal of Political Economy 127, no. 1 (February 2019): 233–295.

[51] Customer dispute information submitted to the CRD system may have other uses. For example, associated persons may use information from the CRD system when deciding with whom to do business. FINRA, states, and other regulators also use the information to regulate brokers.

request. The 2,618 expungement requests during a customer or industry arbitration include 2,604 requests during a customer arbitration and 14 requests during an industry arbitration; and the 3,114 straight-in requests include 3,048 requests filed solely against a member firm or against a member firm and a customer, and 66 requests filed solely against a customer. An associated person added a small monetary claim (of less than $1,000) in 2,356 of the 3,114 straight-in requests (76 percent). In general, associated persons did not add a monetary claim for the remaining straight-in requests.

In general, parties filed an increasing number of expungement requests over the sample period. For example, parties filed 1,400 requests in 2016, 1,708 requests in 2017, 1,936 requests in 2018, and 688 requests in the first half of 2019. Similarly, the proportion of straight-in requests also increased over the sample period. For example, associated persons filed 328 straight-in requests in 2016 (23 percent of 1,400), 846 requests in 2017 (50 percent of 1,708), and 1,371 requests in 2018 (71 percent of 1,936). In the first half of 2019, associated persons filed 569 straight-in requests (83 percent of 688).

The proportion of the straight-in requests where the associated person added a small monetary claim (of less than $1,000) has also increased over the sample period. For example, associated persons added a small monetary claim to 179 straight-in requests in 2016 (55 percent of 328), 569 requests in 2017 (67 percent of 846), 1,143 requests in 2018 (83 percent of 1,371), and 465 requests in the first half of 2019 (82 percent of 569). FINRA expects that absent this proposed rule change, associated persons who file straight-in requests will continue to add a small monetary claim to avoid the fees typically assessed for non-monetary claims.

(c) Economic Impact

The proposed rule change would apply the fees associated with non-monetary claims as minimum fees to expungement requests in FINRA arbitration. The fees associated with non-monetary claims are not new and would not change under the proposal. The fees would apply when parties file an expungement request during a customer arbitration, when parties file a rare expungement request during an industry arbitration, and when associated persons file a straight-in request.

Under the proposed rule change, a party that requests expungement during a customer or industry arbitration would be assessed a minimum filing fee of $1,575. Currently, parties requesting expungement during a customer or industry arbitration are not assessed a filing fee in connection with the expungement request.

In addition, under the proposed rule change, if the arbitrator or panel holds a separate expungement-only hearing to decide the expungement request after the customer's arbitration, then the party that requested expungement would be assessed a minimum hearing session fee of $1,125.[52] The proposed minimum hearing session fee may be less than, equal to, or greater than the fees currently assessed for expungement-only hearings held after an arbitration. These current fees depend on the claim amount in the customer arbitration.[53]

If an associated person files a straight-in request against a member firm, assuming one prehearing conference and one hearing session on the merits, then under the proposed rule change, the associated person and a member firm would be assessed minimum fees totaling $9,475. The associated person would be assessed a minimum filing fee of $1,575 and a minimum hearing session fee of $2,250 ($1,125 for the prehearing conference and $1,125 for the hearing session on the merits). In addition, the member firm would be assessed a minimum surcharge of $1,900 and a minimum process fee of $3,750.[54]

In general, these fees are the same as those that are assessed today if the associated person does not add a small monetary claim to the straight-in request against a member firm. Associated persons and member firms, however, may incur significantly lower fees than what is intended for a straight-in request if the associated person adds a small monetary claim (of less than $1,000) to the request. Assuming one prehearing conference and one hearing session on the merits, an associated person and the member firm would currently be assessed fees totaling $300.[55]

The fees associated with a small claim procedure are intended to ensure that the forum is economically feasible for claimants with small claims,[56] and, in general, do not cover the specific costs to administer an expungement request, which requires a hearing session and typically involves a prehearing conference. For example, the costs to administer a straight-in request can include chairperson honoraria, travel expenses, conference room rental, and other costs to administer the forum. For the typical straight-in request with one prehearing conference and one hearing session on the merits to consider and decide the request, the chairperson honoraria alone totals $725;[57] yet as discussed above, if the associated person adds a small monetary claim (of less than $1,000) to a straight-in request filed against a member firm, then the parties to the request are assessed fees totaling $300.

The minimum fees that would be assessed under the proposed rule change reflect the application of the fee schedule as intended for a non-monetary claim. The proposed rule change would help ensure that costs to the forum for administering expungement requests are allocated as intended to the party or parties requesting expungement and, as applicable, the member firms that employ them. The costs to the forum

[52] *See supra* note 26.

[53] From January 2016 through June 2019, 314 expungement-only hearings were held after an arbitration. In these instances, the assessed hearing session fee under the proposed rule change for an expungement-only hearing would have been less than (86 cases or 28 percent), equal to (155 cases or 49 percent), or greater than (73 cases or 23 percent) the fee assessed currently for an expungement-only hearing held after an arbitration, depending on the size of the initial claim. Assuming one expungement-only hearing session to consider and decide the expungement request, on average and under the proposed rule change, the party filing an expungement request would be assessed an additional hearing session fee of $54 per arbitration. One expungement-only hearing session is consistent with the median number of hearing sessions (one) associated with the straight-in requests that were filed and closed during the sample period.

[54] The assumption of one prehearing conference and one hearing session on the merits is consistent with the median number of prehearing conferences (one) and hearing sessions on the merits (one) associated with straight-in requests that were filed and closed during the sample period. Also, the assumption that one member firm would be assessed a minimum surcharge and process fee is consistent with the median number of member firms (one) that were assessed these fees in a straight-in request that was filed and closed during the sample period.

[55] For these requests, the associated person is assessed a filing fee of $50 and a hearing session fee of $100 ($50 for the prehearing conference and $50 for the hearing session on the merits). The member firm is also assessed a member surcharge fee of $150 but no process fee. If instead the associated person files an expungement request solely against the customer, then the parties to the request are assessed fees totaling $150. The associated person is still assessed a filing fee of $50 and a hearing session fee of $100, but the member firm is not assessed a member surcharge or a process fee.

[56] Under the Codes, arbitrations involving $50,000 or less, exclusive of interest and expenses, will consist of one arbitrator and the claim is subject to the simplified arbitration procedures. Under these procedures, no hearing is held unless the customer or claimant requests a hearing, and the arbitrator renders an award based on the pleadings and other materials submitted by the parties. *See* FINRA Rules 12800 and 13800.

[57] The chairperson honoraria includes $300 for the prehearing conference and $425 for the hearing session on the merits.

include the specific costs to administer the claim as well as the overall attendant costs to administer expungement requests in the forum. Associated persons and member firms that are not assessed the fees for a non-monetary claim experience a benefit in the form of an economic transfer; the costs that were intended to be allocated but not assessed to the party or parties requesting expungement are instead borne by FINRA, other member firms, and other forum participants including other member firms, associated persons, and customers.

In the aggregate, if parties requesting expungement had been assessed the fees applicable to non-monetary claims during the sample period, then a reasonable estimate for the additional fees that would have been assessed is $9.7 million. The $9.7 million includes $2.4 million for the expungement requests during a customer or industry arbitration,[58] and $7.3 million for the straight-in requests where an associated person added a small monetary claim (of less than $1,000).[59] This amount reflects the potential economic transfer over the sample period. The extent of the transfer increased over the sample period with the proportion of straight-in requests where the associated person added a small claim amount.

The proposed rule change may affect some parties more so than others. Some parties, including associated persons and parties who request expungement relief on behalf of an unnamed person, may be more sensitive to the assessed fees under the proposed rule change or have monetary constraints that may inhibit them from filing an expungement request. They may determine that the cost of seeking expungement is higher than the anticipated benefit and, therefore, not seek expungement relief.[60] Associated persons and parties who request expungement relief on behalf of an unnamed person may also be more sensitive to the fees assessed under the proposed rule change if, given the facts and circumstances of the customer dispute, an arbitrator or panel is less likely to recommend expungement.[61]

Associated persons who would have otherwise expunged customer dispute information that may have or not have merit may experience a loss of business and professional opportunities as a result of the information remaining on the CRD system and its display through BrokerCheck. The loss of business and professional opportunities by one associated person, however, may be the gain of another. Associated persons who may benefit in this regard include those who are less price sensitive and continue to seek expungement of customer dispute information, and associated persons who do not have similar disclosures.

The proposed rule change may also affect some member firms more so than others. In particular, the fees assessed under the proposed rule change may be more material for small firms or firms with fewer financial resources than for large firms or firms with additional financial resources.[62] Although the fees may be more material to some firms, the fees are the same as those required for a non-monetary claim and do not depend on the size or financial resources of the firm.

Although the proposed rule change may affect some associated persons and member firms more so than others, the proposed rule change will not result in any burden on competition that is not necessary or appropriate. As discussed above, associated persons and member firms that are assessed significantly lower fees for an expungement request than what is intended under the Codes by adding a small damages claim to the expungement request experience a benefit in the form of an economic transfer. Any burden on competition as a result of this proposed rule change, therefore, relates to the removal of this unintended benefit.

Finally, the proposed rule change may have other, marginal, economic effects. For example, the proposed minimum filing fee would trigger a three-person panel for all straight-in requests. Associated persons would lose the ability to unilaterally decide the number of arbitrators who would consider and decide the request and, therefore, may increase the number of three-person panels. The impact of this change may be small because parties may still jointly agree to a single arbitrator.

The proposed rule change may also affect the customer dispute disclosures on the CRD system and their public display through BrokerCheck. The disclosures that would have otherwise been expunged would remain, and, depending on the merit of these disclosures, may affect the value of the information describing the conduct of associated persons. The merit of these disclosures is dependent on many factors which are difficult to predict. These factors include the incentive of parties to file an expungement request under the proposed rule change and the merit of the customer disputes that would have otherwise been sought expunged. The effect on the value of the customer dispute information is therefore uncertain.

[58] From January 2016 through June 2019, there were 1,508 arbitrations that closed during which an expungement request was filed (that was not a straight-in request). If the parties requesting expungement had been assessed the fees applicable to non-monetary claims, the parties requesting expungement would have been assessed additional filing fees totaling $2.4 million (minimum filing fee of $1,575 for each of the 1,508 cases). Although the parties to these expungement requests may also be assessed additional hearing session fees, the additional fees associated with hearing sessions are estimated to be marginal (*see supra* note 53).

[59] From January 2016 through June 2019, there were 1,064 arbitrations that closed in which a straight-in expungement request was filed. Associated persons added a small monetary claim (of less than $1,000) in 797 of the 1,064 cases. Among the 797 arbitrations, 783 were filed against a member firm or a member firm and a customer, and 14 were filed solely against a customer. If parties requesting expungement had been assessed the fees applicable to non-monetary claims, and assuming one prehearing conference and one hearing session on the merits, then the parties to the straight-in requests filed against a member firm (or filed against that member firm and a customer) would have been assessed additional fees totaling $7.2 million ($9,475 less $300 for each of the 783 cases), and the parties to the straight-in requests filed against a customer would have been assessed additional fees totaling $0.1 million ($9,475 less $150 for each of the 14 cases). *See supra* notes 54 and 55 and accompanying text (discussing the fees that would be assessed under the proposed rule change and that are currently assessed).

[60] Under the Codes, the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship. *See supra* note 3232.

[61] A firm or associated person can also initiate an expungement proceeding directly in a court of competent jurisdiction without first going through any arbitration proceeding. FINRA will challenge these requests in court in appropriate circumstances. From January 2016 through June 2019, the expungement of 123 customer dispute disclosures were sought directly in court. The assessed fees may incent firms or associated persons to initiate an expungement proceeding directly in a court of competent jurisdiction without first going through any arbitration proceeding. The number of firms or associated persons who would instead initiate an expungement proceeding directly in a court of competent jurisdiction is dependent not only on the fees assessed under the proposed rule change, but also the legal fees and other costs a firm or associated person would expect to incur in the different forums to initiate an expungement proceeding. This information is generally not available, and accordingly the potential effect of the proposed rule change on direct-to-court expungement requests is uncertain.

[62] The definition of firm size is based on Article 1 of the FINRA By-Laws. A firm is defined as ''small'' if it has at least one and no more than 150 registered persons, ''mid-size'' if it has at least 151 and no more than 499 registered persons, and ''large'' if it has 500 or more registered persons. In the cases associated with an expungement request filed and closed from January 2016 through June 2019, including expungement requests during a customer or industry arbitration and straight-in requests, 78 percent of the surcharge and process fees were incurred by large firms, 11 percent were incurred by mid-size firms, and 11 percent were incurred by small firms. The large firms incurring member surcharge or process fees had a median excess net capital of $21.7 million in the year prior to the filing of a straight-in request, the mid-size firms had a median excess net capital of $1.6 million, and the small firms had a median excess net capital of more than $334,000.

(d) Alternatives Considered

An alternative to the proposed rule change includes the minimum filing fee of $1,425 for all expungement requests that was proposed in *Regulatory Notice* 17–42 (December 2017) (discussed in more detail below). Although parties filing an expungement request would pay an additional $100 to file an expungement request under the proposed rule change, the $1,575 filing fee is the filing fee applicable to non-monetary claims. As discussed above, an expungement request is a non-monetary claim under the Codes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

FINRA published *Regulatory Notice* 17–42 (December 2017) (''*Notice*'') to seek comment on proposed rule changes related to expungement, including the minimum fees discussed in this filing.[63] FINRA received 28 comment letters in response to the *Notice* that addressed the filing fee, member surcharge, or process fee. A copy of the *Notice* is attached as Exhibit 2a. A list of the comment letters received in response to the *Notice* that are applicable to this filing are attached as Exhibit 2b.[64] Copies of the comment letters received in response to the *Notice* that are applicable to this filing are attached as Exhibit 2c.

In the *Notice,* FINRA proposed a minimum filing fee of $1,425 for all expungement requests. In addition, FINRA proposed, consistent with the existing provisions under the Codes, to assess a member surcharge and process fee against each member that is named a party or respondent, or that employed the associated person at the time of the events giving rise to the dispute, as applicable. Some commenters supported the proposal and others raised concerns with the proposed fees or with the costs of expungement in general. A summary of the comments and FINRA's responses are discussed below.

Filing Fee

NASAA and Public Citizen supported the $1,425 minimum filing fee proposed in the *Notice.* NASAA stated that ''the increased fees would at least in part'' offset the significant costs that FINRA and the states incur related to expungement requests, which include both the costs to review and to process expungement requests. Public Citizen stated that the minimum filing fee would be a ''limit[ ] to potential overuse of expungement proceedings.'' White expressed some support for the proposed minimum filing fee, stating that it may ''benefit staff and limit'' the ''occasional'' request for expungement ''made years after the underlying event.''

Other commenters, including associated persons, member firms, and their industry and legal representatives, opposed the proposed minimum filing fee. Some commenters viewed the proposed minimum filing fee as an additional fee that would be burdensome and discourage associated persons from pursing meritorious expungement claims.[65] For example, SIFMA stated that the filing fee would be an additional fee that the individual would have to pay in addition to the fees in the underlying arbitration. SIFMA also stated that the filing fee could (along with the other fees proposed in the *Notice*) [66] ''have an unfortunate impact of creating a tiered system where only registered representatives and firms that can absorb these additional costs will be able to pursue expungement, regardless of merit.'' JonesBell and Behr contended that since ''presentation of an expungement request by a registered person who is a party to the underlying customer case does not require any additional administrative time or effort, either by FINRA, or by the arbitrators,'' a purpose of the fee was to ''financially punish the associated person for making an expungement request, and to generate additional (but unwarranted) revenue for FINRA.'' Liebrader stated that the approximately $1,500 filing fee ''just to file their claim'' was ''too high'' for both associated persons seeking expungement and claimants in general in comparison to court filing fees, which ''are in the $200-$300 range.'' Several other commenters objected to the proposed minimum filing fee as an increase in the amount of the filing fee [67] or objected to the costs of requesting expungement in general.[68] Some commenters objected to the current costs associated with requesting expungement, which they viewed as too high.[69]

In response to these comments, FINRA declines to reduce or eliminate the proposed minimum filing fee. The $1,425 filing fee proposed in the *Notice* corresponds to the minimum claim amount tier for a three-person panel to decide an arbitration.[70] As noted above, FINRA believes that most expungement requests should be decided by a three-person panel.[71] In addition, an expungement request without a damages claim is a non-monetary claim under the Codes, which requires a three-person panel and currently requires a filing fee of $1,575. Thus, under the proposed rule change, an associated person, or a requesting party if it is an on-behalf-of request, would be required to pay a $1,575 filing fee for an expungement request made during a customer arbitration or straight-in request.

Associated persons should not be able to reduce the filing fee from the $1,575 owed for a non-monetary claim to $50—and reduce the hearing session fee to $50, the member surcharge to $150 and the process fee to $0—merely by adding a small monetary claim, that the associated person often subsequently drops. Today, persons who do not add a small monetary claim to a straight-in request pay the $1,575 filing fee associated with non-monetary claims. The proposal would ensure that all associated persons who request expungement are subject to the same minimum filing fee.

In addition, as with other non-monetary claims, FINRA incurs costs to process expungement requests. Accordingly, expungement requests

[63] This filing addresses the comments to the *Notice* that: (i) Relate to the proposed fees and (ii) do not address the other proposed changes in the *Notice* to the expungement framework that are not part of this filing, but are being developed separately from this filing. *See supra* note 3.

[64] All references to commenters are to the comment letters as listed in Exhibit 2b.

[65] *See* Behr, JonesBell, and SIFMA; *see also infra* note 67.

[66] Some commenters misconstrued the proposed fees discussed in the *Notice* as allowing the same member firm to be charged two separate member surcharge and process fees in the same arbitration. *See infra* note 80 and accompanying text.

[67] *See* Baritz, Higgenbotham, James, Janney, Keesal, Saretsky, Speicher, Walter, and Weinerf. One commenter, SEC Investor Advocate, stated that potentially increasing the fees that brokers or firms must pay when requesting expungement, along with other enhancements to the expungement process proposed in the *Notice* but not addressed in this filing, may cause brokers to seek to avoid the Rule 2080 process entirely, and instead request expungement of their records directly from a court. FINRA notes that a broker can seek expungement by going through the FINRA arbitration process or directly to court (without first going through arbitration). *See* FINRA Rule 2080; *see also supra* note 8 (describing the requirement to name FINRA as a party when brokers seek expungement in court).

[68] *See* Deal, Harris, Isola, Rieger, and Smart.

[69] *See* AdvisorLaw, Commonwealth, Di Silvio, Mahoney, and Scrydloff. AdvisorLaw also provided a hyperlink to an online petition that requested signatures to ''support a balanced, cost and time effective, expungement process'' and that collected associated comments.

[70] The minimum claim amount tier for a three-person panel and a filing fee of $1,425 is $100,000.01 to $500,000.

[71] *See supra* Item II.A.1.(a)II.(iii), ''Concerns with Avoidance of the Current Fee Structure for Expungement Requests.''

should be subject to the same minimum filing fee as other non-monetary claims.

FINRA also declines to revise its proposal to charge the minimum filing fee when expungement is requested, irrespective of whether the request is made in a straight-in request or in an underlying customer arbitration. FINRA notes that other claims for relief filed by associated persons during a customer arbitration (*i.e.,* counterclaims, cross claims, and third party claims) all result in a separate filing fee, just as they would if the associated person filed the claim in a separate arbitration. FINRA acknowledges that the costs to process straight-in requests and requests made in an underlying customer arbitration may not be identical.[72] However, FINRA believes that the proposed minimum filing fee is commensurate with the additional work that arbitrators should undertake when expungement is requested.[73]

With respect to the concern that the minimum filing fee may prevent associated persons from making meritorious expungement requests, FINRA notes that the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship.[74]

A. Cost Shifting

Some commenters proposed shifting the costs of requesting expungement away from associated persons. Braschi suggested that FINRA provide a mechanism to shift the cost of expungement to customers and their attorneys, and Wellington suggested that FINRA should impose little or no cost if the associated person receives an expungement recommendation. Liebrader stated that FINRA should have its members ''shoulder more of the cost in this mandatory arbitration forum'' and should ''provide more relief for Claimants who for financial reasons have trouble coming up with the filing fees.''

FINRA believes that the costs associated with expungement requests should generally be shared by the associated persons who are the subject of the customer complaints and arbitrations, and the firms that employ them.[75] In addition, consistent with the current fee structure under the Codes, under the proposed rule change member firms will continue to bear the larger share of the costs of expungement. As with other types of arbitration claims, member firms that are respondents or employed the associated person seeking expungement, not the associated person or customer, pay the majority of the expense of the forum through the member surcharge and process fee. In addition, as noted above, the Director may defer payment of the filing fee for claimants that demonstrate financial hardship.[76]

Member Surcharge and Process Fee

In the *Notice,* FINRA proposed that when expungement is requested, there would be an assessment of a member surcharge and process fee, consistent with the existing provisions of the Codes,[77] against each member that is named as a party or respondent, or that employed the associated person named as a respondent or party at the time of the events giving rise to the dispute, as applicable. Several commenters expressed concerns with this proposal.

A. Assessment Against Firm That Employed Associated Person ''At the Time of the Events Giving Rise to the Dispute''

Keesal stated that the proposed assessment of a member surcharge and process fee against the member firm that employed the associated person at the time of the ''events giving rise to the dispute'' required ''further clarification.'' Keesal stated that parties may contend that multiple events gave rise to a customer claim, during which the associated person may have been employed with multiple member firms.

After considering the comment, FINRA has modified the proposal to assess, consistent with the existing provisions of the Codes, member surcharge and process fees against the member firm that is a party or is named as a respondent, or ''that employed the associated person at the time the customer dispute arose.'' [78] This is the standard that currently triggers an obligation to pay the process fee and member surcharge in FINRA arbitrations.[79]

B. When Expungement Is Requested in a Customer Arbitration

SIFMA expressed concern that, when expungement is requested in a customer arbitration, the proposal would result in the assessment of a second member surcharge and process fee against a member firm ''in addition to the fees charged in the underlying arbitration.'' Keesal similarly stated that imposing these fees during the customer arbitration was not justified because the expense of ''empaneling and compensating arbitrators and administering the case'' should be handled as part of the customer arbitration.

FINRA notes that the proposal retains the existing requirement that firms may be assessed only one member surcharge and one process fee in a customer arbitration,[80] and that the proposal does not impact how the member surcharge and process fee are assessed today in a customer arbitration.[81] Accordingly, member firms will not be assessed these fees twice in the same customer arbitration, even if expungement is requested during the arbitration. In addition, in the proposal, FINRA has clarified that the minimum member surcharge and process fee apply only when the associated person files a straight-in request against a member firm or customer.[82]

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 (i) as the Commission may designate up to 90 days of such date 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 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:

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[72] *See supra* note 11 (describing how a second member surcharge and process fee will not be assessed in an arbitration, even if expungement is requested).

[73] *See supra* Item II.A.1.(b)I.

[74] *See supra* note 32.

[75] Under the Codes, a panel may order in the award that a party reimburse another party for all or part of any filing fee paid. *See supra* note 32. In addition, in a customer arbitration, the Director will refund the member surcharge if the panel denies all of the customer's claims against the member or associated person and allocates all hearing session fees against the customer. *See* FINRA Rule 12901(b)(1).

[76] *See supra* note 32.

[77] *See supra* notes 10 and 11 and accompanying text.

[78] *See supra* notes 35 and 43 and accompanying text.

[79] *See, e.g.,* FINRA Rules 12901(a)(1)(C) and 13903(b).

[80] *See supra* notes 36 and 45; *see also* proposed Rules 12901(a)(6), 12903(e), 13901(f), and 13903(e).

[81] *See supra* note 10.

[82] *See* proposed Rules 12901(a)(3), 12903(c), 13901(c), and 13903(c).

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2020–005 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2020–005. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2020–005 and should be submitted on or before March 18, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[83]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–03772 Filed 2–25–20; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2020–0008]

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2020–0008].

I. The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than April 27, 2020. Individuals can obtain copies of the collection instruments by writing to the above email address.

Requests for Self-Employment Information, Employee Information, and Employer Information—20 CFR 422.120—0960–0508. When SSA cannot identify Form W–2 wage data for an individual, we place the data in an earnings suspense file and contact the individual (and in certain instances the employer) to obtain the correct information. If the respondent furnishes the name and Social Security Number (SSN) information that agrees with SSA's records, or provides information that resolves the discrepancy, SSA adds the reported earnings to the respondent's Social Security record. We use Forms SSA–L2765, SSA–L3365, and SSA–L4002 for this purpose. The respondents are self-employed individuals and employees whose name and SSN information do not agree with their employer's and SSA's records.

Type of Request: Revision of an OMB approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
SSA–L2765	12,321	1	10	2,054	*22.50	**46,215
SSA–L3365	179,749	1	10	29,958	22.50	**674,055
SSA–L4002	121,679	1	10	20,280	*22.50	**456,300
Totals	313,749			52,292		**1,176,570

*We based these figures on average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data.

**This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

II. SSA submitted the information collection below to OMB for clearance. Your comments regarding this information collection would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than March 27, 2020. Individuals can obtain

[83] 17 CFR 200.30–3(a)(12).

copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

Consent Based Social Security Number Verification Process—20 CFR 400.100—0960–0760. The Consent Based Social Security Number Verification (CBSV) process is a fee-based automated SSN verification service available to private businesses and other requesting parties. To use the system, private businesses and requesting parties must register with SSA and obtain valid consent from SSN holders prior to verification. We collect the information to verify if the submitted name and SSN match the information in SSA records. After completing a registration process and paying the fee, the requesting party can use the CBSV process to submit a file containing the names of number holders who gave valid consent, along with each number holder's accompanying SSN and date of birth (if available) to obtain real-time results using a web service application or SSA's Business Services Online (BSO) application. SSA matches the information against the SSA master file of SSNs, using SSN, name, date of birth, and gender code (if available). The requesting party retrieves the results file from SSA, which indicates only a match or no match for each SSN submitted.

Under the CBSV process, the requesting party does not submit the consent forms of the number holders to SSA. SSA requires each requesting party to retain a valid consent form for each SSN verification request. The requesting party retains the consent forms in either electronic or paper format.

SSA added a strong audit component to ensure the integrity of the CBSV process. At the discretion of the agency, we require audits (called ''compliance reviews'') with the requesting party paying all audit costs. Independent certified public accounts (CPAs) conduct these reviews to ensure compliance with all the terms and conditions of the party's agreement with SSA, including a review of the consent forms. CPAs conduct the reviews at the requesting party's place of business to ensure the integrity of the process. In addition, SSA reserves the right to perform unannounced onsite inspections of the entire process, including review of the technical systems that maintain the data and transaction records. The respondents to the CBSV collection are the participating companies; members of the public who consent to the SSN verification; and CPAs who provide compliance review services.

Type of Request: Revision of an OMB-approved information collection.

Time Burden

Requirement	Number of respondents	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
Participating Companies							
Registration process for new participating companies	*** 10	1	10	120	20	* 36.98	** 740
Creation of file with SSN holder identification data; maintaining required documentation/forms	80	**** 251	20,080	60	20,080	* 36.98	** 742,558
Using the system to upload request file, check status, and download results file	80	251	20,080	5	1,673	* 36.98	** 61,868
Storing Consent Forms	80	251	20,080	60	20,080	* 36.98	** 742,558
Activities related to compliance review	80	251	20,080	60	20,080	* 36.98	** 742,558
Totals	330	.....	80,330	.....	61,933	.....	** 2,290,282
Participating Companies Who Opt for External Testing Environment (ETE)							
ETE Registration Process (includes reviewing and completing ETE User Agreement)	30	1	1	180	90	* 36.98	** 3,328
Web Service Transactions	30	50	1,500	1	25	* 36.98	** 925
Reporting Issues Encountered on Web service testing (*e.g.*, reports on application's reliability)	30	50	1,500	1	25	* 36.98	** 925
Reporting changes in users' status (e.g., termination or changes in users' employment status; changes in duties of authorized users)	30	1	1	60	30	* 36.98	** 1,109
Cancellation of Agreement	30	1	1	30	15	* 36.98	** 555
Dispute Resolution	30	1	1	120	60	* 36.98	** 2,219
Totals	180	.....	3,004	.....	245	.....	** 9,061
People Whose SSNs SSA Will Verify							
Reading and signing authorization for SSA to release SSN verification (Form SSA–89)	2,500,000	1	2,500,000	3	125,000	* 10.22	** 1,277,500
Responding to CPA re-contact	4,000	1	4,000	5	333	* 36.98	** 12,314
Totals	2,504,000	.....	2,504,000	.....	125,333	.....	** 1,289,814

* We based these figures on average Business and Financial operations occupations hourly salaries, as reported by Bureau of Labor Statistics data, and per average DI payments, as reported in SSA's disability insurance payment data.

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

*** One-time registration process/approximately 10 new participating companies per year.

**** Please note there are 251 Federal business days per year on which a requesting party could submit a file.

There is one CPA respondent conducting compliance reviews and preparing written reports of findings. The average burden per the 80 responses is 4,800 minutes for a total burden of 6,400 hours annually.

Cost Burden

The public cost burden is dependent upon the number of companies and transactions per year. In FY 2019, 80

companies enrolled; 80 companies submitted an advance; and 70 actually performed verifications. The cost estimates below are based upon 80 participating companies in FY 2019 (includes an average of 10 new companies per year since 2016) submitting a total of 2,500,000 transactions.

One-Time per Company Registration Fee—$5,000.

Estimated per SSN Transaction Fee—$1.00.

Estimated per Company Cost to Store Consent Forms—$300.

Dated: February 21, 2020.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2020–03847 Filed 2–25–20; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 11044]

30 Day Notice of Proposed Information Collection: ECA Exchange Student Surveys

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) up to March 27, 2020.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Tiffany Parkes-Moscova who may be reached on (202) 632–6359 or *Parkes-Moscovatm@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* ECA Exchange Student Surveys.
- *OMB Control Number:* 1405–0210.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Educational and Cultural Affairs (ECA/PE/C/PY).
- *Form Number:* SV2012–0007 (Foreign Exchange students).
- *Respondents:* Exchange students from foreign countries participating in Department of State sponsored programs from 2020–2023.
- *Estimated Number of Respondents:* 1500.
- *Estimated Number of Responses:* 1500.
- *Average Time per Response:* 15 minutes.
- *Total Estimated Burden Time:* 375 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

This collection of information is under the provisions of the Mutual Educational and Cultural Exchange Act, as amended, and the Exchange Visitor Program regulations (22 CFR part 62), as applicable. The information collected will be used by the Department to ascertain whether there are any issues that would affect the safety and well-being of exchange program participants.

Methodology

The survey will be sent electronically via the Survey Monkey tool and responses collected electronically. If a respondent requests a paper version of the survey it will be provided.

Robert Ogburn,

Director.

[FR Doc. 2020–03821 Filed 2–25–20; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity for Public Comment To Dispose of 3.97 Acres at Bangor International Airport, Bangor ME

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for public comments.

SUMMARY: Notice is being given that the FAA is considering a request from the City of Bangor, MA to Dispose of 3.97 Acres at Bangor International Airport, Bangor, ME. The land is no longer needed for aviation purposes and can be disposed without affecting future aviation needs of the airport. The revenue generated by the disposal will be placed into the airport's operation and maintenance fund.

DATES: Comments must be received on or before March 27, 2020.

ADDRESSES: You may send comments using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov,* and follow the instructions on providing comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W 12–140, 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.

Interested persons may inspect the request and supporting documents by contacting the FAA at the address listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Mr. Jorge E. Panteli, Compliance and Land Use Specialist, Federal Aviation Administration New England Region Airports Division, 1200 District Avenue, Burlington, Massachusetts, 01803. Telephone: 781–238–7618.

Issued in Burlington, Massachusetts on January 31, 2020.

Julie Seltsam-Wilps,

Deputy Director, ANE–600.

[FR Doc. 2020–03781 Filed 2–25–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent of Waiver With Respect to Land; Sloulin Field International Airport, ISN, Williston, North Dakota

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA is considering a proposal to change 788.93 acres of airport land from aeronautical use to non-aeronautical use and to authorize the sale of airport property located at the former Sloulin Field International Airport, ISN, Williston, ND. The aforementioned land is not needed for aeronautical use because the new Williston Basin International Airport, XWA, Williston, ND is open and available for public aeronautical use. The former Williston Airport, ISN, site is located primarily on the west side of Highway 2, north of 26th Street in the City of Williston with 7.25 acres located on the east side of Highway 2. The airport's prior aeronautical use was for commercial and general aviation flying. The proposed non-aeronautical use of the property will be for commercial and residential development.

DATES: Comments must be received on or before March 27, 2020.

ADDRESSES: Documents are available for review by appointment at the FAA Dakota-Minnesota Airports District Office, Mark J. Holzer, FAA Program Manager, 2301 University Drive-Bldg. 23B, Bismarck, ND 58504 Telephone: 701–323–7393/Fax: 701–323–7399 and City of Williston, Williston Basin Intl. Airport, 14127 Jensen Ln. Suite 200, Williston, ND 58801, Telephone: 701–875–8594. Written comments on the Sponsor's request must be delivered or mailed to: Mark J. Holzer, FAA Program Manager, Federal Aviation Administration, Dakota-Minnesota Airports District Office, 2301 University Drive-Bldg. 23B, Bismarck, ND 58504 Telephone: 701–323–7393/Fax: 701–323–7399.

FOR FURTHER INFORMATION CONTACT: Mark J. Holzer, FAA Program Manager, Federal Aviation Administration, Dakota-Minnesota Airports Bismarck District Office, 2301 University Drive-Bldg. 23B, Bismarck, ND 58504 Telephone: 701–323–7393/Fax: 701–323–7399.

SUPPLEMENTARY INFORMATION:

In accordance with section 47107(h) of Title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

The former Sloulin Field International Airport was a commercial service airport located in the City of Williston, ND. The land was acquired by the City of Williston with funding assistance from the FAA AIP, ADAP and FAAP grant programs, ND State Aeronautics Commission and local funding. The City of Williston plans to make the former airport site available for development opportunities including combinations of multi-family residential, commercial and business uses as well as public and civic uses.

The disposition of proceeds from the sale of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999 (64 FR 7696). Approval does not constitute a commitment by the FAA to financially assist in the change in use of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA.

This notice announces that the FAA is considering the release of the subject airport property at the former Sloulin Field International Airport, ISN, Williston, ND from all federal land covenants, subject to a restrictive covenant related to the future use of certain ''avoidance areas'' within the released property. The FAA's Finding of No Significant Impact/Record of Decision for the Proposed Replacement Airport (XWA), dated September 22, 2015, requires such restrictive covenant as a condition for releasing the former airport property. Approval does not constitute a commitment by the FAA to financially assist in the disposal of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA.

Property Description

Parcels West of Hwy 2

Lots 8, 9 & 10 in Block 4 and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 & 12 in Block 7 of SLOULIN FIELD FIRST ADDITION to the City of Williston, Williams County, North Dakota; AND Lots 1R, 2R, 3R, 4R, 5R, 6R, 7R, 8R, 9R, and 10R in Block 4 of the REARRANGEMENT OF LOTS 1, 2, 3, 4, 5, 6, & 7 IN BLOCK 4 OF THE SLOULIN FIELD FIRST ADDITION to the City of Williston, Williams County, North Dakota; AND

Lots 1, 2, 3, 4, 5, & 6 in Block 8 of SLOULIN FIELD SECOND ADDITION to the City of Williston, Williams County, North Dakota; AND

Plots 1, 2, 3 & 4 of the Plat of the SW¼SE¼ of Section 11, Township 154 North, Range 101 West of the 5th/Principal Meridian, Williams County, North Dakota; AND

Plots 9 and 10 of the Plat of the SE¼SE¼ of Section 11, Township 154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota; AND

A tract in the SE¼SW¼, S½SE¼, NW¼SE¼ of Section 3, Township 154 North, Range 101 West of the 5th/Principal Meridian, Williams County, North Dakota as described in Book 214 Deeds, page 95; AND

A tract in the SE¼SE¼ of Section 3, Township 154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota as described in Document No. 469117 plus ½ vacated alley; AND

A tract in the NW¼NE¼ of Section 10, Township 154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota as described in Book 215 Deeds, Page 73; AND

A tract in the SE¼NE¼ of Section 10, Township 154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota as described in Document No. 473961; AND

ALL of the NE¼NE¼ of Section 10, Township 154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota; AND

All of Section 11, Township 154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota, LESS AND EXCEPT All Lots and Blocks in the SLOULIN FIELD FIRST ADDITION to the City of Williston; All Lots and Blocks in the REARRANGEMENT OF LOTS 1, 2, 3, 4, 5, 6, & 7 IN BLOCK 4 OF THE SLOULIN FIELD FIRST ADDITION to the City of Williston; All Lots and Blocks in the SLOULIN FIELD WAL–MART REARRANGEMENT; All Lots and Blocks in the GLENN ADDITION; All Lots and Blocks in the HERRON FLATS SUBDIVISION; All Lots and Blocks in the PITMAN ADDITION; All Lots and Blocks in the GLENN REARRANGEMENT OF LOTS 5 AND 6 of the Plat of SW¼SE¼ of Section 11, Township 154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota; Plots 11 & 12 of the Plat of SW¼SE¼ of Section 11, Township 154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota; All Lots and Blocks in the JOHNSON'S REARRANGEMENT of the E½ of Lot 12 of the Plat of SE¼SE¼ of Section 11, Township

154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota; and LESS AND EXCEPTING 2 tracts of land in the SE¼SE¼ of Section 11, Township 154 North, Range 101 West of the 5th Principal Meridian, Williams County, North Dakota as described in Document No. 767736; ALL IN THE CITY OF WILLISTON, WILLIAMS COUNTY, NORTH DAKOTA; AND

Lots 1 and 2 of WILLISTON MUNICIPAL GOLF COURSE SUBDIVISION to the City of Williston, Williams County, North Dakota.

Additional Parcels East of Hwy 2

Lots 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, Block 1, Monroe Subdivision to the City of Williston, Williams County, North Dakota;

Lots 18R and 19R of the Monroe Rearrangement of Lots 1, 18 and 19 of Block 1, Block 1, Monroe Subdivision to the City of Williston, Williams County, North Dakota;

Block 2R of Crow Fly High Rearrangement of Lot 1 of Crow Fly High Subdivision to the City of Williston, Williams County, North Dakota.

Issued in Minneapolis, MN, on February 19, 2020.

Andy Peek,

Manager, Dakota-Minnesota Airports District Office, FAA, Great Lakes Region.

[FR Doc. 2020–03870 Filed 2–25–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Transfer of Federally Assisted Facility

AGENCY: Federal Transit Administration (FTA), United States Department of Transportation (USDOT).

ACTION: Notice of Intent (NOI) to transfer federally assisted land or facility.

SUMMARY: Federal public transportation law delegated to the Federal Transit Administrator permits the Administrator of the Federal Transit Administration (FTA) to authorize a recipient of FTA funds to transfer land or a facility to a public body for any public purpose with no further obligation to the Federal Government (the Government) if, among other things, no Federal agency is interested in acquiring the asset for Federal use. Accordingly, FTA is issuing this Notice to advise Federal agencies that the Northeast Illinois Regional Commuter Railroad Corporation a/k/a Metra (Metra) intends to transfer the land and building located at 16912 and 16901 Paulina Avenue (respectively), Hazel Crest, Illinois (Subject Property) to the Village of Hazel Crest (Village). Metra used the location as a Passenger Assistance Link building and storage facility from 1987 to the present (33 years). Metra has determined it no longer needs the building for public transportation purposes. The Village plans to utilize the Subject Property as a job training center for the community. The Village hopes to partner with another unit of government and/or local college to equip the building with technology equipment and staff it with career development experts who would be dedicated to helping career seekers find employment in the region.

DATES: Any Federal agency interested in acquiring the facility must notify the FTA Region V office of its interest no later than March 27, 2020.

ADDRESSES: Interested parties should notify the Regional Office by writing to Kelley Brookins, Regional Administrator, Federal Transit Administration, 200 West Adams Street, Suite 320, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: Kathryn Loster, Regional Counsel, (312) 353–3869.

SUPPLEMENTARY INFORMATION:

Background

Federal public transportation law (49 U.S.C. 5334(h)) provides guidance on the transfer of capital assets. Specifically, if a recipient of FTA assistance decides an asset acquired, at least in part, with assistance under 49 U.S.C. Chapter 53 is no longer needed for the purpose for which it was acquired, the Secretary of Transportation may authorize the recipient to transfer the asset to a local governmental authority to be used for a public purpose with no further obligation to the Government. 49 U.S.C. 5334(h)(1).

Determinations

The FTA Administrator may authorize a transfer for a public purpose other than mass transportation only if the FTA Administrator decides:

(A) The asset will remain in public use for at least 5 years after the date the asset is transferred;

(B) There is no purpose eligible for assistance under Chapter 53 of title 49, United States Code, for which the asset should be used;

(C) The overall benefit of allowing the transfer is greater than the interest of the Government in liquidation and return of the financial interest of the Government in the asset, after considering fair market value and other factors; and

(D) Through an appropriate screening or survey process, that there is no interest in acquiring the asset for Government use if the asset is a facility or land.

Federal Interest in Acquiring Land or Facility

This Notice implements the requirements of 49 U.S.C. 5334(h)(1)(D). Accordingly, FTA hereby provides notice of the availability of the Subject Property further described below. Any Federal agency interested in acquiring the Subject Property should promptly notify the FTA. If no Federal agency is interested in acquiring the Subject Property, FTA will make certain that the other requirements specified in 49 U.S.C. 5334(h)(1)(A) through (C) are met before permitting the asset to be transferred.

Additional Description of Land or Facility

The Subject Property is recognized with the Parcel Identification Numbers 29–30–221–037 and 29–30–222–001. It is made up of a combined total of 0.81 acres and improved with a masonry structure that is approximately 17,000 square feet. The northern most section of the building is finished as office space, while the middle and southern sections are unfinished with exposed masonry walls. The middle section of the building has high ceilings and an overhead garage door.

The southern section has a more typical ceiling height and access doors. The building is structurally sound, but in poor condition primarily because the roof needs to be repaired. The Subject Property is currently vacant. Public utilities include gas, electric, and water.

(Authority: 49 U.S.C. 5334(h))

K. Jane Williams,

Acting Administrator.

[FR Doc. 2020–03765 Filed 2–25–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Internal Revenue Service Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following

information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before March 27, 2020 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

1. Title: Export Exemption Certificate (Form 1363).

OMB Control Number: 1545–0685.

Type of Review: Extension without change of a currently approved collection.

Description: IRC section 4272(b)(2) excepts exported property from the excise tax on transportation of property. Regulation section 49.4271–1(d)(2) authorizes the filing of Form 1363 by the shipper to request exemption for a shipment, or a series of shipments. The form is filed with the carrier. It is used by IRS as proof of tax-exempt status of each shipment.

Form: 1363.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 100,000.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 100,000.

Estimated Time per Response: 4 hours 15 minutes.

Estimated Total Annual Burden Hours: 425,000.

2. Title: Employer-Designed Tip Reporting Program (EmTRAC) for the Food and Beverage Industry.

OMB Control Number: 1545–1716.

Type of Review: Extension without change of a currently approved collection.

Description: Information is required by the Internal Revenue Service in its compliance efforts to assist employers and their employees in understanding and complying with section 6053(a), which requires employees to report all their tips monthly to their employers.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 20.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 20.

Estimated Time per Response: 43 hours 30 minutes.

Estimated Total Annual Burden Hours: 870.

3. Title: IRS Taxpayer Burden Surveys.

OMB Control Number: 1545–2212.

Type of Review: Revision of a currently approved collection.

Description: Each year, individual taxpayers in the United States submit more than 140 million tax returns to the Internal Revenue Service (IRS). The IRS uses the information in these returns, recorded on roughly one hundred distinct forms and supporting schedules, to administer a tax system whose rules span thousands of pages. Managing such a complex and broad-based tax system is costly but represents only a fraction of the total burden of the tax system. Equally, if not more burdensome, is the time and out-of-pocket expenses that taxpayers spend in order to comply with tax laws and regulations.

Changes in tax regulations, tax administration, tax preparation methods, and taxpayer behavior continue to alter the amount and distribution of taxpayer burden. The purpose of these surveys is to gather data that will be used to update and expand the IRS Taxpayer Burden Model, a robust predictive model based on an improved burden estimation methodology. Information gathered by the surveys is not available in the administrative tax return data, so survey data are a critical input to the model. The survey data are not viewed discretely. Rather, because the data are used as inputs to the Taxpayer Burden Model, they provide an end-to-end, taxpayer facing view of compliance burden. The related behavioral studies further inform IRS's understanding of taxpayer behavior, inform burden model design, and help IRS improve processes and identify opportunities to reduce taxpayer burden.

Form: None.

Affected Public: Businesses or other for-profits, Not-for-profit Institutions, Individuals and households.

Estimated Number of Respondents: 225,246.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 225,246.

Estimated Time per Response: 29 minutes.

Estimated Total Annual Burden Hours: 109,659.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: February 21, 2020.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2020–03863 Filed 2–25–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Community Development Financial Institutions Fund Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before March 27, 2020 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Community Development Financial Institutions Fund (CDFI Fund)

1. Title: Uses of Award Report Form.

OMB Control Number: 1559–0032.

Type of Review: Revision of a currently approved collection.

Description: The Community Development Financial Institutions Fund (CDFI Fund) administers the Bank Enterprise Award Program (BEA Program), the Community Development Financial Institutions Program (CDFI Program), and the Native American CDFI Assistance Program (NACA Program). The Uses of Award Report Form is used by Award Recipients of the BEA, CDFI, and NACA Programs to report to the CDFI Fund, on the uses of their award funds per their Award/Assistance Agreements.

Form: Uses of Award (UOA) Report.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 470.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 470.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 470.

2. Title: New Markets Tax Credit Program Allocation and Qualified Equity Tracking (AQEI) System.

OMB Control Number: 1559–0024.

Type of Review: Revision of a currently approved collection.

Description: The New Markets Tax Credit Program (NMTC Program) was established by Congress in 2000 to spur new or increased investments into operating businesses and real estate projects located in low-income communities. The NMTC Program attracts investment capital to low-income communities by permitting individual and corporate investors to receive a tax credit against their Federal income tax return in exchange for making equity investments in specialized financial institutions called Community Development Entities (CDEs). Via a competitive process, the CDFI Fund awards NMTC allocation awards to select CDEs, based upon information submitted in their NMTC Allocation Application. Entities receiving an NMTC allocation must enter into an allocation agreement with the CDFI Fund. The allocation agreement contains the terms and conditions, including all reporting requirements, associated with the receipt of a NMTC allocation. The CDFI Fund required each Allocatee to use an electronic data collection and submission system, known as the Allocation Tracking System (ATS), to report on the information related to its receipt of a Qualified Equity Investment (QEI). As of May 2018, the ATS function was renamed as the NMTC Allocation and Qualified Equity Investment Tracking System (AQEI) and moved to the CDFI Fund's Awards Management Information System (AMIS), a business system that supports all CDFI Fund programs through each phase of the programs' life cycle.

AQEI enables Allocatees to report information to the CDFI Fund in a timely fashion. This information is also used by the Treasury Department (including both the CDFI Fund and the Internal Revenue Service (IRS)) to: (1) Monitor the issuance of QEIs to ensure that no Allocatee exceeds its allocation authority; (2) ensure that QEIs are issued within the timeframes required by the NMTC Program regulations and the legal agreements signed between the CDFI Fund and the Allocatee; and (3) assist with NMTC Program evaluation efforts.

Form: None.

Affected Public: Businesses or other for-profits, State, Local, & Tribal Governments.

Estimated Number of Respondents: 156.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 1,872.

Estimated Time per Response: 1 hour 30 minutes.

Estimated Total Annual Burden Hours: 2,808.

3. Title: New Markets Tax Credit (NMTC) Program—Community Development Entity (CDE) Certification Application.

OMB Control Number: 1559–0014.

Type of Review: Revision of a currently approved collection.

Description: The purpose of the NMTC Program is to provide an incentive to investors in the form of a tax credit, which is expected to stimulate investment in new private capital in low-income communities. In order to qualify for a NMTC Program allocation award from the CDFI Fund, an applicant must be certified by the CDFI Fund as a Community Development Entity (CDE). The CDE Certification Application is used to determine whether an entity seeking CDE certification meets the CDFI Fund's requirements for such certification.

Form: CDFI–0019.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 300.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 300.

Estimated Time per Response: 4 hours.

Estimated Total Annual Burden Hours: 1,200.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: February 21, 2020.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2020–03878 Filed 2–25–20; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Distilled Spirits Plants—Transaction and Supporting Records

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before March 27, 2020 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Tax and Trade Bureau (TTB)

Title: Distilled Spirits Plants—Transaction and Supporting Records.

OMB Control Number: 1505–0056.

Type of Review: Revision of a currently approved collection.

Description: In general, the Internal Revenue Code (IRC) at 26 U.S.C. 5001

imposes Federal alcohol excise tax on distilled spirits produced or imported into the United States. To protect that revenue, the IRC at 26 U.S.C. 5207 also provides that distilled spirits plant (DSP) proprietors must maintain records related to their production, storage, denaturing, and processing activities and render reports covering those activities ''as the Secretary shall by regulations prescribe.'' Under those IRC authorities, the TTB regulations in 27 CFR parts 19, 26, 27, and 28 require DSP proprietors to keep certain usual and customary records related to their production, storage, denaturing, and processing activities. This information collection consists of the transaction and supporting records that are common to all four of those DSP activities. Proprietors use those common records, along with records that are unique to each activity, to document the data provided on their monthly DSP production, storage, denaturing, and processing operations reports. (TTB requirements to keep records unique to each of the four DSP activities, and the four related DSP operations reports, are approved under other OMB control numbers.) TTB personnel may examine the required records to verify the data provided by DSP proprietors in their monthly operations reports as those reports assist TTB in determining a DSP proprietor's Federal excise tax liability. As such, this information collection is necessary to protect the revenue.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 3,340.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 3,340.

Estimated Time per Response: 0 hours. The information collection consists only of customary and usual recordkeeping, which imposes no additional burden on respondents.

Estimated Total Annual Burden Hours: 0.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: February 21, 2020.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2020–03862 Filed 2–25–20; 8:45 am]

BILLING CODE 4810–31–P

FEDERAL REGISTER

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Part II

National Labor Relations Board

29 CFR Part 103
Joint Employer Status Under the National Labor Relations Act; Final Rule

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

RIN 3142–AA13

Joint Employer Status Under the National Labor Relations Act

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board (NLRB or Board) has decided to issue this final rule for the purpose of carrying out the provisions of the National Labor Relations Act (NLRA or Act) by establishing the standard for determining whether two employers, as defined in Section 2(2) of the Act, are a joint employer under the NLRA. The Board believes that this rulemaking will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby enhancing labor-management stability, the promotion of which is one of the principal purposes of the Act. Under this final rule, an entity may be considered a joint employer of a separate employer's employees only if the two share or codetermine the employees' essential terms and conditions of employment, which are exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

DATES: This rule has been classified as a major rule subject to Congressional review. The effective date is April 27, 2020. However, at the conclusion of the congressional review, if the effective date has been changed, the National Labor Relations Board will publish a document in the **Federal Register** to establish the new effective date or to withdraw the rule.

FOR FURTHER INFORMATION CONTACT: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001, (202) 273–2917 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background

A. The Act

The NLRA sets forth a number of rights and responsibilities that apply to employers, employees, and labor organizations representing employees, in furtherance of the Act's overarching goals of promoting labor relations stability,[1] protecting employees' right to designate representatives of their own choosing ''for the purpose of collective bargaining or other mutual aid or protection,'' [2] and preventing unfair labor practices by employers and labor organizations.[3]

The NLRA also defines the terms ''employer'' and ''employee.'' Under Section 2(2) of the Act, ''the term 'employer' includes any person acting as an agent of an employer, directly or indirectly,'' but excludes certain governmental entities, entities subject to the Railway Labor Act, or any labor organization (other than when acting as an employer). Section 2(3) of the Act provides that ''the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter [of the Act] explicitly states otherwise . . . but shall not include . . . any individual having the status of an independent contractor. . . .'' 29 U.S.C. 152(3).

The text of the Act and its legislative history further establish that, in determining whether an employment relationship exists between a putative employer and employee, common-law agency principles are controlling. See, *e.g., NLRB* v. *United Ins. Co. of America,* 390 U.S. 254, 256 (1968). Thus, in making this determination, the Board is bound by common-law principles, which require that it focus on the control exercised by a putative employer over a person performing work for it. Id; see also *Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. 318, 322–323 (1992).

The Act does not contain the term ''joint employer,'' much less define it. As discussed below, the Board and reviewing courts have developed that concept in adjudication over the years to address situations where two or more separate entities engaged in a business relationship jointly affect the terms and conditions of employment of a group of employees. See *Boire* v. *Greyhound Corp.,* 376 U.S. 473 (1964) (holding that Board's determination that bus company possessed ''sufficient control over the work'' of its cleaning contractor's employees to be considered a joint employer was not reviewable in federal district court); *Indianapolis Newspapers, Inc.,* 83 NLRB 407, 408–409 (1949) (finding that two newspaper businesses, Star and INI, were not joint employers, despite their integration, because ''there [wa]s no indication that Star, by virtue of such integration, t[ook] an active part in the formulation or application of the labor policy, or exercise[d] any immediate control over the operation, of INI''). Consistent with the statutory requirement that the common law of agency be applied, joint-employer determinations have focused on the extent to which the separate companies exercise control over the persons performing the work. Id.

As also discussed below, Section 6 of the Act authorizes the Board to ''make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter.'' See *American Hosp. Ass'n* v. *NLRB,* 499 U.S. 606 (1991) (affirming authority of NLRB to enact rules establishing bargaining units for acute care hospitals). The Board has determined that it is appropriate to do so now in order to define who may be a joint employer under the Act.

B. The Development of the Joint-Employment Doctrine Under the NLRA

The general formulation of the Board's joint-employer standard is firmly established. ''The Board will find that two separate entities are joint employers of a single work force if the evidence shows that they 'share or codetermine those matters governing the essential terms and conditions of employment.' '' *CNN America, Inc.,* 361 NLRB 439, 441 (2014) (quoting *TLI, Inc.,* 271 NLRB 798 (1984), enfd. mem. sub nom. *Gen. Teamsters Local Union No. 326* v. *NLRB,* 772 F.2d 894 (3d Cir. 1985)), enf. denied in part 865 F.3d 740 (DC Cir. 2017). This standard derives from language in *Greyhound Corp.,* 153 NLRB 1488, 1495 (1965), enfd. 368 F.2d 778 (5th Cir. 1966), and was endorsed in *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1122–1123 (3d Cir. 1982). It is rooted in longstanding Board precedent and has been consistently approved by reviewing courts.

Notably, however, the Board has never attempted to comprehensively define the ''essential terms and conditions of employment'' that are relevant to the joint-employer inquiry, even though the standard itself inherently implies that it is control over those terms and conditions of employment that is determinative of joint-employer status.[4] And even when a term or condition of employment is deemed ''essential'' for the purpose of

[1] Section 1 of the Act, 29 U.S.C. 151.

[2] Section 7 of the Act, 29 U.S.C. 157.

[3] Section 8 of the Act, 29 U.S.C. 158.

[4] The Board has held that a joint-employer finding requires ''a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.'' *Laerco Transportation,* 269 NLRB 324, 325 (1984); accord *TLI, Inc.,* 271 NLRB at 798–799. But this list did not purport to be exhaustive.

determining joint-employer status, the joint-employer standard described above does not specify the extent of control that must be shown before the two entities may be found to ''share or codetermine'' that essential term or condition. As fully described in the Notice of Proposed Rulemaking (NPRM), the Board's treatment of the latter issue has evolved over the years.[5] Nevertheless, for at least 30 years (from no later than 1984 to 2015), evidence of indirect control was typically insufficient to prove that an entity was the joint employer of another employer's workers. Even direct and immediate supervision of another employer's employees was insufficient to establish joint-employer status where such supervision was ''limited and routine.'' [6]

The law governing joint-employer determinations changed significantly in August 2015. At that time, a divided Board overruled the then-extant precedent described above and substantially relaxed the requirements for proving a joint-employer relationship. Specifically, a Board majority held that it would no longer require proof that a putative joint employer has exercised any ''direct and immediate'' control over the essential terms and conditions of employment of another company's workers. *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery,* 362 NLRB 1599, 1600 (2015) (*Browning-Ferris*), affd. in part, reversed in part and remanded 911 F.3d 1195 (D.C. Cir. 2018). The majority in *Browning-Ferris* explained that, under its new standard, a company could be deemed a joint employer even if its control over the essential working conditions of another business's employees was indirect, limited and routine, or contractually reserved but never exercised. Id. at 1613–1614. At the same time, however, the *Browning-Ferris* majority stated that ''[e]ven where the common law *does* permit the Board to find joint employer status in a particular case, the Board must determine whether it would serve the purposes of the Act to do so. . . .'' Id. at 1610 (emphasis in original); see also id. at 1614 (''[I]t is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.'').

In December 2018, the United States Court of Appeals for the District of Columbia Circuit issued its decision on review of the Board's *Browning-Ferris* decision. See *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d 1195 (*Browning-Ferris* v. *NLRB*). Consistent with the principles stated above, the court held that the Board was required to apply the common law of agency in determining whether an entity was a joint employer of particular employees. Whether proceeding by adjudication or rulemaking, then, the Board ''must color within the common-law lines identified by the judiciary.'' Id. at 1208. The court upheld the Board's longstanding right-to-control standard as ''an established aspect of the common law of agency.'' Id. at 1209. In addition, the court also concluded that the common law ''permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment.'' Id. at 1199–1200. The court therefore affirmed *Browning-Ferris's* ''articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment.'' Id. at 1200. In so holding, the court recognized that *Browning-Ferris* did not present the issue of whether either indirect control or a contractually reserved but unexercised right to control can be dispositive of joint-employer status absent evidence of exercised direct and immediate control. Id. at 1213, 1218.

The court, however, faulted the *Browning-Ferris* Board for failing to confine its inquiry to ''indirect control over the essential terms and conditions of the workers' employment.'' Id. at 1209. Specifically, the court found that, in considering the factor of indirect control, *Browning-Ferris* failed to

> hew to the relevant common-law boundaries that prevent the Board from trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts. To inform the joint-employer analysis, the relevant forms of indirect control must be those that ''share or co-determine those matters governing essential terms and conditions of employment.'' By contrast, those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status.

Id. at 1219–1220 (internal citations omitted). The court remanded the case to the Board, and the Board accepted the remand.[7]

C. NPRM

On September 14, 2018, the Board issued its joint-employer NPRM. There, the Board proposed the following rule:

> An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

[5] As more fully described in the NPRM, the Board has consistently recognized that direct control of essential terms and conditions is relevant to this determination, while the extent to which indirect control was a factor has changed over time. Compare *Floyd Epperson,* 202 NLRB 23, 23 (1973) (dairy company was the joint employer of truck drivers supplied to it by an independent trucking firm based on evidence of both direct and indirect control over the working conditions of the drivers), enfd. 491 F.2d 1390 (6th Cir. 1974), with *Airborne Express,* 338 NLRB 597, 597 fn. 1 (2002) (holding that ''the essential element'' in a joint-employer analysis ''is whether a putative joint employer's control over employment matters is direct and immediate'' (citing *TLI, Inc.,* 271 NLRB at 798–799)); see also *NLRB* v. *CNN America, Inc.,* 865 F.3d 740, 748–751 (D.C. Cir. 2017) (finding that Board erred by failing to adhere to ''direct and immediate control'' standard); *SEIU Local 32BJ* v. *NLRB,* 647 F.3d 435, 442 (2d Cir. 2011) (''An essential element' of any joint employer determination is 'sufficient evidence of immediate control over the employees.'' (quoting *Clinton's Ditch Co-op Co.* v. *NLRB,* 778 F.2d 132, 138 (2d Cir. 1985))).

As also described in the NPRM, the relevance to the joint-employer determination of an entity's contractually reserved but unexercised authority over another company's employees has also changed over time. See *Hychem Constructors, Inc.,* 169 NLRB 274 (1968) (petrochemical manufacturer was not a joint employer of its construction subcontractor's employees even though their cost-plus agreement reserved to the manufacturer a right to approve wage increases and overtime hours and the right to require the subcontractor to remove any employee whom the manufacturer deemed undesirable); *Jewel Tea Co.,* 162 NLRB 508, 510 (1966) (department store was a joint employer of the employees of two independent companies licensed to operate specific departments of its store based on its reserved contractual authority). In *AM Property Holding Corp.,* the Board found that a ''contractual provision giving [a property owner] the right to approve [its cleaning contractor's] hires, standing alone, [was] insufficient to show the existence of a joint employer relationship.'' 350 NLRB 998, 1000 (2007), enfd. in relevant part sub nom. *SEIU Local 32BJ* v. *NLRB,* 647 F.3d 435 (2d Cir. 2011). The Board explained that ''[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties.'' Id.

[6] See, *e.g., AM Property Holding Corp.,* 350 NLRB at 998; *Airborne Express,* 338 NLRB at 597; *TLI, Inc.,* 271 NLRB at 798.

[7] The court also found that the *Browning-Ferris* Board had neglected to apply the second step of its newly-fashioned standard, under which, ''even if it finds that the common law would deem a business to be a joint employer, the Board will also ask whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.'' Id. at 1221 (internal quotation omitted). The court directed the Board to address this issue on remand as well.

83 FR at 46696. The proposed rule also included a number of hypothetical examples illustrating how it would apply to particular scenarios.

In the NPRM, the Board acknowledged that the Agency historically has made major policy determinations through adjudication, but stated that it interpreted Section 6 of the Act as authorizing the Board to engage in this rulemaking, adding that rulemaking on the issue of determining joint-employer status was preferable to adjudication in order to provide clarity and stability to this area of the law. The NPRM further stated the Board's preliminary view, subject to potential revision in response to comments, that a joint-employer doctrine under which the duty to bargain is imposed only on entities that have played an active role in establishing essential terms and conditions of employment best serves the Act's purposes of promoting collective bargaining and minimizing industrial strife. The NPRM invited comments on these issues and, indeed, on all aspects of the proposed rule, including input from employees, unions, and employers regarding their experience in workplaces where multiple entities have some authority over the workplace.

The Board set an initial comment period of 60 days, with 7 additional days allotted for reply comments. Thereafter, the Board extended these deadlines three times, including an extension to allow interested parties to comment on the impact of the D.C. Circuit's decision in *Browning-Ferris* v. *NLRB*.[8]

II. Summary of Changes to the Proposed Rule

In this section, we provide a summary overview of changes to the proposed rule.

A. Overview

The final rule, like the NPRM, provides that an entity is a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms or conditions of employment. However, the Board has modified the proposed rule to define ''share or codetermine'' as the possession and exercise of ''such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.'' The Board has also modified the proposed rule to factor indirect control over essential terms or conditions of employment, contractually reserved control over essential terms or conditions of employment, and control over mandatory subjects of bargaining other than essential terms and conditions of employment into the joint-employer analysis, ''but only to the extent [they] supplement[] and reinforce[] evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment.''

Consistent with these provisions, evidence of contractually reserved control over an essential term or condition of employment is probative for the purpose of determining whether an entity possesses or exercises direct and immediate control over that essential term or condition. Plainly, the fact that an entity has a contractually reserved right to control an essential term or condition is probative of whether it possesses control over that term. Such evidence may also be probative of whether the control possessed and exercised is ''substantial,'' as that term is defined in the final rule (see Sec. II.E, '' 'Substantial' direct and immediate control'', infra). Similarly, evidence of indirect control over an essential term or condition of employment may be probative of whether the control possessed and exercised is substantial.

Depending on the circumstances of a particular case, evidence of control over a nonessential term or condition that nonetheless constitutes a mandatory subject of bargaining may be probative of whether an entity possesses and exercises substantial direct and immediate control over an essential term or condition of employment. One can readily foresee cases where the parties dispute the significance or sufficiency of evidence that an entity exercises substantial direct and immediate control over an essential term or condition of employment, such as by claiming that the evidence is not credible or is too isolated or sporadic to meet the substantiality standard, but where the entity's control over one or more related nonessential terms may tend to support a finding of substantial direct and immediate control over an essential term or condition. For example, an entity's control over grievance adjustment or drug or alcohol testing might be probative of its direct and immediate control over discipline or supervision, and an entity's control over dress codes or attendance rules might be probative of its direct and immediate control over discipline.

Evidence of an entity's contractually reserved or indirect control over an essential term or condition of employment, or its control over mandatory but nonessential subjects of bargaining, is not, however, otherwise probative of whether the entity ''meaningfully affects matters relating to the employment relationship.'' Under the final rule, a putative joint employer reaches that threshold only through possession and exercise of substantial direct and immediate control over one or more essential terms and conditions of employment.

B. Indirect Control

The Board has modified the proposed rule to factor indirect control into the joint-employer analysis, but not to find it sufficient without more to make an entity a joint employer. Accordingly, the final rule provides that evidence of indirect control over essential terms and conditions of employment is probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control over essential terms and conditions.

The definitions of the several essential terms and conditions of employment include statements of what does and does not count as direct and immediate control over the essential term and condition being defined. These statements may bear on indirect control, since what does not count as direct and immediate control *may* count as indirect control. However, consistent with the D.C. Circuit's decision in *Browning-Ferris* v. *NLRB,* the definition of ''indirect control'' excludes ''control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract,'' and evidence of control that by definition does not count as direct and immediate control may fall within this exclusion and so not constitute indirect control, either. For example, the definition of ''[h]ours of [w]ork'' states that ''[a]n entity does not exercise direct and immediate control over hours of work by establishing an enterprise's operating hours or when it needs the

[8] See Order dated January 11, 2019. The NPRM set the deadline for initial comments as November 13, 2018, and comments replying to comments submitted during the initial comment period were due November 20, 2018. On October 30, 2018, the Board extended the deadlines for submitting initial and reply comments for 30 days, to December 13, 2018, and December 20, 2018, respectively. On December 10, 2018, the deadlines were extended for an additional 30 days, to January 14, 2019, and January 22, 2019, respectively. After the D.C. Circuit issued its decision in *Browning-Ferris* v. *NLRB,* the Board extended the deadlines a third and final time to permit commenters to address issues raised by the court's decision. The deadline for initial comments was extended to January 28, 2019, and for reply comments to February 11, 2019.

services provided by another employer.'' But establishing an enterprise's operating hours may not be evidence of indirect control, either. A business that contracts, for example, with a food service contractor to staff its employee lunchroom surely sets ''basic ground rules or expectations'' for that contractor by specifying the hours when the lunchroom will be open. Thus, specifying those hours would be neither direct and immediate control nor indirect control. In other instances, however, what is excluded by definition from direct and immediate control *may* constitute indirect control. Accordingly, what is indirect control over an essential term and condition of employment versus what is merely a setting of objectives, basic ground rules or expectations for a contractor's performance is an issue of fact to be determined on a case-by-case basis.

C. Contractually Reserved But Unexercised Right To Control

The final rule recognizes contractually reserved but unexercised control as a potentially relevant consideration. It provides that evidence of an entity's contractually reserved but never exercised authority over the essential terms and conditions of another employer's employees is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of direct and immediate control over essential terms and conditions of employment.

In addition, although not stated explicitly in the regulatory text, the distinction drawn between indirect control that may be relevant to a joint-employer determination and ''decisions that set the objectives, basic ground rules, and expectations for a third-party contractor'' [9]—*i.e.,* the ''routine components of a company-to-company contract'' [10]—also applies to contractually reserved but unexercised control. That is, if a contract reserves to an entity a right to control one or more matters involving the objectives, basic ground rules, or expectations for a third-party contractor, such evidence will not be probative of joint-employer status. For example, contractual safety, performance, and quality standards are generally ''routine components of a company-to-company contract'' [11] and do not support a finding of joint-employer status. This necessarily follows from the final rule's definition of indirect control. If actual influence over the objectives, basic ground rules, or expectations for a third-party contractor is not probative of joint-employer status, as the D.C. Circuit held in *Browning-Ferris* v. *NLRB,* then necessarily a contractual but unexercised right to control such matters cannot be probative of such status, either. See *Browning-Ferris* v. *NLRB,* 911 F.3d at 1221 (''[A] joint employer's control—whether direct or indirect, *exercised or reserved*—must bear on the essential terms and conditions of employment, and not on the routine components of a company-to-company contract.'') (emphasis added; internal quotation and citation omitted).

D. Limited and Routine Control

The proposed rule stated, in relevant part, that ''[a] putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment *in a manner that is not limited and routine*'' (emphasis added). The Board has decided to revise the proposed rule to delete ''limited and routine'' as a general qualifying term and instead to use that term solely in the context of defining what is and is not direct and immediate control over supervision. Thus, the final rule provides that an entity does not exercise direct and immediate control over supervision when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it. The final rule does not otherwise use the phrase ''limited and routine.''

E. ''Substantial'' Direct and Immediate Control

The final rule retains the requirement that direct and immediate control over essential terms and conditions of employment be ''substantial'' to give rise to joint-employer status. The Board has decided, however, to define ''substantial direct and immediate control'' in the final rule. As defined, ''substantial'' direct and immediate control means direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. Such control is not ''substantial'' if it is only exercised on a sporadic, isolated, or de minimis basis. Thus, the exercise of even direct and immediate control may be so isolated, sporadic or de minimis that it fails to establish that the putative joint employer meaningfully affects matters relating to the employment relationship.

F. ''Essential'' Terms And Conditions of Employment

The proposed rule, in relevant part, states that ''[a]n employer may be considered a joint employer of a separate employer's employees only if the two entities share or codetermine the employees' essential terms and conditions of employment, *such as* hiring, firing, discipline, supervision, and direction'' (emphasis added). The phrase ''such as'' suggested that the specifically enumerated essential terms—hiring, firing, discipline, supervision, and direction—might not be exhaustive, but the proposed rule left unanswered whether additional terms and conditions could be deemed essential, and if so, what those terms and conditions might be.

The final rule expands the list of essential terms and conditions to include wages, benefits, and hours of work. Additionally, to provide greater certainty and remove a potential issue from litigation, the final rule makes the list of essential terms exhaustive. Finally, the final rule has been revised to provide that an entity's control over other mandatory subjects of bargaining not considered essential terms and conditions of employment is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of direct and immediate control over essential terms and conditions of employment.

G. Hypothetical Scenarios in the NPRM

The proposed rule included a number of hypothetical scenarios, termed ''examples.'' They were included to provide additional guidance on the practical application of the proposed rule. The Board has decided to omit the hypothetical scenarios from the final rule and has instead provided more specific guidance in the text of the rule itself, as discussed below.

III. Justification for Using Rulemaking, Rather Than Adjudication, To Revise the Joint-Employer Standard

A. Authority To Engage in Rulemaking

Congress has delegated general rulemaking authority to the Board. Specifically, Section 6 of the National Labor Relations Act, 29 U.S.C. 156, provides that the Board ''shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the [Administrative Procedure Act (APA)], such rules and regulations as may be necessary to carry out the provisions of [the Act].''

Although the Board historically has made most substantive policy determinations through case

[9] *Browning-Ferris* v. *NLRB,* 911 F.3d at 1220.

[10] Id. at 1221.

[11] Id.

adjudication, it has, with Supreme Court approval, engaged in substantive rulemaking. *American Hosp. Ass'n.* v. *NLRB,* 499 U.S. 606 (1991) (upholding Board's rulemaking on appropriate bargaining units in the healthcare industry); see also *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) (''[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.'').

Further, Section 6 authorizes the final rule as necessary to carry out Sections 2, 7, 8, 9, and 10 of the Act, 29 U.S.C. 152, 157, 158, 159, and 160, respectively. Specifically, Section 2(2) of the Act defines ''employer'' and Section 2(3) defines ''employee.'' Section 7 of the Act defines the employee rights that the Act protects, including the right to bargain collectively through representatives of their own choosing, the right to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection, and the right to refrain from these activities. Section 8 of the Act defines unfair labor practices under the Act. Of particular relevance is Section 8(a)(5), which provides that it is an unfair labor practice for an employer ''to refuse to bargain collectively with the representatives of *his* employees'' (emphasis added). Section 9 of the Act sets forth the Board's responsibilities for conducting representation elections, and Section 10 of the Act provides the Board with the authority to investigate, prevent, and remedy unfair labor practices. The Board's joint-employer doctrine implicates each of these provisions of the Act, and Section 6 grants the Board the authority to promulgate rules that carry out those provisions.

B. The Preference for Rulemaking Over Adjudication

In the NPRM, we expressed a preliminary belief that rulemaking in this area of the law is desirable for several reasons. Specifically, the NPRM stated that rulemaking, rather than adjudication, would enable the Board to gather information from a wide variety of interested parties and to provide greater clarity to the joint-employer analysis. Rulemaking would also respect the reasonable expectations of regulated parties by ensuring that further changes to the law in this area would only be made prospectively in a new rulemaking proceeding, whereas with case adjudication, changes in the law may be made retroactively. After carefully considering nearly 29,000 comments, the Board continues to believe that rulemaking, rather than adjudication, is the better method to revise and clarify the standard for determining joint-employer status under the Act.

First, the Board has been well served by public comment on the issue. The Board received numerous helpful comments from a wide variety of sources, many with considerable legal expertise and/or a great deal of relevant experience. Having considered these comments, the Board has refined the proposed rule in several ways, outlined above in Section II and discussed more fully below in Sections V and VI.

It is likely that the Board would not have received as much input from revisiting the joint-employer standard through adjudication rather than rulemaking. Rulemaking has given interested persons a way to provide input through the convenient comment process, and participation was not limited, as in the adjudicatory setting, to legal briefs filed by the parties and amici. Further, the comments confirm that it was especially important for the Board to receive feedback in light of the recent oscillation on the joint-employer standard, after decades of stability, beginning with *Browning-Ferris,* which overruled longstanding Board precedent and substantially relaxed the evidentiary requirements for finding a joint-employer relationship, and followed by *Hy-Brand Industrial Contractors, Ltd. & Brandt Construction Co.,* 365 NLRB No. 156 (2017) (*Hy-Brand I*), which restored the prior standard, but which was then vacated for procedural reasons in *Hy-Brand Industrial Contractors, Ltd. & Brandt Construction Co.,* 366 NLRB No. 26 (2018) (*Hy-Brand II),*[12] resulting in reinstatement by default of the joint-employer standard adopted in *Browning-Ferris.*

Second, rulemaking has made it possible for the Board to provide greater clarity with respect to the standard than would likely be accomplished through adjudication. Although the Board has decided, in response to comments, to omit the examples that were set forth in the text of the proposed rule, the final rule provides clarity by, for example, setting forth actions that will and actions that will not constitute direct and immediate control over each essential term and condition of employment. This is regulatory guidance that could be dismissed as dicta if set forth in an adjudicatory decision in a case in which it was not essential to the outcome. By providing such guidance, the final rule will comport with the Supreme Court's instruction that the Board should provide parties with ''certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice.'' *First Nat'l Maint. Corp.* v. *NLRB,* 452 U.S. 666, 679 (1981).

Third, the Board continues to believe, as discussed in the NPRM, that by establishing the joint-employer standard through the Board's Rules and Regulations, the final rule will enable employers, unions, and employees to plan their affairs free of the uncertainty that significant changes to the joint-employer doctrine could be made, and retroactively applied, via case adjudication. *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 777 (1969) (Douglas, J., dissenting) (''The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming.'').

Finally, the decision to engage in rulemaking regarding the standard for determining joint-employer status is consistent with the similar determinations, by the United States Department of Labor (DOL) and the United States Equal Employment Opportunity Commission (EEOC), to similarly address this issue through rulemaking.[13]

In sum, and as indicated in the NPRM with respect to the proposed rule, the Board believes that the final rule will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby enhancing labor-management stability, the promotion of which is one of the principal purposes of the Act.

IV. Recusal Issues

A number of commenters claim that Chairman Ring, Member Emanuel, and/or Member Kaplan entered into this rulemaking with unalterably closed minds as to the outcome and consequently that each should recuse himself from participating in it. For the reasons that follow, the Board rejects these contentions.

''[A]n individual should be disqualified from rulemaking only when there has been a clear and convincing showing'' that the official ''has an

[12] Mot. for reconsideration denied 366 NLRB No. 93 (2018) (*Hy-Brand III).*

[13] See Joint Employer Status Under the Fair Labor Standards Act, 85 FR 2820 (Jan. 16, 2020) (to be codified 29 CFR part 791); Introduction to the Fall 2019 Regulatory Plan, 84 FR 71091 (Dec. 26, 2019) (listing EEOC Fall 2019 Unified Rulemaking Agenda, Joint Employer Status Under the Federal Equal Employment Opportunity Statutes (RIN: 3046–AB16)).

unalterably closed mind on matters critical to the disposition of the proceeding.'' *Air Transp. Ass'n of America, Inc.* v. *NMB,* 663 F.3d 476, 487 (D.C. Cir. 2011) (quoting *C & W Fish Co.* v. *Fox,* 931 F.2d 1556, 1564 (D.C. Cir. 1991)). Moreover, ''[a]n administrative official is presumed to be objective and 'capable of judging a particular controversy fairly on the basis of its own circumstances.' '' *Steelworkers* v. *Marshall,* 647 F.2d 1189, 1208 (D.C. Cir. 1980) (quoting *United States* v. *Morgan,* 313 U.S. 409, 421 (1941)). Further, ''[w]hether the official is engaged in adjudication or rulemaking,'' the fact that he or she ''has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption.'' Id. That presumption is also not overcome ''when the official's alleged predisposition derives from [his or] her participation in earlier proceedings on the same issue.'' Id. at 1209. Expanding on the latter point, the D.C. Circuit has explained that ''[t]o disqualify administrators because of opinions they expressed or developed in earlier proceedings would mean that 'experience acquired from their work . . . would be a handicap instead of an advantage.' '' Id. (quoting *FTC* v. *Cement Inst.,* 333 U.S. 683, 702 (1948)). More recently, the D.C. Circuit has similarly emphasized that it would '''eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency's future actions.' '' *Air Transp. Ass'n of America,* 663 F.3d at 488 (quoting *C & W Fish Co.,* 931 F.2d at 1565).

Consistent with the foregoing precedent, each participating Member has determined that there is no basis to recuse himself from this rulemaking. Indeed, comparison of the final rule with the proposed rule in itself clearly demonstrates that the Members did not engage in this endeavor with ''an unalterably closed mind.'' After considering nearly 29,000 comments, the Board has revised the proposed rule in several significant respects. Throughout this rulemaking process, the Board has been willing to reconsider the preliminary views expressed in the NPRM and to revise the rule as found appropriate.

One commenter raises arguments based on section 1, paragraph 6 of Executive Order 13770, entitled ''Ethics Commitments by Executive Branch Appointees,'' 82 FR 9333 (Jan. 28, 2017).[14] As other commenters correctly note, the cited provision is inapplicable.[15] Section 1, paragraph 6 of Executive Order 13770 is a pledge that states: ''I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.'' This paragraph, read together with the definitions of ''former employer,'' ''former client,'' and ''directly and substantially related'' set forth in Executive Order 13770, prohibits a Board Member from participating in a ''particular matter involving specific parties'' in which his or her former employer or own former client is a party or the representative of a party. Section 2(s) of Executive Order 13770 provides that a particular matter involving specific parties has the same meaning as set forth in 5 CFR 2641.201(h).[16] 5 CFR 2641.201, which contains interpretive guidance for the post-employment restrictions found in 18 U.S.C. 207, states that ''only those particular matters that involve a specific party or parties fall within the prohibition'' of 18 U.S.C. 207(a)(1), and that

> [s]uch a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

5 CFR 2641.201(h)(1). Further, the regulation states that ''[l]egislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties.'' Id. 2641.201(h)(2).

Here, the joint-employer rulemaking—unlike an administrative adjudication of a case—is not a ''specific proceeding affecting the legal rights of the parties'' to that proceeding. Rather, this rulemaking is a matter of general applicability. See 5 CFR 2641.201(h)(1)-(2). Further, the phrase ''including regulations'' in the pledge recusal provision in section 1, paragraph 6 of Executive Order 13770 ''is not intended to suggest that all rulemakings are covered,'' but instead is a ''reminder that regulations sometimes may be particular matters involving specific parties, although in rare circumstances.'' Ethics Pledge: Revolving Door Ban—All Appointees Entering Government, DO–09–11 at 2 (Mar. 26, 2009) (''certain rulemakings may be so focused on the rights of specifically identified parties as to be considered a particular matter involving specific parties''); see also Guidance on Executive Order 13770, LA–17–03 (Mar. 20, 2017). Because the joint employer rulemaking is not directed at specific parties, the cited provision of Executive Order 13770 does not apply, and arguments based on Executive Order 13770 are misplaced.

Citing Member Emanuel's participation in *Hy-Brand I,* one commenter argues that Member Emanuel should recuse himself because ''[i]t is clear where [he] stands on the important issues at stake in this rulemaking'' and because he has ''expressed those strong views.'' [17] However, the fact that Member Emanuel expressed views on the joint-employer standard in *Hy-Brand I* is insufficient to demonstrate that Member Emanuel has engaged in this rulemaking with an unalterably closed mind. See *Air Transp. Ass'n of America, Inc.,* 663 F.3d at 487–488; *Steelworkers,* 647 F.2d at 1208–1209. Accordingly, the AFT's argument is unfounded.

Commenters also argue that Member Emanuel should recuse himself because his participation in this rulemaking would ''accomplish the same goals'' that he could not accomplish in *Hy-Brand I,* and this would be inconsistent with his ''ethical obligations.'' [18] As an initial matter, Member Emanuel's disqualification from *Hy-Brand I* was unrelated to the substantive issues in that case. It was based on the fact that Member Emanuel had been a shareholder in the law firm that represented Leadpoint Business Services, one of the parties before the Board in *Browning-Ferris;* it had nothing to do with the substance of the case or the joint-employer standard. See *Browning-Ferris* v. *NLRB,* 911 F.3d at 1205–1206. To the extent the AFT is suggesting that Member Emanuel should be disqualified from participating in this

[14] See comment of Service Employees International Union (SEIU).

[15] See comments of Ranking Member Virginia Foxx of the U.S. House of Representatives Committee on Education and Labor (Ranking Member Foxx); HR Policy Association.

[16] Section 2(s) additionally states that the definition of a particular matter involving specific parties shall also include ''any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.'' This portion of the provision does not apply here.

[17] See comment of American Federation of Teachers (AFT) at 4.

[18] Id.; see also comments of AFL–CIO; SEIU; Congressional Progressive Caucus; Attorneys General of New York, Pennsylvania, et al.; Center for American Progress Action Fund.

rulemaking because he has ''[policy] goals,'' neither Member Emanuel's underlying philosophy, nor his previously expressed views, nor his initial participation in *Hy-Brand I* constitute grounds for his disqualification or establish that Member Emanuel has an unalterably closed mind on matters critical to this rulemaking. See *Air Transp. Ass'n of America, Inc.,* 663 F.3d at 487–488; *Steelworkers,* 647 F.2d at 1208–1209.

Moreover, and as emphasized above, the final joint-employer rule applies prospectively only. Thus, the final rule will not effectively reinstate the Board's vacated decision in *Hy-Brand I,* it will not affect the outcome in *Browning-Ferris* (currently pending before the Board on remand from the D.C. Circuit), and it will not affect Leadpoint or any other party in *Browning-Ferris.*[19]

Although the Board's Designated Agency Ethics Official (DAEO) determined that Member Emanuel was disqualified from participation in the *Hy-Brand* cases, the DAEO subsequently determined that Member Emanuel was not disqualified from participating in this rulemaking and provided guidance to all Board members with respect to general recusal considerations. With respect to the DAEO's latter determination, one comment faulted the DAEO's memorandum for purportedly failing to apply the recusal standard for rulemaking ''in light of the NPRM's particularly suspect history,'' asserting that there should be a ''more fulsome'' public examination of the DAEO's opinion or memorandum.[20] This vague claim does not undermine the DAEO's determination.

Another commenter has suggested that the DAEO's memorandum is flawed because it was issued while the Board's recusal procedures were under review.[21] The Board's report on those procedures issued on November 19, 2019.[22] Nothing in that report or in the fact that the review was underway at the time the DAEO issued her memorandum undermines the DAEO's opinion regarding Member Emanuel's participation.

One commenter also contends that Member Emanuel's participation in this rulemaking creates an appearance of preferential treatment of a client (Leadpoint) of his former law firm because the client would ''derive the same impermissible benefit as it would have from *Hy-Brand I.*'' [23] Accordingly, this commenter argues that Member Emanuel's participation ''runs afoul'' of section 1, paragraph 6 of Executive Order 13770, as well as 5 CFR 2635.101(b)(8) and (14). Id. 5 CFR 2635.101(b)(8) states: ''Employees shall act impartially and not give preferential treatment to any private organization or individual.'' 5 CFR 2635.101(b)(14) similarly requires employees to ''endeavor to avoid'' any actions that would create the appearance that they are violating the law or applicable ethical standards, as ''determined from the perspective of a reasonable person with knowledge of the relevant facts.''

As discussed above, section 1, paragraph 6 of Executive Order 13770 does not apply to this rulemaking and thus does not support SEIU's claim. Further, because the final rule will apply prospectively only and will not affect pending unfair labor practice cases such as *Browning-Ferris,* and because there is no evidence that Member Emanuel has acted other than impartially or given preferential treatment to anyone through this rulemaking, there is no basis for finding that Member Emanuel's participation is contrary to 5 CFR 2635.101(b)(8), and no reasonable person with knowledge of the relevant facts would find that Member Emanuel's participation in this rulemaking would create an appearance that the law or ethical standards have been or are being violated.

Two commenters argue that Chairman Ring and Member Emanuel are ''too biased to participate in rulemaking'' based on unfair labor practice litigation involving McDonald's USA, LLC (the McDonald's litigation).[24] Those commenters cite Chairman Ring's and Member Emanuel's former law firms' work in connection with the McDonald's litigation and then-pending motions for Chairman Ring and Member Emanuel to recuse themselves from that case. These commenters argue that the participation of Chairman Ring and Member Emanuel in this rulemaking is ''no less problematic'' because it would enable Chairman Ring and Member Emanuel ''to tailor a rule for the McDonald's case that would directly benefit their former firms' client.''

The Board issued its decision approving a proposed settlement of the McDonald's litigation on December 12, 2019. See *McDonald's USA, LLC,* 368 NLRB No. 134 (2019). Chairman Ring took no part in the consideration of the case, and the motion for his recusal was dismissed as moot. Id., slip op. at 1 fn. 2. For the reasons explained in the decision, the motion to recuse Member Emanuel was denied. Id. Moreover, as discussed above, the final rule applies prospectively only and thus will have no substantive effect on the now-concluded McDonald's litigation.[25] As such, there is no reasonable basis for concluding that the participation of Chairman Ring and Member Emanuel in this rulemaking would involve preferential treatment of any party to the McDonald's litigation or create an appearance of partiality or preferential treatment. Accordingly, the pendency of the McDonald's litigation at the time the NPRM was published neither requires nor supports Chairman Ring's or Member Emanuel's recusal from participation in this rulemaking.

Finally, to the extent that any commenter's argument regarding the McDonald's litigation is based on 5 CFR 2635.502(a)–(b), the argument is misplaced. 5 CFR 2635.502(a)(1) states that, unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties that he knows is likely to affect the financial interests of a member of his household, or in which he knows that a person with whom he has a covered relationship is

[19] The question of what standard should apply in *Browning-Ferris* on remand was not addressed by the D.C. Circuit, which declined to rule on BFI's challenge to the retroactive application of the *Browning-Ferris* standard in that case. See 911 F.3d at 1222.

[20] Comment of Chairman Robert C. ''Bobby'' Scott of the House Committee on Education and Labor and Ranking Member Patty Murray of the Senate Committee on Health, Education, Labor, and Pensions (Chairman Scott and Ranking Member Murray) at 16.

[21] Comment of Congressional Progressive Caucus.

[22] See NLRB's Ethics Recusal Report, *https://www.nlrb.gov/reports/other-agency-reports/ethics-recusal-report* (last visited Jan.15, 2020). The Board subsequently announced plans to modify aspects of the report not material to the issues discussed here. Id.

[23] Comment of SEIU at 20.

[24] Comment of SEIU National Fast Food Workers Union at 2 (capitalization altered); see also id. at 3 (citing *McDonald's USA, LLC, a Joint Employer, et al.* ''Charging Parties' Motion for Recusal of Chairman Ring and Member Emanuel,'' Case 02–CA–093893 et al. (Aug. 14, 2018)); see also comment of SEIU at 21.

[25] The fact that the Board had proposed a joint-employer rule was taken into consideration in the decision to approve the settlement in the McDonald's litigation, but only to the extent that the Board recognized that the standard adopted in a final rule ''[would] likely supplant any standard arising from the [McDonald's] litigation,'' and therefore ''a decision regarding joint-employer status'' in that litigation ''may have limited precedential value.'' 368 NLRB No. 134, slip op. at 7. Importantly, in weighing the risks inherent in continued litigation, the Board observed that ''there [was] no guarantee that McDonald's would be found to be a joint employer with its Franchisees'' ''[e]ven under the joint-employer standard articulated in *Browning-Ferris,*'' considering that the Board ''has generally not held franchisors to be joint employers with their franchisees'' and that ''the Board in [*Browning-Ferris*] explicitly disclaimed an intent to address the joint-employer standard in the context of the relationship between a franchisor and a franchisee.'' Id., slip op. at 6–7.

or represents a party,[26] if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. For reasons already stated, because this CFR provision applies to ''particular matters involving specific parties,'' it does not apply to a rulemaking of broad application such as this one. Id.; see also Office of Government Ethics Legal Advisory, DO–06–029, ''Particular Matter Involving Specific Parties,'' ''Particular Matter,'' and ''Matter,'' at 9 fn. 10 (Oct. 4, 2006) (''[R]ulemaking 'would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)[.]' '') (quoting OGE Informal Advisory Letter 93 x 25 (Oct. 1, 1993)).

5 CFR 2635.502(a)(2) also includes a ''catchall'' provision, which states: ''An employee who is concerned that circumstances *other than those specifically described in this section* would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter'' (emphasis added). But because the final rule applies prospectively only and does not affect the outcome of any pending litigation, no such concerns are present here.

V. Response to Comments

The Board received almost 29,000 comments from interested organizations, labor unions, business owners, members of Congress, state attorneys general, academics, and other individuals. The Board has carefully reviewed and considered these comments as discussed below.

A. Comments Regarding the Development of the Joint-Employer Doctrine Under the Act

The Board received numerous comments on the development of the joint-employer doctrine under the Act. In general, those comments acknowledge the accuracy of the Board's description of that development in the NPRM, which is briefly summarized above in Section I. As more fully developed there, for at least 30 years (from no later than 1984 to 2015), evidence of direct and immediate control over essential terms and conditions of employment was required to prove that an entity was the joint employer of another business's workers. This requirement disappeared in August 2015 with the issuance of *Browning-Ferris,* which held that joint-employer status could be based on evidence of indirect or reserved-but-unexercised control, without more.

Several commenters criticize the proposed rule's return to the Board's joint-employer standard as it existed before *Browning-Ferris.*[27] These commenters contend that the Board cannot simply revert to the pre–*Browning-Ferris* joint-employer standard because the Board precedent upon which that standard was based—*Laerco* and its progeny—departed without explanation from the standard articulated in *Greyhound Corp.,* 153 NLRB at 1488, by disregarding evidence of contractually reserved authority and indirect control as evidence of joint-employer status and discounting evidence of supervision and direction that was ''limited and routine.'' See *Laerco,* 269 NLRB at 326; *TLI,* 271 NLRB at 798–799. In the view of these commenters, these departures led to a narrowing of the joint-employer standard without ''the benefit of any explicit modification of the earlier *Greyhound* standard.'' [28]

In addition, some commenters contend that the final rule's ''direct and immediate'' standard was ''manufactured'' by the Board in *Airborne Express,* with no explanation and no citation to the common law.[29] These commenters point to Restatement (Second) of Agency (1958) Sec. 220(1), comment d, which states that ''the control or right to control needed to establish the relation of master and servant may be very attenuated.'' Some commenters argue that the proposed rule's requirement that a putative joint employer must possess and actually exercise substantial direct and immediate control over employees' working conditions ''amounts to little more than a 'categorical rule' that drains reserved and/or indirect control of any relevance.'' At least one commenter observes that the common-law ''right-to-control'' principle is consistent with Section 2(11) of the NLRA, which defines ''supervisor'' as ''any individual *having authority,* in the interest of the employer,'' to perform one or more of 12 supervisory functions. 29 U.S.C. 152(11) (emphasis added).[30]

Contrary to these comments, the pre–*Browning-Ferris* Board precedent described above is consistent with the common law of joint-employment relationships in the context of the Act. Even assuming that *Laerco, TLI,* and *Airborne Express* did not adequately explain the basis for requiring substantial direct and immediate control, the Board has provided that explanation here.

As the D.C. Circuit has held, ''the common law inquiry is not woodenly confined to indicia of direct and immediate control; an employer's indirect control over employees *can be a relevant consideration.*'' *Browning-Ferris* v. *NLRB,* 911 F.3d at 1209 (emphasis added). And again, the court upheld ''as fully consistent with the common law the Board's determination'' in *Browning-Ferris* ''that both reserved authority to control and indirect control *can be relevant factors* in the joint-employer analysis.'' Id. at 1222 (emphasis added). The Board agrees that reserved authority to control and indirect control are relevant considerations. To state the obvious, however, the court also acknowledged the significance of direct and immediate control to the common-law joint-employer analysis when it stated that ''the common-law inquiry is not woodenly *confined* to indicia of direct and immediate control,'' id. at 1209 (emphasis added), and the court expressly did not decide whether either indirect control or contractually reserved but unexercised authority, without more, could establish joint-employer status under the Act, id. at 1213, 1218. Accordingly, the final rule makes evidence of indirect control and contractually reserved but unexercised authority probative of joint-employer status insofar as it supplements and reinforces evidence of direct and immediate control over essential terms and conditions of employment. The final rule is therefore consistent with the D.C. Circuit's decision in *Browning-Ferris.* And by requiring evidence of direct and immediate control, it is also consistent with *Laerco* and its progeny.

The final rule, moreover, is consistent with the Board's pre-1984 precedent, which deemed indirect control relevant to joint-employer status without holding that it was sufficient, standing alone, to establish that status. For example, in *Floyd Epperson,* 202 NLRB at 23, the Board considered the fact that the putative joint employer, a dairy company, had indirect control over the wages of drivers supplied by another employer. But the Board's conclusion that the dairy company was a joint employer of the drivers relied on ''all the circumstances'' of the case, including the fact that the company

[26] Pursuant to 5 CFR 2635.502(b)(1)(iv), an employee is considered to have a ''covered relationship'' with ''[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.''

[27] See comments of Laborers' International Union of North America (LIUNA); International Union of Operating Engineers (IUOE); AFL–CIO.

[28] See comment of IUOE.

[29] See comments of State Attorneys General; the AFL–CIO.

[30] See comment of AFL–CIO.

dictated the specific routes that drivers were required to take when transporting its goods, ''generally supervise[d]'' the drivers, and had authority to modify their work schedules. Id. As explained in the NPRM, in *Floyd Epperson* and like cases arising before 1984, the Board was not called upon to decide, nor did it assert, that an entity's indirect influence over another company's workers' essential working conditions, standing alone, could establish a joint-employer relationship.

Some commenters argue that the rule conflicts with the policies and purposes of the NLRA by purportedly diminishing opportunities for collective bargaining and eliminating protections for those seeking to exercise their rights under the Act.[31] Another commenter argues that while the *Browning-Ferris* standard facilitates collective bargaining when chosen by workers, promotes enforcement of the Act, and provides clear standards, the proposed rule fails on each of these counts.[32] Other commenters take the opposite position, arguing that the proposed rule encourages collective bargaining by fostering predictable joint-employer determinations in a variety of business relationships, thereby promoting labor-management stability, one of the principal purposes of the Act.[33] In agreement with the latter commenters, the Board believes that the final rule promotes national labor policy by appropriately imposing bargaining obligations solely on entities that have actually exercised substantial direct and immediate control over essential terms and conditions of employment.

B. Comments Regarding Indirect Control

Many commenters support requiring actual exercise of substantial direct and immediate control in order to establish joint-employer status. In this regard, commenters assert, among other things, that this requirement is practical;[34] is long-accepted[35] and has always been a fundamental aspect of the joint-employer standard;[36] is consistent with court precedent, the common law, the pertinent Restatements, and/or congressional intent;[37] appropriately assigns unfair labor practice liability to the employer responsible for the violation;[38] and enables businesses to enter into a variety of business relationships and to establish certain high-level requirements (*e.g.,* minimum training levels) with the confidence that they will not be held responsible for another entity's employees.[39] Further, some commenters state that pre–*Browning-Ferris* precedent addressing the meaning of direct and immediate control will provide helpful guidance to parties.[40]

Relatedly, several commenters state that evidence of indirect control may be ''probative,''[41] relevant, or permissibly considered, but that the common law, the courts, and/or the Taft-Hartley Congress would not support finding joint-employer status absent evidence of direct or immediate control.[42] In this connection, one commenter states that the Board may choose to address whether indirect control could be ''dispositive,'' noting that the D.C. Circuit in *Browning-Ferris* v. *NLRB* left that question unanswered.[43] However, another commenter takes the position that the extent to which control is exercised has limited or no relevance.[44]

In contrast, several commenters say that consideration of indirect control is consistent with the common law, the pertinent Restatements, court decisions (including *Browning-Ferris* v. *NLRB*),[45] and the practices of other federal agencies that consider indirect control under other statutes.[46] One commenter asserts that considering indirect control is necessary in order to capture how control is actually exercised in the workplace.[47] Some commenters state that indirect control can be just as effective and significant as direct control.[48] Further, some commenters state that the Board failed to adequately justify its ''preliminary belief'' in the NPRM that, without requiring direct and immediate control, it would be difficult to police the line between independent commercial contractors and genuine joint employers.[49]

Citing various sections of the Act, several commenters argue that indirect control is either relevant to, or an independently sufficient basis for finding, joint-employer status. Specifically, they cite the definition of ''employer'' in Section 2(2),[50] of ''supervisor'' in Section 2(11),[51] and of ''agent'' in Section 2(13),[52] and the policies set forth in Section 1.[53]

Under the common law, some forms of indirect control are relevant to the joint-employer analysis. Consistent with this principle, the final rule makes clear that evidence of indirect control over essential terms and conditions of employment is probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control over essential terms and conditions of employment. Nothing in the Act itself or joint-employer precedent compels us to adopt a rule that permits a finding of joint-employer status based solely on an entity's indirect control over another entity's employees, and the Board declines to do so. With regard to comments that cite various sections of the Act, none of the cited sections requires a conclusion that one entity's exercise of merely indirect control over another entity's employees is sufficient to make the former entity a joint employer. Further, the Board believes that the policies of the Act are furthered, not hindered, by requiring only those entities to come to the bargaining table that have sufficient control over essential terms and conditions of employment to warrant a finding that they meaningfully affect matters relating to the employment relationship, and that direct and immediate control over at least one essential term is necessary to warrant such a finding.

[31] See comments of National Employment Law Project (NELP); Economic Policy Institute (EPI).

[32] See comment of State Attorneys General.

[33] See comments of American Supply Association; Chamber of Commerce.

[34] Comment of International Foodservice Distributors Association.

[35] Comments of International Foodservice Distributors Association; Restaurant Law Center.

[36] Comment of National Retail Federation.

[37] Comments of Coalition for a Democratic Workplace (CDW); Chamber of Commerce; HR Policy Association; Ranking Member Foxx; American Staffing Association; Council on Labor Law Equality (COLLE); Restaurant Law Center.

[38] Comments of COLLE; Americans for Tax Reform.

[39] Comment of National Association of Truckstop Operators.

[40] Comments of International Bancshares Corporation; Restaurant Law Center; COLLE.

[41] Comment of CDW.

[42] Comments of CDW; HR Policy Association; American Staffing Association; Retail Industry Leaders Association (RILA).

[43] Comment of Jenner & Block, LLP.

[44] Comment of SEIU.

[45] Comments of Southern Poverty Law Center; United Brotherhood of Carpenters and Joiners of America; Congressional Progressive Caucus; Greater Boston Legal Services; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); AFL–CIO; International Brotherhood of Teamsters (IBT); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (UA); 1199SEIU United Healthcare Workers East; LIUNA; Spivak Lipton LLP; IUOE; Members of Congress; Chairman Scott and Ranking Member Murray; Communications Workers of America, AFL–CIO (CWA); NELP; James van Wagtendonk; SEIU; Attorneys General of New York, Pennsylvania, et al.; SEIU Local 32BJ.

[46] Comments of UA; James van Wagtendonk.

[47] Comment of NELP.

[48] See, *e.g.,* Comment of Kelly Sagaser.

[49] Comments of Chairman Scott and Ranking Member Murray; Attorneys General of New York, Pennsylvania, et al.

[50] Comments of A. Feola; AFL–CIO; UA; SEIU.

[51] Comments of UAW; AFL–CIO.

[52] Comment of SEIU.

[53] Comments of IUOE; Members of Congress.

Several commenters state that the term ''direct and immediate control'' is unclear and will lead to uncertainty and litigation over its meaning.[54] Some commenters also state that the final rule should define the term,[55] and some propose definitions or advocate for particular interpretations of that phrase.[56]

For the reasons stated by many commenters, the final rule provides guidance on distinguishing what does and does not evidence direct and immediate control over each essential term and condition of employment. We believe that that this approach helps clarify the meaning of ''direct and immediate control.'' Moreover, the several definitions of essential terms and conditions of employment—specifically, of what does not constitute evidence of direct and immediate control—also shed light on the meaning of indirect control.

Many commenters are critical of the term ''indirect control,'' saying, among other things, that it is undefined, ambiguous, and/or seemingly limitless.[57] Some commenters note that there are different types of indirect control, and they cite the *Browning-Ferris* court's distinction between forms of indirect control that involve sharing or codetermining those matters governing essential terms and conditions of employment, which may be relevant to a joint-employer determination, and employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor, which are not.[58] Relatedly, other commenters state or imply that joint-employer status should not be found based solely on a business having the ability to cancel a contract with a subcontractor or franchisee.[59]

Further, several commenters propose defining, or describe, ''indirect control'' as involving or including control exercised through intermediaries or controlled third parties,[60] or some version of that concept.[61] Relatedly, other commenters state that, in determining the meaning of indirect control, it may be useful to consider the common-law ''subservant doctrine.'' [62]

Based on these comments, the Board has decided to provide more clarity by expressly defining ''indirect control'' in the final rule in a manner that largely tracks the distinction that the D.C. Circuit articulated in *Browning-Ferris* v. *NLRB.* Thus, under the final rule, ''indirect control'' means indirect control over essential terms and conditions of employment of another employer's employees, but not control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract. In defining indirect control, the Board has opted to focus on the connection between the entity's actions and the employees' essential terms and conditions of employment, rather than on how alleged control is communicated. However, the final rule is not intended to immunize an entity from joint-employer status based solely on how its control is communicated, if the other requirements of joint-employer status otherwise are met. In this connection, as the D.C. Circuit observed in *Browning-Ferris* v. *NLRB,* the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship, and we do not intend this rule to do so. Relatedly, as *Browning-Ferris* v. *NLRB* discussed, the subservant doctrine takes into account control exercised through an intermediary.

One commenter states that indirect control should be considered along with all of the facts and circumstances, including how often indirect control is actually exercised, how many employees are impacted by the indirect control, and whether the indirect control governs a significant number of essential terms and conditions of employment.[63] In addition, several commenters propose examples of indirect control or other arrangements that should not demonstrate joint-employer status, such as determining the skills of the individuals who will perform services; [64] establishing conduct requirements to ensure that the company's employees, property, and customers are protected; [65] deciding that the services of temporary workers supplied by another company are no longer needed at one's worksite; [66] establishing the amount that the customer is willing to pay for services; [67] cost-plus contracts; [68] corporate social-responsibility policies; [69] ensuring compliance with regulatory obligations; [70] permitting employees to participate in basic benefit plans such as retirement, health, dental, and life insurance; [71] establishing minimum wages, where the direct employer is permitted to pay more; [72] and establishing requirements concerning performance management, products, quality, or safety.[73]

The final rule incorporates several aspects of these comments. Preliminarily and as a general matter, the rule states that joint-employer status must be determined on the totality of the relevant facts in each employment setting. More specifically, the final rule provides guidance as to kinds of indirect control that may not be probative of joint-employer status. It does so in the several definitions of essential terms and conditions in stating what does *not* constitute direct and immediate control of each essential term. Thus, for example, the final rule provides that direct and immediate control excludes setting minimal hiring standards; setting minimal standards of performance or conduct; refusing to allow another employer's employee to continue performing work under a contract; entering into a cost-plus contract; maintaining standards that are required by government regulation; and permitting another employer, under an arms-length contract, to participate in its benefit plans. These same acts also would not constitute evidence of indirect control to the extent they involve setting the objectives, basic ground rules, or expectations for another entity's performance under a contract.[74] See *Browning-Ferris* v. *NLRB,* 911 F.3d at 1220 (''[E]mployer

[54] Comments of UAW; 1199SEIU United Healthcare Workers East; SEIU; Signatory Wall and Ceiling Contractors Alliance.

[55] See, *e.g.,* Comment of Restaurant Law Center.

[56] Comments of SEIU; National Retail Federation; American Hotel & Lodging Association.

[57] Comments of American Staffing Association; American Action Forum; International Sign Association; Restaurant Law Center; American Hotel & Lodging Association; FedEx Corporation; HR Policy Association; National Association of Home Builders; General Counsel Peter Robb; Chamber of Commerce.

[58] Comments of the American Hotel & Lodging Association; COLLE; Restaurant Law Center.

[59] See, *e.g.,* Comment of Dean Johnson.

[60] Comments of Selby Schwartz; United Brotherhood of Carpenters and Joiners of America; UAW; Spivak Lipton LLP; HR Policy Association; SEIU; Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial and Allied Workers, Local 848, IBT; Chairman Scott and Ranking Member Murray.

[61] See, *e.g.,* Comment of Kentucky Equal Justice Center (''via supervisors and other lower-level direct overseers'').

[62] See, *e.g.,* Comment of SEIU.

[63] Comment of Jenner & Block, LLP.

[64] Comment of Restaurant Law Center.

[65] Id.

[66] Comment of Jenner & Block, LLP.

[67] Comment of Restaurant Law Center.

[68] Comments of Restaurant Law Center; COLLE.

[69] Comments of COLLE; RILA; HR Policy Association.

[70] Comment of HR Policy Association.

[71] Id.

[72] Comment of John B. Hirsch.

[73] Comment of HR Policy Association.

[74] On the other hand, conduct excluded by definition from evidencing direct and immediate control may evidence indirect control where it does *not* involve setting the objectives, basic ground rules, or expectations for another entity's performance under a contract. See Sec. II.B, ''Summary of Changes to the Proposed Rule: Indirect Control.''

decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status.'').

While not specifically addressed in the text of the final rule, so-called social responsibility provisions, such as contractual provisions requiring workplace safety practices, sexual harassment policies, morality clauses,[75] wage floors, or other measures to encourage compliance with the law or to promote desired business practices generally will not make joint-employer status more likely under the Act. Typically, such provisions will constitute the setting of basic ground rules or expectations for a third-party contractor. We cannot rule out the possibility, however, that a social-responsibility provision may be probative of joint-employer status to the extent it goes beyond merely setting basic ground rules or expectations for a third-party contractor and evidences substantial control over one or more essential terms or conditions of employment.

One commenter asserts that the NPRM created confusion by providing that joint-employer status would be limited to entities that play an active role in ''establishing'' essential terms and conditions of employment.[76] The commenter states that it would undermine the Act's goals if the Board immunized from joint-employer status entities that did not initially establish terms and conditions of employment, but that were nonetheless instrumental in post-establishment interpretation and implementation of those terms and conditions, in preventing modifications of them, or in ''endorsing, ratifying, and incorporating'' them.[77]

The proposed rule was not intended to limit joint-employer status in this way. The text of the proposed rule did not thus limit joint-employer status, and neither does the text of the final rule. Thus, an entity may be found to be a joint employer where it possesses and exercises substantial direct and immediate control over essential terms and conditions of employment by maintaining or revising them without having established them in the first instance.

One commenter states that we should rely on indirect control that is ''actual and measurable''—*i.e.,* indirect control would be probative of joint-employer status if it can be readily identified and objectively measured.[78] While the final rule does not incorporate the commenter's proposed ''actual and measurable'' standard, it does limit the scope of probative ''indirect control'' evidence in other ways. Consistent with the D.C. Circuit's decision in *Browning-Ferris* v. *NLRB,* the final rule provides that control or influence over setting the objectives, basic ground rules, or expectations for a third-party contractor does not constitute ''indirect control'' for the purpose of determining joint-employer status. Moreover, the several definitions of essential terms and conditions of employment—specifically, of the statements in those definitions of what does not count as evidence of direct and immediate control—also furnish guidance on what may not count as evidence of indirect control, either. Finally, as to evidence of indirect control that *may* factor into a joint-employer determination, the final rule provides that such evidence is probative of joint-employer status only to the extent it supplements and reinforces evidence of direct and immediate control.

Some commenters describe various fact patterns they said would be problematic under the proposed rule, including a situation where an entity uses a pretextual reason to ask an undisputed employer to discharge an employee, where the request is unlawfully motivated.[79] Rather than lengthening or complicating the final rule with a variety of examples or fact patterns, the final rule clarifies that joint-employer status must be determined on the totality of the relevant facts in each particular employment setting.

One commenter states that the Board should first conduct an independent-contractor analysis to determine whether the Board has jurisdiction before assessing whether direct and immediate control has been exercised.[80] But an entity alleged to be a joint employer of another employer's employees will be the direct employer of its own employees, and the Board's jurisdiction over that entity will be established on this basis, provided the usual statutory and discretionary jurisdictional standards are met. From that point forward, the independent-contractor analysis has little if any bearing on the joint-employer determination. As the *Browning-Ferris* court discussed, the issue of whether a worker is an independent contractor or an employee is distinct from the issue of whether a worker who is undisputedly the employee of one employer also has a second, joint employer. Accordingly, the Board has not amended the rule to make the suggested change.

C. Comments Regarding Contractually Reserved But Unexercised Control

Many commenters address the question of whether reserved but unexercised control is relevant to the joint-employer analysis.

A number of commenters argue that the Board should not consider contractually reserved but unexercised control in its joint-employer analysis. One commenter argues that under the right-to-control standard set forth in the Board's decision in *Browning-Ferris,* virtually all user employers, franchisors, etc., would be joint employers simply because their contracts with undisputed primary employers almost always give them the potential to control the terms and conditions of employment of the primary employer's employees, if only because such user employers can simply cancel such contracts if not satisfied with the terms and conditions of employment set by the primary employer.[81] Another commenter argues that finding an entity to be an employer of another entity's employees based solely on the conditions under which the entities have agreed that they might terminate their relationship unjustifiably restricts parties' liberty to contract and contravenes private rights long recognized in Anglo-Saxon jurisprudence.[82] Commenters also argue that a standard incorporating contractually reserved control is vague, elusive, and uncertain, difficult to apply, or unworkable, and that such a standard may be used in an outcome-determinative manner to support a particular result.[83] Another commenter states that considering reserved control may inappropriately or unfairly enmesh an entity, especially a franchisor, in another entity's labor dispute.[84] Finally, a commenter argues that extending joint-employer status to entities on the basis of potential control would conflict with other federal and state statutory schemes, creating unwarranted

[75] Morality clauses require employees to maintain standards of behavior to protect the reputation of their employer. See, *e.g., Galaviz* v. *Post-Newsweek Stations,* 380 Fed. Appx. 457, 459 (5th Cir. 2010), and *Bernsen* v. *Innovative Legal Marketing, LLC,* No. 2:11CV546, 2012 WL 3525612 (E.D. Va. June 20, 2012), for examples of morality clauses.

[76] Comment of SEIU.

[77] Id.

[78] Comment of HR Policy Association.

[79] See, *e.g.,* Comment of LIUNA.

[80] Comment of Employment Law Alliance.

[81] See comment of General Counsel Robb.

[82] See comment of Chamber of Commerce.

[83] See comments of American Hotel & Lodging Association; International Bancshares Corporation; CDW; International Sign Association; International Foodservice Distributors Association.

[84] See comment of FordHarrison LLP.

difficulties for businesses in their attempts to comply with various federal and state employment-related laws.[85]

In contrast, many commenters argue that the Board's standard should give at least some weight to evidence of an entity's contractually reserved control over essential terms and conditions of employment of another employer's employees.[86] These commenters argue that contractually reserved rights are relevant because they impact and, in some cases, set terms and conditions of employment and claim that the common law deems reserved control relevant because an entity's authority over the work, even if unexercised, prevents another from deciding to render service in a manner different from that which serves the entity holding the reserved control.[87] Another commenter argues that a contractual reservation of authority, particularly when paired with a clause allowing for at-will termination of the contractual relationship, gives the undisputed primary employer a powerful incentive to comply with the wishes of the putative joint employer, without the necessity of any actual exercise of control by the latter.[88] Many commenters argue that the common law, as reflected in relevant Restatements and judicial decisions, permits or requires the consideration of reserved but unexercised control.[89] These commenters argue that the D.C. Circuit's recent decision in *Browning-Ferris* v. *NLRB* held that consideration of a company's reserved authority to control terms and conditions of employment is an established aspect of the common law of agency. Commenters also contend that the common law permits or requires consideration of contractually reserved control because the Second Restatement of Agency defines a master as, among other things, someone who has the ''right to control,'' defines a servant as someone subject to the master's right to control, and looks to the extent of control that the master may exercise ''by the agreement.'' [90]

Commenters further argue that the Act itself supports considering contractually reserved but unexercised control, citing the Act's purpose of promoting collective bargaining, which is expressly stated in Section 1 of the Act, and the asserted need to adapt to changes in today's workforce by extending the right to collective bargaining to a wide variety of contingent workers as a matter of policy.[91] Other commenters claim that effective collective bargaining requires that all entities with the ability to control workers' terms and conditions of employment must participate in collective bargaining, thereby preventing an entity with reserved but unexercised control from upending, after the fact, collective-bargaining agreements made by the primary employer of the employees over whom the entity possesses reserved control.[92] Another commenter argues that general statutory requirements of good-faith bargaining require the presence at the bargaining table of, for instance, an exclusive purchaser of a manufacturer's products, or a major donor that conditions donations to a nonprofit on specified terms and conditions for the nonprofit's employees, each of which possesses effective control over employees' essential terms and conditions of employment by virtue of its economic relationship with their employer.[93]

Two commenters argue that a joint-employer standard that does not consider reserved control would be inconsistent with Section 2(11) of the Act, which defines who is a ''supervisor'' under the Act.[94] These commenters contend that established Board interpretations of Section 2(11) exclude individuals who possess supervisory authority as defined in Section 2(11) from employee status under Section 2(3), whether or not such authority is exercised.[95] Thus, they maintain, it is inconsistent to hold that a person may be a Section 2(11) supervisor based solely on reserved but unexercised control, but not to find his or her employer a joint employer of the supervised employee based on the same reserved but unexercised control. For example, one commenter argues that no one could dispute that a Director of Nursing in a hospital is a statutory supervisor if the Director retains authority, expressly or implicitly, to direct nurses supplied by a staffing agency when the Director observes that the nurses are not providing services correctly. In that commenter's view, a proper joint-employer framework would provide that the hospital that employs the Director of Nursing must be a joint employer of the supplied nurses.[96] Other commenters point out that the NPRM does not exclude consideration of reserved but unexercised control, but merely clarifies that it is insufficient to establish joint-employer status absent evidence of actual exercise of such control.[97]

Having carefully considered these comments, the Board has decided to modify the proposed rule to provide that an entity's contractually reserved but never exercised authority over the essential terms and conditions of employment of another employer's employees is probative of joint-employer status, but only to the extent that evidence of such authority supplements and reinforces evidence of actually exercised direct and immediate control.

The Board agrees with those commenters who suggest that an entity's ability to cancel a contract or terminate a business relationship with another entity should not be deemed reserved control relevant to the joint-employer inquiry.[98] As stated above, reserved or indirect control is not relevant to the joint-employer analysis, whether such control is exercised or not, where it bears on ''the objectives, basic ground rules, or expectations for another entity's performance under a contract.'' See text of Final Rule (Rule) Sec. 103.40(E), infra; *Browning-Ferris* v. *NLRB,* 911 F.3d at 1221 (''[A] joint employer's control—whether direct or indirect, exercised or reserved—must bear on the essential terms and conditions of employment, and not on the routine components of a company-to-company contract.'') (internal quotation and citation omitted). Consistent with this principle, entities' decisions about the conditions under which their business relationships may end are ordinary incidents of contractual relationships that are not probative of joint-employer status. Cf., *e.g., First Nat'l Maint. Corp.* v. *NLRB,* 452 U.S. 666, 677–679, 687–688 (1981) (company had no duty to bargain with representative of its own employees over decision to terminate contract and discharge employees).

The Board agrees with commenters who observe that the common law and the Act *permit* consideration of reserved control, the approach adopted by the final rule. In response to commenters' concerns about vague and unlimited

[85] See comment of General Counsel Robb.

[86] See comments of IBT; NELP.

[87] NELP cites Restatement of Employment Law Sec. 1.04.

[88] Comment of CWA.

[89] See comments of Chairman Scott and Ranking Member Murray; Equal Justice Center; Spivak Lipton LLP; IUOE.

[90] See comments of Chairman Scott and Ranking Member Murray; AFL–CIO; IBT; IUOE; Attorneys General of New York, Pennsylvania, et al.

[91] See comments of IUOE; Professor Alexia Kulwiec.

[92] See comments of IUOE; NELP.

[93] See comment of International Brotherhood of Electrical Workers Local 21 (IBEW Local 21).

[94] See comments of UAW; AFL–CIO.

[95] AFL–CIO cites *Yamada Transfer,* 115 NLRB 1330, 1332 (1956), and *U.S. Gypsum Co.,* 93 NLRB 91, 92 fn. 8 (1951).

[96] See comment of AFL–CIO.

[97] See comments of Ranking Member Foxx; CDW.

[98] See, *e.g.,* comments of General Counsel Robb; Job Creators Network; Dean Johnson.

''potential'' control that might have been found probative of joint-employer status under the *Browning-Ferris* standard, the final rule defines and limits what will constitute probative evidence of contractually reserved authority. Under the final rule, such contractually reserved authority, to be probative of joint-employer status, (1) means reserved authority over the essential terms and conditions of employment of another employer's employees, and (2) must supplement and reinforce evidence of direct and immediate control over essential terms and conditions of employment of the other employer's employees. Rule Sec. 103.40(F), (A), infra. It therefore follows that an entity's contractual authority to cancel a contract or terminate a business relationship with another entity is not evidence that the former shares or codetermines matters governing essential terms and conditions of employment of the latter's employees. Accordingly, the rule's approach is consistent with contract-respecting principles of Anglo-Saxon jurisprudence.

Similarly, and consistent with the congressional purpose expressed in the Taft-Hartley amendments,[99] an entity's reserved ''control'' in the sense of its ability to indirectly affect the terms and conditions of employment of another entity's employees as a matter of economic reality—including by being the exclusive purchaser of a manufacturer's products or by a donor conditioning donations to a nonprofit on changes to terms and conditions of employment of the nonprofit's employees—will not be the kind of control that is relevant to the joint-employer analysis. As a matter of economic reality, an employer producing goods or performing services under a contract that is terminable at will has strong incentives to respond to any complaints, suggestions, or requests that the contracting entity may have. The Board is, however, precluded from taking such considerations into account in determining employer status under the Act. See, *e.g., Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. at 324–325 (discussing Congress's 1947 amendments to NLRA in response to Supreme Court's expansive interpretation of Sec. 2(3) in *Hearst*); *NLRB* v. *United Ins. Co. of America,* 390 U.S. at 254 (same). It necessarily follows that the Board cannot rely on such considerations in determining joint-employer status, either.

For the following reasons, the Board is unpersuaded by the arguments by analogy to the Board's analysis of supervisory status under Section 2(11) of the Act.

First, determining supervisory status under Section 2(11) turns on the interpretation of statutory language that differs from the statutory language governing employer or employee status under Section 2(2) and 2(3), respectively. The history of interpretation of Section 2(11) has not been straightforward or free from controversy. See, *e.g., NLRB* v. *Kentucky River Commty. Care, Inc.,* 532 U.S. 706, 712–721 (2001) (discussing history of interpretation of parts of Sec. 2(11)). Given the intricacy of Section 2(11) and its different purpose from Section 2(2), it should not be surprising that the Board applies different standards to the analysis of supervisory status and joint-employer status.

Second, while the commenters correctly observe that the *possession* of authority under Section 2(11) establishes supervisory status, it is well established that the Board looks beyond mere job titles or conclusory statements of supervisory status in order to determine whether an individual is actually a supervisor under Section 2(11). See, *e.g., Coral Harbor Rehab. & Nursing Ctr.,* 366 NLRB No. 75, slip op. at 1, 17 (2018) (''[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.''). Accordingly, while the Board need not apply congruent standards to analyze these different statutory relationships, the legal tests are in fact less divergent than the commenters suggest.

Finally, ''an individual must exercise supervisory authority over employees of the employer at issue, and not employees of another employer, in order to qualify as a supervisor under Section 2(11) of the Act.'' *Crenulated Co.,* 308 NLRB 1216, 1216 (1992) (citing cases). Thus, an individual, employed by a hospital, who possesses contractually reserved but unexercised authority responsibly to direct nurses supplied to the hospital by a staffing agency would not, on that basis, be a Section 2(11) supervisor, nor would the hospital, on that basis, be a joint employer of the nurses employed by the staffing agency. However, if the hospital, through the individual, possessed *and exercised* substantial direct and immediate control over essential terms and conditions of employment of the supplied staffing-agency nurses, the hospital might well be found to be a joint employer of the supplied nurses, *and* the individual might accordingly be found to be a statutory supervisor. Accordingly, in practice, the legal tests for joint employer and supervisory status are likely to converge on consistent results in individual cases.

Many commenters provide examples of industries or business relationships involving what the commenters identify as potential or reserved control.[100] The final rule incorporates the well-established legal principle that joint-employer status must be determined on the totality of the relevant facts in each particular employment setting. Rule Sec. 103.40(A), infra. Accordingly, the outcome of a joint-employer analysis in individual cases will not be determined based on the industry or type of business relationship involved, but rather will result from application of the standards set forth in the final rule to the particular facts of the case. See, *e.g., Boire* v. *Greyhound Corp.,* 376 U.S. at 481 (''[W]hether Greyhound possessed sufficient indicia of control to be an 'employer' is essentially a factual issue.'').

Further, many commenters provide examples of specific kinds of contractual reservations of control that should or should not be probative of an entity's status as a joint employer. As made clear above, kinds of reserved ''control'' that are ''routine components of a company-to-company contract,'' *Browning-Ferris* v. *NLRB,* 911 F.3d at 1221, will not be probative of joint-employer status under the rule, and, when necessary, the Board will evaluate evidence of an entity's alleged contractually reserved but unexercised control over another company's employees within this framework. (Consistent with the provisions of the final rule, such an evaluation need not be conducted unless the proponent of joint-employer status proves that the entity exercises direct and immediate

[99] See, *e.g., Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. 318, 324–325 (1992) (discussing Congress's 1947 amendments to NLRA in response to Supreme Court's expansive interpretation of Sec. 2(3) ''employee'' in *NLRB* v. *Hearst Publ's Inc.,* 322 U.S. 111 (1944)); *NLRB* v. *United Ins. Co. of America,* 390 U.S. 254 (1968) (same).

[100] For example, commenters including International Bancshares Corporation, Chamber of Commerce, General Counsel Robb, COLLE, International Sign Association, Job Creators Network, FordHarrison LLP, and Jim Steitz, discuss potential or reserved control in business relationships including those between franchisors and franchisees, contractors and subcontractors, parent and subsidiary companies, and companies that generally provide and receive goods or services, including labor, from one another. Commenters including SEIU Local 32BJ, COLLE, Professor Kulwiec; National Association of Home Builders, International Sign Association, American Hotel & Lodging Association, and FordHarrison LLP discuss potential or reserved control in industries including building cleaning and security, food service and hospitality, home healthcare, agriculture, home building, visual communications, and professional employee organizations.

control over at least one essential term and condition of employment.) More specifically, some commenters discuss whether the joint-employer analysis can or should turn on contractual performance requirements and general work standards,[101] or contractually required compliance with regulations or codes, including government-required nondiscrimination provisions.[102] These kinds of contractual requirements are ordinary incidents of any contractual relationship, and they will generally not be probative of joint-employer status under the final rule. See, *e.g., Aldworth Co.,* 338 NLRB 137, 139 (2002) (''[A]ctions taken pursuant to government statutes and regulations are not indicative of joint employer status.''), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc.* v. *NLRB,* 363 F.3d 437 (D.C. Cir. 2004).

Some commenters discuss whether the joint-employer analysis can or should consider the ability of an entity that uses services provided by another entity's employees to have input on who provides those services, to monitor performance, to dictate times, manner, and method of performance, or a user entity's reservation of the right to reject individual workers provided by a supplier entity and to require that supplied workers comply with the user entity's plant rules and regulations.[103] The final rule clarifies the conditions under which such contractually reserved controls may be probative of a user entity's joint-employer status.[104] Thus, the contractually reserved but unexercised right to have input on who provides services may be probative of joint-employer status if the evidence demonstrates that such input, if provided, would determine which particular individuals another employer will hire and which it will not or would directly result in the discharge of another employer's employee. Rule Sec. 103.40(C)(4) and (5), infra; see also *NLRB* v. *Browning-Ferris Indus. of Pennsylvania,* 691 F.2d at 1125 (facts that BFI ''shared with the brokers the power to approve drivers, and devised the rules under which the drivers were to operate at BFI sites'' contributed to ''substantial evidence which supports the Board's finding that BFI exerted significant control over the work of the drivers'').

An entity's contractually reserved authority to monitor performance ordinarily will not be probative of joint-employer status. If, however, the evidence were to demonstrate that conduct characterized as ''monitoring performance'' also encompasses instructing individual employees *how* to perform their work or issuing performance appraisals to individual employees, that conduct may be probative of joint-employer status. Rule Sec. 103.40(C)(7), infra. And an entity's reserved authority to dictate times, manner, and method of performance may be probative of joint-employer status to the extent such authority encompasses determining work schedules or work hours, including overtime, of another employer's employees, instructing another employer's employees how to perform their work, or assigning particular employees their individual work schedules, positions, and tasks. Rule Sec. 103.40(C)(3), (7), and (8); see also *Cmty. for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 751 (1989) (''In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control *the manner and means* by which the product is accomplished.'') (emphasis added); Restatement of Employment Law Sec. 1.01(a)(3) (''[A]n individual renders services as an employee of an employer if . . . the *employer controls the manner and means* by which the individual renders services.'') (emphasis added).[105]

One commenter also questions whether the joint-employer analysis could consider a user entity's reservation of authority to prevent disruption of its operations or unlawful conduct by a supplier entity's employees on its property, or the user's efforts to monitor, evaluate, and improve the performance of supplied employees where such efforts fall short of controlling the manner, means and details of their performance.[106] In general, policies prohibiting disruption of operations or unlawful conduct constitute the type of basic ground rules and expectations that ''cast no meaningful light on joint-employer status.'' *Browning-Ferris* v. *NLRB,* 911 F.3d at 1219–1220. Efforts to monitor, evaluate, and improve the performance of supplied employees would constitute direct and immediate control of essential terms and conditions if those efforts entailed a decision by the user entity to actually discharge, suspend, or otherwise discipline another entity's employees, to instruct them how to perform their work or issue performance appraisals, or to assign them individual work schedules, positions, and tasks. Rule Sec. 103.40(C)(5)–(8). Thus, contractually reserved authority that, if exercised, would result in the foregoing would be probative of joint-employer status to the extent it supplements and reinforces evidence of direct and immediate control.

Another commenter observes that many businesses outsource janitorial and security services, or production, delivery, and marketing functions.[107] It suggests that any reserved control inherent in such outsourcing should not establish a joint-employment relationship. Under the rule, such ordinary contractual relationships do not make the outsourcing company a joint employer so long as it does not possess and exercise substantial direct and immediate control over essential terms and conditions of employment of employees performing the outsourced functions. Rule Sec. 130.40(A), infra. The commenter further observes that companies have sound business reasons for establishing operational, production, and safety standards in their agreements with suppliers and contractors. For example, it suggests that an aircraft manufacturer's contractual specification of timeframe and production standards for a parts supplier and requirement that the supplier certify that it has a drug and alcohol testing program in place should not weigh towards finding the manufacturer an employer of the supplier's employees. Under the rule, such standards are likely ordinary incidents of contractual relationships that merely set basic ground rules for the supplier's performance under the contract and are therefore not probative of joint-employer status. Rule Sec. 103.40(E), infra.

[101] CDW; General Counsel Robb.

[102] National Association of Home Builders; Center for Workplace Compliance.

[103] See comments of General Counsel Robb; Chamber of Commerce.

[104] Again, in all cases, contractually reserved but unexercised control is probative only to the extent it supplements and reinforces evidence of direct and immediate control. Rule Sec. 103.40(A), infra.

[105] Sections 103.40(C)(1)–(8), the definitions of the several essential terms and conditions of employment, do not directly address contractually reserved but unexercised control. Those definitions specify what does, and give examples of what does not, count as direct and immediate control. But as with indirect control, so also with contractually reserved but unexercised control: In many if not most cases, examples of what does not count as direct and immediate control will also come within the scope of routine components of company-to-company contracting and thus not be probative of joint-employer status. However, we are unable to state, a priori, that this will hold true in all cases. Ultimately, therefore, whether a particular type of contractually reserved but unexercised control that would not, if exercised, count as direct and immediate control may nonetheless be probative of joint-employer status is a question of fact to be determined on the evidence in each case.

[106] See comment of General Counsel Robb.

[107] See comment of COLLE.

Two commenters suggest that the Board should clarify that an entity does not exercise control over a term or condition of employment by entering into a contract that dictates a particular employment term for individuals performing services under that contract.[108] To the contrary, another commenter suggests that the Board should examine whether an agreement between contracting parties sets wages and/or other working conditions of one party's employees.[109] The final rule adopts the latter suggestion. Under the final rule, if a contract between two employers actually sets essential terms and conditions of employment for employees who will manufacture goods or perform services under the contract, the two employers have shared or codetermined those essential terms. In this regard, the rule is consistent with the Board's pre–*Browning-Ferris* precedent and with the Third Circuit's formulation of the joint-employer test in *NLRB* v. *Browning-Ferris Industries of Pennsylvania,* 691 F.2d at 1124 (''[W]here two or more employers . . . share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' within the meaning of the NLRA.'').

One commenter suggests that the Board should require proof that a joint employer exercises actual supervision and direction on an ongoing basis.[110] The final rule is partially consistent with this suggestion, in that a finding that an entity exercises ongoing supervision and direction (as the rule defines those terms) over the employees of another entity will likely suffice to establish a joint-employer relationship. However, because supervision and direction are only two of eight essential terms and conditions of employment defined by the rule, the final rule does not adopt the commenter's suggestion to the extent it implies that control over supervision and direction are *necessary* to a joint-employer finding. Evidence of control over other essential terms and conditions of employment may suffice to establish joint-employer status even absent supervision and direction.

Many commenters suggest that if the Board decides to consider indicia of reserved, unexercised control, it do so with specific limits.[111] The final rule makes clear that evidence of reserved, unexercised control will only be found probative to the extent it supplements and reinforces evidence of actually exercised direct and immediate control. However, the Board finds it impractical to attempt to quantitatively predetermine how specific factual evidence will weigh in all future cases.

Two commenters suggest that the Board should draw clear lines between the kinds of reserved control it will not find probative of joint-employer status (such as brand standards in franchise agreements) and those it will find probative (such as contractually reserved authority to codetermine essential terms and conditions of employment).[112] The Board agrees with this comment and has attempted to provide the guidance requested in both the regulatory text and this accompanying supplementary material.

Another commenter suggests that the Board should consider reserved control probative of joint-employer status only insofar as it embodies an entity's specific right to displace another entity and directly control the other entity's employees, as opposed to possession by the first entity of some economic influence over the entity that retains day-to-day control over its own employees.[113] The final rule adopts this suggestion insofar as the rule will not permit finding joint-employer status solely on the basis of an entity's economic influence. However, the ''share or codetermine'' standard does not require displacement by one entity of another company's control because the underlying premise of that standard is that two entities *together* determine the terms and conditions of employment of a single group of employees. See, *e.g., NLRB* v. *Browning-Ferris Indus. of Pennsylvania,* 691 F.2d at 1125 (finding joint-employer relationship where ''BFI and the brokers together determined the drivers' compensation and shared in the day to day supervision of the drivers'').

A commenter suggests that the Board should not consider reserved control as a sufficient basis to permit, as primary, activity otherwise prohibited as secondary under Section 8(b)(4) of the Act.[114] The final rule is consistent with this suggestion. Thus, under the rule, Company A's contractually reserved but unexercised control over terms and conditions of employment of Company B's employees will not, standing alone, permit a union representing Company B's employees to picket against Company A with an object prohibited by Section 8(b)(4). However, under the final rule, evidence of Company A's contractually reserved but unexercised control over essential terms and conditions of employment of Company B's employees will be probative of joint-employer status to the extent it supplements and reinforces evidence of exercised direct and immediate control. Rule Sec. 103.40(A). If Company A is found to be a joint employer of Company B's employees, action by Company's B's employees' bargaining representative against Company A that would otherwise be secondary and unlawful absent the joint-employer finding would be lawful primary activity.

Another commenter suggests that the Board should consider, in individual unfair labor practice cases, whether a putative joint employer actually controls the specific term(s) or condition(s) of employment implicated in the case, whether or not it possesses or exercises control over other terms and conditions of employment.[115] In brief, the current rule does not change the Board's existing policies with regard to the allocation of unfair labor practice liability among multiple employers.

Finally, a commenter suggests that the Board explain the term ''active role'' used in the NPRM and define the frequency with which an entity must actually exercise contractually reserved control and the scope of such exercise in order to be found a joint employer.[116] The final rule does not include the term ''active role,'' but it does provide guidance on these issues. The rule requires possession and exercise of ''substantial direct and immediate control over one or more essential terms or conditions'' of employment, it specifies what will constitute ''direct and immediate'' control over each essential term or condition of employment, and it defines ''substantial'' direct and immediate control. Rule Sec. 103.40(A), (C)(1)–(8), (D). The rule does not otherwise specify predetermined thresholds of exercised control that will be necessary to support a finding of a joint-employer status. Rather, such status will be determined within the framework of the rule based on the totality of the relevant facts in each particular employment setting. Rule Sec. 103.40(A).

[108] See comments of General Counsel Robb; Job Creators Network.

[109] See comment of IBEW Local 21.

[110] See comment of HR Policy Association.

[111] For example, Center for Workplace Compliance suggests that the Board should accord reserved control less weight than actual control, and quantify the weight that should be given. Relatedly, HR Policy Association suggests specifically limiting the consideration of reserved control to ten percent of the analysis.

[112] See comments of Restaurant Law Center; International Franchise Association (IFA).

[113] See comment of RILA.

[114] See comment of HR Policy Association.

[115] See comment of IFA.

[116] See comment of CWA.

D. Comments Regarding Actual Exercise Requirement

Many commenters present practical and legal arguments for and against the proposed rule's requirement that an entity actually exercise control over terms and conditions of employment of another entity's employees in order to be found a joint employer of those employees. As reflected in the final rule and discussed below, the Board has decided to retain this requirement.

Beginning with practical arguments about an actual exercise requirement, many commenters argue that such a requirement introduces ambiguity into the analysis, makes outcomes less predictable, or otherwise prejudices interested parties in any potential litigation of joint-employer issues.[117] These commenters argue that an exercise requirement complicates the analysis because, unlike contractually reserved control, exercised control cannot be analyzed simply by reference to documents. In contrast, these commenters argue, a standard that did not require evidence of exercised control would allow parties to set expectations at the outset of their contractual relationship and to allocate rights and duties in advance of any allegation of joint employment. With regard to litigation, one commenter argues that an exercise requirement introduces a ''worst evidence rule,'' where the Board will ignore express language of the contract unless a party can show that an entity has actually exercised control.[118] Commenters argue that an exercise requirement will subject the outcome to the vagaries of the litigation process, with slight factual differences leading to opposite outcomes, will require extensive mini-trials—which may take place months or years after the fact—over individual instances of alleged exercised control, and will impose an unfair evidentiary burden on unions.[119]

Commenters also argue that an actual exercise requirement will prevent effective collective bargaining, because an entity subject to another entity's reserved authority will be unable to effectively bargain over terms and conditions of employment subject to that authority, and could allow an entity that had not participated in bargaining to upend any collective-bargaining agreement covering terms and conditions of employment over which the entity possessed contractually reserved, unexercised control.[120] Another commenter suggests that just-cause provisions in collective-bargaining agreements between a staffing agency and its employees would be meaningless if entities to which the agency supplied services retained a contractual right to exclude employees from the worksite without cause.[121] Relatedly, commenters argue that an exercise requirement would erode the duty to bargain under Section 8(a)(5) by allowing an entity to move in and out of joint-employer status tactically by acting to control employment conditions when it finds it necessary to do so, but refraining from exercising its reserved control when it prefers to avoid the legal obligations incumbent upon a joint employer.[122] Finally, a commenter argues that imposing an actual exercise requirement is not supported by the Board's expressed desire to avoid involving uninterested entities in the bargaining relationships of their business partners because an entity that contracts to reserve control over terms and conditions of employment of another entity's employees may be as interested in the employment relationship as is the undisputed employer.[123]

Other commenters argue that an actual exercise requirement is a bright-line rule that will make it easier for parties to predict outcomes, encourage economically fruitful business relationships and contractual arrangements, and promote stability by providing the Board and the courts with a consistent standard.[124] One commenter argues that an exercise requirement ensures meaningful collective bargaining, while a standard that permits finding joint-employer status based solely on contractually reserved control does not.[125] Finally, one commenter seeks guidance as to how much weight, if any, the Board will afford various factors evidencing reserved control, guidance that assertedly was missing from *Browning-Ferris*.[126]

After carefully considering all of the commenters' arguments, the Board has decided to retain the actual exercise requirement in the final rule. Whether or not evidence of actual exercise of control was required, it would clearly be relevant under any permissible joint-employer standard. Accordingly, the Board disagrees with any contention that requiring evidence of actual exercise of direct and immediate control unnecessarily complicates the joint-employer analysis. For similar reasons, the Board disagrees with the suggestion that the rule's approach introduces a ''worst evidence rule.'' To the contrary, an entity's actual exercise of direct and immediate control over essential terms and conditions of employment of another entity's employees is the best evidence that the first entity is a joint employer of those employees and is properly subjected to the consequences of that finding under the Act. Moreover, the rule does take parties' contractual allocation of rights and responsibilities into account as part of the totality of the relevant facts in each particular employment setting. This approach is consistent with the long line of Board and court decisions emphasizing the fact-dependent nature of the joint-employer inquiry. *E.g., Boire* v. *Greyhound Corp.,* 376 U.S. at 481.

The Board has concluded that an actual exercise requirement will provide businesses more certainty over whether the Board will or will not find them to be joint employers of another employer's employees and to conduct themselves accordingly. An actual exercise requirement is also a bright-line rule that will make it easier for the Board, and ultimately for the courts, to reach consistent decisions across a range of individual cases. And the Board has responded to commenters' requests for guidance about the meaning of contractually reserved but unexercised control and the extent to which we will find it probative of a joint-employer relationship in Part V.C, ''Response to Comments: Comments Regarding Contractually Reserved But Unexercised Control,'' above.

The Board finds unpersuasive arguments that an exercise requirement imposes an unfair burden of proof on unions. To the contrary, a putative joint employer's actual exercise of direct and immediate control is readily observable by employees, who can then share the information with unions or others. Evidence of reserved but unexercised control, in contrast, is more likely to be known only by the contracting parties themselves. In any event, in unfair labor practice cases, the burden in every case is on the General Counsel to establish the complaint allegations,[127] while in representation cases, NLRA Section 9(c) instructs the Board to investigate a

[117] See comments of IBT; SEIU Local 32BJ; Employment Law Alliance; AFL–CIO.

[118] See comment of LIUNA.

[119] See comments of LIUNA; SEIU Local 32BJ.

[120] See comments of LIUNA; IUOE.

[121] See comment of IBT.

[122] See comments of AFL–CIO; IUOE.

[123] See comment of LIUNA.

[124] See comments of National Retail Federation; CDW; FedEx Corporation.

[125] See comment of CDW.

[126] See comment of General Counsel Robb.

[127] See, *e.g., Laborers Local 1177 (Qualicare-Walsh),* 269 NLRB 746, 746 (1984) (''The burden of proof regarding jurisdiction, *as with all other elements of a prima facie case,* is on the General Counsel.'') (emphasis added).

petition and direct a hearing ''if it has reasonable cause to believe that a question of representation affecting commerce exists.'' Section 11 of the Act further provides for the issuance of subpoenas on the application of any party with respect to ''all hearings and investigations.'' Accordingly, the rule's actual exercise requirement does not unfairly burden unions.

Finally, the Board disagrees with arguments that an exercise requirement will impede collective bargaining, interfere with the formation of efficacious collective-bargaining relationships, or permit entities to move in and out of joint-employer status and thus selectively affect terms and conditions of employment of other employers' employees without incurring obligations under the Act. Nothing in this rule changes the ordinary rights and obligations of employees, employers, and unions under the Act. Every employer remains subject to all rights and obligations defined by Sections 8 and 9 of the Act with respect to its employees. Thus, an employer that possesses and exercises substantial direct and immediate control over employees' terms and conditions of employment must, if those employees are represented, bargain on request with their representative as required by Section 8(a)(5). The rule does not excuse joint employers from that duty, nor does it deprive represented employees of their remedies under Section 8(a)(5) with respect to an employer that unilaterally changes their terms and conditions of employment without first giving their representative notice and an opportunity to request bargaining, or of their remedies under Section 8(a)(5) within the meaning of Section 8(d) with respect to an employer that fails to adhere to the terms of a collective-bargaining agreement with their representative. Moreover, a collective-bargaining agreement may, in certain circumstances, impose restraints on an entity's exercise of contractually reserved authority over essential terms and conditions of employment governed by the agreement, though the entity is not party to the agreement. Cf. *Atterbury* v. *United States Marshals Serv.,* 941 F.3d 56, 62–64 (2d Cir. 2019) (U.S. Marshals Service acted unlawfully by requiring discharge of security guards employed by a contractor without providing process required by ''just cause'' provision of guards' collective-bargaining agreement with contractor). Accordingly, an exercise requirement will not prevent parties with an actual interest in controlling terms and conditions of employment of another employer's employees from safeguarding their contractually reserved authority to do so by engaging in bargaining, either directly or through a representative.

Turning to legal arguments about an exercise requirement, some commenters assert that the Board only began in 1984 to require evidence that an entity had exercised control over another entity's employees as part of the joint-employer analysis, and that, at that time, the Board did not articulate a legal justification for doing so.[128] Without accepting the commenters' characterization of the Board's pre–*Browning-Ferris* precedent, the Board has concluded that the final rule's approach is warranted for the reasons explained herein.

Some commenters oppose an actual exercise requirement by arguing that the common law, as reflected in judicial decisions, restatements of the law, and elsewhere, requires giving contractually reserved but unexercised control dispositive weight.[129] Other commenters note that contractual rights exist even if they have never been exercised, and contend that an exercise requirement is inconsistent with court and Board decisions recognizing that while highly skilled professionals like nurses or low-skilled workers like janitors may require little or only ''routine'' supervision, such workers nevertheless remain employees of the employer providing that supervision.[130] One commenter further argues that imposing an actual exercise requirement raises predictability concerns similar to those that motivated the Supreme Court's rejection of an actual-control test in a dispute over copyright ownership in *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730 (1989).[131] Finally, commenters argue that imposing an exercise requirement puts the Board's standard in conflict with other state and federal standards, including Health Insurance Portability and Accountability Act, Medicaid and Medicare, the Affordable Care Act, Title VII of the Civil Rights Act of 1964 (Title VII), the Fair Labor Standards Act (FLSA), and Uniformed Services Employment and Reemployment Rights Act—and with guidance from the EEOC, Internal Revenue Service (IRS), U.S. Citizenship and Immigration Services, and DOL.[132]

On the other side of the issue, commenters argue that an exercise requirement is consistent with the common law as reflected in court decisions, prior Board decisions, legislative history of the NLRA, and relevant restatements of law.[133] Other commenters argue that courts have approved the Board's focus on actual control.[134] Many of the same commenters also point out that the D.C. Circuit in *Browning-Ferris* v. *NLRB* held that reserved control was relevant to

[128] See comments of Senator Murray and Representative Scott (joined by numerous other Senators and Representatives); IBT.

[129] See comments of Julia Tomassetti; AFL–CIO; NELP; SEIU; Attorneys General of New York, Pennsylvania, et al. Commenters cite, inter alia, *Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. 318, 323 (1992) (quoting *Reid,* 490 U.S. at 751–752); *Singer Mfg. Co.* v. *Rahn,* 132 U.S. 518, 523 (1889); *Garcia-Celestino* v. *Ruiz Harvesting, Inc.,* 898 F.3d 1110, 1121 (11th Cir. 2018) (quoting *NLRB* v. *Associated Diamond Cabs, Inc.,* 702 F.2d 912, 920 (11th Cir. 1983)); *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of North Am.* v. *NLRB,* 603 F.2d 862, 874 (D.C. Cir. 1978) (quoting *Williams* v. *United States,* 126 F.2d 129, 132 (7th Cir. 1942)), cert. denied 317 U.S. 655 (1942); *Dovell* v. *Arundel Supply Corp.,* 361 F.2d 543, 545 (D.C. Cir. 1966) (quoting *Grace* v. *Magruder,* 148 F.2d 679, 681 (D.C. Cir. 1945)); Restatement (Second) of Agency, Secs. 2(1), 2(2), 220(1), 220(2)(a), and 220 cmt. d; William A. Gregory, The Law of Agency and Partnership 114 at Sec. 50 (West Group Hornbook Series, 3d ed. 2001).

[130] See comments of LIUNA; AFL–CIO. AFL–CIO cites *Holyoke Visiting Nurses Ass'n* v. *NLRB,* 11 F.3d 302, 307 (1st Cir. 1993), and *Syufy Enterprises,* 220 NLRB 738, 740 (1975).

[131] See comment of AFL–CIO.

[132] See comments of Representative Scott and Senator Murray; UA; Professor Kulwiec; James van Wagtendonk.

[133] See comments of HR Policy Association; General Counsel Robb; CDW; IFA; RILA; Center for Workplace Compliance. Commenters cite, inter alia, *Kelley* v. *S. Pac. Co.,* 419 U.S. 318, 324 (1974); *Shenker* v. *Baltimore & Ohio R.R. Co.,* 374 U.S. 1, 6 (1963); *NLRB* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261, 263 (1938); *Jones* v. *Royal Admin. Servs., Inc.,* 887 F.3d 443 (9th Cir. 2018); *NLRB* v. *CNN America, Inc.,* 865 F.3d 740 (D.C. Cir. 2017); *Butler* v. *Drive Auto. Indus. of America, Inc.,* 793 F.3d 404, 409, 410 (4th Cir. 2015); *Doe I* v. *Wal-Mart Stores, Inc.,* 572 F.3d 677, 683 (9th Cir. 2009); *Gulino* v. *New York State Education Dep't,* 460 F.3d 361, 379 (2d Cir. 2006); *Clinton's Ditch Co-op Co.* v. *NLRB,* 778 F.2d at 138; *NLRB* v. *Browning-Ferris Indus. of Pennsylvania,* 691 F.2d 1117 (3d Cir. 1982); *Zapex Corp.* v. *NLRB,* 621 F.2d 328, 333 (9th Cir. 1980); *Herbert Harvey, Inc.* v. *NLRB,* 424 F.2d 770, 776–777 (D.C. Cir. 1969); *NLRB* v. *Greyhound Corp.,* 368 F.2d 778, 781 (5th Cir. 1966), enfg. 153 NLRB 1488 (1965); *Vernon* v. *California,* 10 Cal. Rptr. 3d 121, 130–131 (Cal. Ct. App. 2004); *SEIU Local 434* v. *City of Los Angeles,* 275 Cal. Rptr. 508 (Cal. Ct. App. 1990); *Airborne Express,* 338 NLRB 597 (2002); *TLI, Inc.,* 271 NLRB 798 (1984); *Laerco Transportation,* 269 NLRB 324 (1984); *Sun-Maid Growers of California,* 239 NLRB 346 (1978); *Clayton B. Metcalf,* 223 NLRB 642 (1976); *Hamburg Industries, Inc.,* 193 NLRB 67 (1971); *Greyhound Corp.,* 153 NLRB 1488 (1965); H.R. Rep. No. 80–245, at 18 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 292, 309 (1959); H.R. Rep. No. 80–510, at 32–33 (1947) (Conf. Rep.), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 505, 536–537 (1959); Restatement (Second) of Agency Secs. 5(2), 226, 227 & cmt. d; Restatement of Employment Law Secs. 1.01(a)(3) & cmts. a and c and illus. 5, 1.04(b).

[134] See comments of International Foodservice Distributors Association; National Retail Federation; CDW.

determining joint-employer status under the common law, but the court did not find that it was sufficient, in and of itself and absent any actual exercise of control, to establish a joint-employment relationship under the Act. 911 F.3d at 1213.[135]

Finally, one commenter argues that the Board, as an executive agency with subject-matter expertise, is not required to apply the common law in its rulemaking, that nothing in the Act or in Supreme Court precedent interpreting the Act requires the Board to follow the common law, and that there are, in any case, no relevant uniform common-law principles.[136]

After carefully considering all of the comments on both sides of the issue, we conclude that the rule's approach falls within the boundaries of the common law as applied in the particular context of the NLRA.

We disagree with the argument that an actual exercise requirement is inconsistent with Board and court cases finding employment relationships where employees require little or only routine supervision.[137] Under the rule, supervision is only one of eight essential terms and conditions of employment relevant to the joint-employer analysis, and an entity that possesses and exercises substantial direct and immediate control over other essential terms may be found to be a joint employer absent evidence that the entity exercises such control over supervision. In any case, in each of the decisions the commenter cites in support of this argument, the Board found that the entity at issue not only possessed but actually exercised substantial direct and immediate control over terms and conditions of employment of the employees at issue. See *Holyoke Visiting Nurses Ass'n,* 310 NLRB 684, 685–686 (1993); *Syufy Enterprises,* 220 NLRB at 739.

Nor is an exercise requirement inconsistent with *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730 (1989). The issue in *Reid* was who owned the copyright in a statue created by an artist on commission. The Supreme Court reviewed several conflicting interpretations of the statutory phrase ''a work prepared by an employee within the scope of his or her employment'' in Sec. 101(1) of the Copyright Act of 1976. 490 U.S. at 738–739. Possible alternative interpretations included (1) ''that a work is prepared by an employee whenever the hiring party *retains the right to control the product,*'' (2) ''that a work is prepared by an employee . . . when the hiring party *has actually wielded control* with respect to the creation of a particular work,'' and (3) ''that the term 'employee' within Sec. 101(1) carries its common-law agency meaning.'' Id. at 739 (emphasis added). The Court did not reject an actual control test (the second interpretation) in favor of a reserved control test (the first interpretation). Rather, the Court rejected both of these interpretations as inappropriately focused on the relationship between the hiring party and *the product,* while the statutory language at issue focused on the relationship between *the hired and hiring parties.* Id. at 741–742. Having concluded that the Copyright Act requires a court to ascertain, under the common law of agency, whether a work was prepared by an employee or an independent contractor, the Court proceeded to analyze the record under the factors relevant to the independent-contractor determination, set forth in Section 220(2) of the Restatement (Second) of Agency. Id. at 750–753. The Court found that ''the extent of control the hiring party exercises over the details *of the product* is not dispositive,'' but the Court's independent-contractor analysis suggests that the hiring party there neither possessed nor exercised *any* control over the manner in which and means by which the independent-contractor artist produced the work. Id. at 752–753 (emphasis added). Accordingly, *Reid* is no more instructive on the specific issue here than myriad other judicial decisions finding that a worker was an independent contractor absent either reserved or exercised control by a common-law principal.

The Board also disagrees with the numerous arguments that an actual exercise requirement puts the Board's standard in conflict with other statutory regimes. First, vastly different areas of law identified by commenters involve widely different concerns and should not, as a normative matter, necessarily require the application of identical tests to determine joint-employer status. Second, to the extent that different standards stem from different statutory definitions of employment relationships, those differences reflect the judgment of Congress that different standards should apply in those settings—differences the Board is not at liberty to ignore.[138] While the Board recognizes that divergent standards may pose difficulties for businesses seeking to achieve—or courts to enforce—compliance with different statutory obligations, this is nothing new. Businesses and courts are accustomed to this state of affairs. Moreover, it is likely that no joint-employer rule the Board could adopt could achieve uniformity with all the statutory standards identified by the commenters. Thus, failure to achieve such uniformity cannot be a valid criticism of the rule.

Finally, the Board agrees that it may reasonably expect some deference from the courts with regard to our exercise, through rulemaking, of Congressional authority delegated to us in Section 6 of the Act. See *NLRB* v. *Food & Commercial Workers,* 484 U.S. 112, 123 (1987); *Chevron, U.S.A., Inc.* v. *N. Res. Def. Council, Inc.,* 467 U.S. 837 (1984). But it is well established that where the Supreme Court has determined the clear meaning of statutory terms, agencies, including the Board, are not thereafter free to depart from the Court's interpretation. *Lechmere, Inc.* v. *NLRB,* 502 U.S. 527, 536–537 (1992); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.,* 497 U.S. 116, 131 (1990). Here—as the Board and the courts have previously recognized—the Court has determined that the Taft-Hartley amendments reflect Congressional intent that the terms ''employer'' and ''employee'' within the Act are to be given their common-law agency meaning. *Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. at 324–325 (citing *NLRB* v. *United Ins. Co. of America,* 390 U.S. at 254).[139] And as stated by the D.C. Circuit in *Browning-Ferris* v. *NLRB,* the Board ''must color within the common-law lines identified by the judiciary.'' *Browning-Ferris* v. *NLRB,* supra at 1208. The final rule respects this principle.

The Board is also not persuaded by the argument that there are no relevant uniform common-law principles because the joint-employer concept is foreign to the common law. As courts and the Board have observed, ''[t]he basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an

[135] General Counsel Robb also advances this argument.

[136] See comment of General Counsel Robb.

[137] See comment of AFL–CIO.

[138] Compare, for example, NLRA Sec. 2(2) (exempting ''any State or political subdivision thereof'' from definition of ''employer'') with FLSA Sec. 203(d) (''Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . . .'').

[139] See also *Browning-Ferris* v. *NLRB,* 911 F.3d at 1206 (''Under Supreme Court and circuit precedent, the National Labor Relations Act's test for joint-employer status is determined by the common law of agency.''); id. at 1228 (Randolph, J., dissenting) (''[T]he common law . . . is supposed to control our decision and should have controlled the Board's.''); *Browning-Ferris,* 362 NLRB at 1610 (''In determining whether an employment relationship exists for purposes of the Act, the Board must follow the common-law agency test.'').

otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer'' to permit a finding that the first entity is *also* an employer of the employees. *NLRB* v. *Browning-Ferris Indus. of Pennsylvania,* 691 F.2d at 1123 (citing *Walter B. Cooke,* 262 NLRB 626, 640 (1982)). Common-law principles governing the employer/employee relationship, while sometimes difficult to ascertain with precision, are far from non-existent.[140] Finally, the Board is unpersuaded by the argument that the Supreme Court's discussion in *Hearst,* 322 U.S. at 125–126, warrants departing from the common-law analysis in this area. See *Nationwide Mut. Ins.,* 503 U.S. at 325 (''[A] principle of statutory construction can endure just so many legislative revisitations, and *Reid*'s presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise signaled our abandonment of *Silk*'s emphasis on construing that term 'in the light of the mischief to be corrected and the end to be attained.' '' (quoting *Hearst,* 322 U.S. at 124, and citing *U.S.* v. *Silk,* 331 U.S. 704, 713 (1947)).

E. Comments About Limited and Routine Control

Several commenters state that treating limited and routine control as irrelevant to determining joint-employer status is consistent with and/or required by the Act, court decisions, the common law, and/or pertinent Restatements.[141] In this regard, one commenter notes that the D.C. Circuit in *Browning-Ferris* v. *NLRB* did not hold that limited and routine control could establish joint-employment status.[142] Additionally, several commenters suggest definitions or interpretations of the words ''limited'' and ''routine,'' or the phrase ''limited or routine,'' and make arguments for or against the rule based on their suggested definitions or interpretations.[143] One commenter notes that the NPRM itself suggested a definition of ''limited or routine'' by stating: ''The Board generally [has] found supervision to be limited and routine where a supervisor's instructions consist[ ] mostly of directing another business's employees what work to perform, or where and when to perform the work, but not how to perform it.'' [144] Further, some commenters note that there is a body of case law to which the Board, the courts, and parties may look for guidance regarding the term's meaning.[145]

On the other side, some commenters argue that failing to consider limited and routine control as evidence of joint-employer status is inconsistent with the Act, the common law, court decisions, and/or pertinent Restatements.[146] One commenter asserts that, in the common-law master-servant relationship, the relevant question is whether the entity can exercise meaningful control, not the extent to which that control is exercised.[147] One commenter notes that pre–*Browning-Ferris* decisions did not adequately explain their holding that limited and routine control does not tend to support a joint-employer finding.[148]

Further, many commenters assert that the terms are vague, undefined, confusing, or contradictory, and/or that their use in the rule would create unanswered, potentially fact-intensive questions that will require litigation to answer.[149] Some commenters also state that excluding ''limited or routine'' control as probative evidence of joint-employer status creates a loophole that will enable entities to exercise control over employees' working conditions while avoiding responsibilities under the Act.[150]

Upon consideration of these comments, the Board has decided to modify the proposed rule to eliminate ''limited and routine'' as a general qualifying term and to use that term solely in the context of defining what is, and what is not, direct and immediate control over supervision. Thus, under the final rule, an entity does not exercise direct and immediate control over supervision where its instructions are ''limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it.'' Rule Sec. 103.40(C)(7). This is consistent with how the term was discussed in the NPRM's supplementary information and the case law cited therein. See 83 FR at 46683 (citing *Flagstaff Medical Center,* 357 NLRB 659, 667 (2011), enfd. in relevant part 715 F.3d 928 (D.C. Cir. 2013); *AM Property Holding Corp.,* 350 NLRB at 1001; *G. Wes Ltd. Co.,* 309 NLRB 225, 226 (1992)). None of the authorities cited by commenters supports an absolutist position—*i.e.,* as requiring the Board to treat limited and routine control of all essential terms and conditions as either categorically irrelevant or categorically relevant to determining joint-employer status. Indeed, some of the cited authorities deal with the issue of independent-contractor status, which is analytically distinct from joint-employer status.[151] See *Browning-Ferris* v. *NLRB,* 911 F.3d at 1213–1215.

As noted above, the final rule defines ''substantial direct and immediate control'' as ''direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment'' and further provides that the exercise of direct and immediate control over an essential term or condition of employment is not ''substantial'' if it is ''only exercised on a sporadic, isolated, or de minimis basis.'' This definition is necessary to specify what constitutes ''substantial'' direct and immediate control, and the inclusion of clear standards for determining substantiality avoids the concerns identified by commenters with the NPRM's exclusion of ''limited and routine'' control as evidence of joint-employer status.

Several commenters provide examples of limited or routine control that should not be deemed probative of joint-employer status. These examples include contracted-for standards,[152] requiring another party to adopt corporate social-responsibility policies,[153] timeliness-of-completion requirements,[154] statutory and

[140] Cf. *Cimorelli* v. *New York Century R. Co.,* 148 F.2d 575, 577 (6th Cir. 1945) (''We are dealing here with a legal problem so difficult that law writers were unclear and perplexed about it long before we came on the scene and no doubt they will so continue after we have gone, but there are extant certain intelligible, if imperfect, legal rules by which there may be an ascertainment of when a person is the employee of another, although his contract of employment is not directly made with such person.'').

[141] Comments of HR Policy Association; Chamber of Commerce; National Retail Federation.

[142] Comment of RILA.

[143] Comments of 1199SEIU United Healthcare Workers East; SEIU; AFL–CIO; UAW; NELP; CWA; IUOE; HR Policy Association.

[144] Comment of AFL–CIO.

[145] See, *e.g.,* Comment of International Bancshares Corporation.

[146] Comments of AFL–CIO; NELP; CWA; IUOE; IBT; UAW.

[147] Comment of SEIU.

[148] Comment of AFL–CIO.

[149] Comments of SEIU Local 32BJ; SEIU; Southern Poverty Law Center; Asian Pacific American Labor Alliance, AFL–CIO (APALA); CWA; Texas RioGrande Legal Aid; IBT; AFL–CIO; Signatory Wall and Ceiling Contractors Alliance; 1199SEIU United Healthcare Workers East.

[150] Comments of SEIU; Equal Justice Center; Southern Poverty Law Center; Labor & Employment Committee of the National Lawyers Guild.

[151] See, *e.g.,* comment of CWA (citing *FedEx Home Delivery* v. *NLRB,* 563 F.3d 492 (D.C. Cir. 2009)); comment of IBT (citing *McGuire* v. *United States,* 349 F.2d 644 (9th Cir. 1965)); see also *Browning-Ferris* v. *NLRB,* 911 F.3d at 1214 (''[A]t bottom, the independent-contractor and joint-employer tests ask different questions.'').

[152] Comments of CDW; National Retail Federation; International Bancshares Corporation.

[153] Comment of National Retail Federation.

[154] Comment of HR Policy Association.

regulatory compliance requirements,[155] isolated instances of notifying a supplier company that certain employees are not welcome on the user entity's property due to misconduct,[156] a retailer controlling the hours that a vendor can operate in the retailer's store,[157] requiring a contracting employer to provide services during certain hours,[158] and economic controls such as cost-plus contracts or generalized caps on contract costs.[159] Conversely, several commenters provide examples of control that is not limited or routine, such as setting employee pay and/or paying them directly,[160] hiring or being involved in hiring decisions,[161] firing employees,[162] disciplining employees,[163] and directing ''the manner in which the business shall be done, as well as the result to be accomplished.'' [164]

The final rule incorporates many of the commenters' examples in appropriate places. For example, most of the examples in the former category—*i.e.,* examples of control that should not be deemed probative of joint-employer status—are identical, or nearly so, to examples excluded by the rule from constituting evidence of direct and immediate control of essential terms and conditions of employment: Various standards set by contract, setting schedules for completion of a project, setting standards required by government regulation, refusing to allow another employer's employees to access one's premises or to perform work under a contract, establishing an enterprise's operating hours or when it needs the services provided by another employer, and entering into cost-plus contracts. Rule Sec. 103.40(C)(1)–(8). Indeed, those same examples involve setting the objectives, basic ground rules, and expectations for another entity's performance under a contract, which does not count as even indirect control of essential terms and conditions and is irrelevant to determining joint-employer status. Rule Sec. 103.40(E). With regard to examples in the latter category—*i.e.,* examples of control that is *not* limited or routine—these are incorporated in the final rule in provisions specifying what constitutes direct and immediate control over the several essential terms and conditions of employment. Rule Sec. 103.40(C)(1)–(8).

One commenter asserts that the common law requires the Board to weigh ''all of the incidents of the relationship'' or to consider the amount of control necessary for the particular work or workplace.[165] The final rule clarifies that joint-employer status ''must be determined on the totality of the relevant facts in each particular employment setting.''

One commenter states that the Board should consider that, in some cases, a ''routine'' contractual term will directly implicate the terms and conditions of employment, particularly in industries where the cost of a contract is almost entirely the cost of labor, or where an entity has only one customer.[166] The proposed rule used the term ''routine'' to characterize a kind of control over terms and conditions of employment, not a kind of contractual term. Thus, the comment has no bearing on what role ''limited and routine'' control over terms and conditions of employment should play in the joint-employer analysis. Nevertheless, the final rule clarifies that the ''limited and routine'' qualifier applies only in the context of supervision. However, to the extent that the commenter is suggesting that joint-employer status is established based solely on the circumstances the commenter posits, the Board disagrees. The final rule makes clear that entering into a cost-plus contract, ''with or without a maximum reimbursable wage rate,'' is not direct and immediate control over wages. In the Board's view, it is improper to find a joint-employment relationship merely because one entity, in an arms-length transaction, negotiates the maximum wage rate that it is willing to reimburse under a cost-plus contract. While the direct employer may face economic pressures that make it difficult to negotiate a higher wage rate with its employees, this should not be sufficient to make the other party to the contract a joint employer with the direct employer. See *Browning-Ferris* v. *NLRB,* 911 F.3d at 1220 (''[R]outine contractual terms, such as a very generalized cap on contract costs, . . . would seem far too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis.'').

One commenter states that, in jobs where employees are rarely directly supervised in their day-to-day tasks, the employer's level of day-to-day supervision is less relevant.[167] That may be true, but substantial direct and immediate control in the area of supervision is only one of the ways in which joint-employer status can be established. In various workplace situations, one or another of the essential terms and conditions of employment, such as supervision, may have greater or lesser significance in making a joint-employer determination. See also Supplementary Information Section V.D, ''Response to Comments: Comments Regarding Actual Exercise Requirement,'' supra.

One commenter states that much supervision by undisputed employers is routine, and therefore the fact that supervision is routine should not be a basis for declining to find joint-employer status.[168] Even assuming that some undisputed employers supervise their employees in a manner that would not be sufficient, standing alone, to make a separate entity a joint employer if the separate entity engaged in such supervision, there is no support in the law and no sound reason to draw the conclusion that a separate entity that engages in only limited and routine supervision must be deemed a joint employer on that basis. Moreover, even if an undisputed employer supervises its employees in a routine manner, it exercises direct and immediate control over other essential terms and conditions of employment, including wages, benefits, hiring, and discharge. Thus, the comment posits a false equivalency between the undisputed employer and the putative joint employer.

F. Comments About ''Substantial'' Direct and Immediate Control

Many commenters provide positive feedback regarding the requirement of ''substantial'' direct and immediate control. Specifically, commenters state that this requirement is clear, predictable, and/or rational; [169] is consistent with the common law and court decisions, including *Browning-Ferris* v. *NLRB;* [170] was the well-settled legal standard before the Board's decision in *Browning-Ferris;* [171] ensures that entities are not forced into relationships as ''joint employers'' with

[155] Comments of HR Policy Association; National Retail Federation.

[156] Comment of COLLE.

[157] Comment of National Retail Federation.

[158] Comments of International Bancshares Corporation; National Retail Federation.

[159] Comment of CDW.

[160] Comment of David Kaufmann.

[161] Comment of HR Policy Association.

[162] Comment of COLLE.

[163] Id.

[164] Comment of HR Policy Association.

[165] Comment of IBT.

[166] Comment of SEIU Local 32BJ.

[167] Comment of NELP.

[168] Comment of CWA.

[169] Comments of then-Chairwoman Virginia Foxx of the U.S. House of Representatives Committee on Education and the Workforce and then-Chairman Tim Walberg of the U.S. House Subcommittee on Health, Employment, Labor, and Pensions; General Counsel Robb.

[170] Comment of Ranking Member Foxx; cf. comment of National Retail Federation (discussing ''significant'' control).

[171] Comment of American Staffing Association.

others they deal with only in arms-length transactions;[172] promotes collective bargaining by ensuring that only the necessary parties are in attendance at the bargaining table;[173] and preserves franchisees' ability to run the day-to-day operations of their businesses without compromising the brand standards required of the franchise model.[174] Further, some commenters cite Section 8(b)(4) of the Act and argue that entities with attenuated control over another business's employees should not be deemed a primary employer and embroiled in that business's labor disputes.[175]

In contrast, many commenters argue that the Board should not impose the ''substantial'' qualifier, effectively advocating that *any* exercise of direct and immediate control over an essential term, no matter how limited, should render an entity a joint employer. Some argue that the ''substantial'' qualifier is contrary to the Act, the common law, court decisions, and/or pertinent Restatements.[176] Others assert that it would impair employees' ability to engage in meaningful collective bargaining.[177]

For many of the reasons discussed in the positive comments, the Board continues to believe that it is appropriate to include the ''substantial'' qualifier in the final rule. Contrary to some of the negative comments, inclusion of the qualifier will not impair meaningful collective bargaining. In fact, meaningful bargaining would be impaired if the final rule dispensed with a substantiality requirement, since the requirement ensures that only those entities that meaningfully affect matters relating to the employment relationship are present at the bargaining table. Rule Sec. 103.40(A). It also would be contrary to the purposes and policies of the Act to impose liability for another company's unfair labor practices on an entity that does not exercise ''substantial'' direct and immediate control over essential terms and conditions of employment of that company's employees, or to subject that entity to secondary economic pressure. Further, the substantiality requirement is consistent with longstanding pre–*Browning-Ferris* Board precedent. See, *e.g., Quantum Resources Corp.,* 305 NLRB 759, 760 (1991) (relying on entity's ''substantial'' control over hiring, promotion, base wage rates, hours, and working conditions of another employer's employees to find the entity a joint employer). As discussed in the NPRM, prior to *Browning-Ferris* the Board held that even direct and immediate control may not establish joint-employer status where that control is too limited in scope. See NPRM, 83 FR at 46686–46687 (citing *Flagstaff Medical Center,* 357 NLRB at 667; *Lee Hospital,* 300 NLRB 947, 948–950 (1990)). Nothing in the critical comments cited above undercuts the reasonableness of this precedent or of the substantiality requirement.

Several commenters contend that the term ''substantial'' is undefined, vague, and/or will require litigation to clarify.[178] Some commenters pose specific questions about its meaning, such as whether it is quantitative (*i.e.,* whether it designates control over a large number of essential terms and conditions), qualitative (*i.e.,* whether it designates ''massive'' control over just one essential term), or both.[179] Further, several commenters suggest that the final rule should define the term and/or explain what is, and what is not, substantial control, and many commenters suggest definitions.[180] One commenter claims that the NPRM's suggestion that controlling only one essential term or condition is insufficient would permit the Board to find not only that an entity that controls only wages is not an employer, but also that employees have no employer at all where control over essential terms and conditions is sufficiently splintered among multiple entities.[181] One commenter asserts that if the Board does not find joint-employer status where control is ''exercised rarely,'' this would allow an entity that sets initial wages not to be an employer, and it would also be inconsistent with the Act's definition of ''supervisor'' in Section 2(11).[182] The same commenter also asserts that the NPRM's description of the term suggests that a hospital whose employees are the sole supervisors of visiting nurses would not be their joint employer, contrary to the Act and the common law.[183]

In response to the comments, the Board has decided to expressly define ''substantial direct and immediate control'' in the final rule. Specifically, the final rule provides that ''[s]ubstantial direct and immediate control' means direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees.'' The rule further specifies that control is not ''substantial'' if it is ''exercised on a sporadic, isolated, or de minimis basis.'' The final rule thus clarifies that a party asserting joint-employer status must prove that the putative joint employer (i) exercises direct and immediate control over one or more essential terms or conditions of employment of another entity's employees, (ii) that the control exercised over that essential term or those essential terms has ''a regular or continuous consequential effect'' and is not ''sporadic, isolated, or de minimis,'' and (iii) that the substantial direct and immediate control thus exercised over that essential term or those essential terms warrants finding that the putative joint employer ''meaningfully affects matters relating to the employment relationship'' with another employer's employees. Of course, the final rule is necessarily general, and future cases adjudicated under the rule will give further meaning and guidance.

The example proposed by one commenter of employees with no employer at all because control is divided among numerous entities no one of which exercises substantial control over any essential term or condition strikes us as unrealistic. The rule presumes that employees have a direct employer, and the comment does not persuade us to abandon that presumption.

Regarding the example of setting wages, the commenter seems to assume that a one-time setting of initial wages would compel a finding of joint-employer status. The Board would not make that assumption. Suppose a user entity is party to a long-term contract with a supplier employer. The user entity sets the initial wages to be paid the supplied workers. Years go by, the user entity never exercises any further control or influence over wages, and the supplier employer repeatedly adjusts the supplied employees' wages. Whether the user entity is a joint employer of the supplied employees based on that one-time initial setting of wages does not have a self-evident affirmative answer. On the other hand, where a user entity's one-time setting of supplied employees' wages has a continuous consequential effect on

[172] Comment of COLLE.

[173] Comment of Restaurant Law Center.

[174] Comment of Brian Carmody.

[175] See, *e.g.,* comment of General Counsel Robb.

[176] Comments of SEIU;IBT.

[177] See, *e.g.,* comment of UA.

[178] Comments of SEIU; CWA; IBT; Center for American Progress Action Fund; General Counsel Robb; LIUNA; AFL–CIO; SEIU Local 32BJ.

[179] See, *e.g.,* comment of Texas RioGrande Legal Aid.

[180] Comments of Jenner & Block, LLP; International Franchise Association; CDW; Restaurant Law Center; National Retail Federation; Associated Builders and Contractors, Inc.

[181] Comment of AFL–CIO.

[182] Id.

[183] Id.

those employees' wages, such evidence may suffice to establish that entity's joint-employer status. Finally, regarding the hospital example and the interplay of Section 2(11) and joint-employer status, see the discussion in Section V.C, ''Response to Comments: Comments Regarding Contractually Reserved But Unexercised Control,'' supra.

One commenter states that the Board must clarify the relationship between ''substantial'' direct and immediate control and ''limited and routine'' control.[184] The final rule provides the requested clarification. It deletes ''limited and routine'' as a general qualifying term and, instead, specifies that the phrase applies only to supervision. It explains what limited and routine supervision means: Telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it. Rule Sec. 103.40(C)(7). And it contrastingly defines direct and immediate control over supervision to mean actually instructing another employer's employees how to perform their work or actually issuing employee performance appraisals.

Several commenters suggest examples of what should not be deemed substantial direct and immediate control, such as establishing eligibility criteria to provide services,[185] requiring corporate social-responsibility initiatives,[186] and requiring supplier employers to provide minimum amounts of leave to their employees.[187] Many of the suggested examples have been incorporated in the final rule. For example, in defining what is and is not ''direct and immediate control'' over specific essential terms and conditions of employment, the final rule excludes setting minimal hiring standards or minimum standards of performance or conduct.

G. Comments Regarding ''Essential'' Terms and Conditions of Employment

In the NPRM, the Board proposed that ''an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.''

The majority of comments concerning this aspect of the proposed rule do not contest the overarching principle that the Board's joint-employer standard should focus on a putative joint employer's control over employees' *essential* terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.[188] A few comments, however, contend that a joint-employer analysis should examine whether an entity shares or codetermines *any* term or condition of employment that is a mandatory subject of bargaining, whether deemed ''essential'' or not.[189] Additional comments ask the Board to clarify whether or not the proposed list of essential terms and conditions of employment is exclusive, *i.e.,* whether it consists of the enumerated terms and conditions and no others.[190] Still other comments ask the Board to clarify the number of essential terms and conditions of employment an employer must share or codetermine to be considered a joint employer. Finally, the Board received comments proposing expansion of the proposed list of essential terms and conditions to include wages,[191] benefits,[192] hours of work,[193] health and safety,[194] training,[195] drug testing,[196] and access for union representatives,[197] among others.

After carefully considering these comments, the Board has decided to modify the proposed rule in several respects. Under the final rule, essential terms and conditions of employment ''means wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.'' Thus, the list of essential terms and conditions of employment has been expanded and made exclusive. To be found a joint employer under the final rule, an entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of employment as would warrant finding that the entity meaningfully affects matters related to the employment relationship, and joint-employer status is determined on ''the totality of the relevant facts in each particular employment setting.'' Thus, direct and immediate control over at least one essential term or condition is necessary, but the final rule makes clear that it is not necessarily sufficient. Moreover, under the final rule, control over mandatory subjects other than essential terms and conditions may be relevant to joint-employer status, depending upon the other evidence in the case. As provided in the final rule, ''the entity's control over mandatory subjects of bargaining other than the essential terms and conditions of employment is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment.''

The Board believes a standard that requires an entity to possess and exercise substantial direct and immediate control over essential terms and conditions of employment is consistent with the purposes and policies of the Act, as discussed in greater detail below in the justification for the final rule. The Act's purpose of promoting collective bargaining is best served by a joint-employer standard that places at the bargaining table only those entities that control terms and conditions that are most material to collective bargaining. Moreover, a less demanding standard would unjustly subject innocent parties to liability for others' unfair labor practices and coercion in others' labor disputes. A fuzzier standard with no bright lines would make it difficult for the Board to distinguish between arm's-length contracting parties and genuine joint employers. Accordingly, preserving the element of direct and immediate control over *essential* terms and conditions draws a discernible and predictable line, providing ''certainty beforehand'' for the regulated community. See *First Nat'l Maint. Corp.* v. *NLRB,* 452 U.S. at 679.

Turning to the merits of specific comments, the Board agrees that a proper standard should not disregard control over mandatory subjects of bargaining that do not qualify as essential terms or conditions, and the final rule does not limit the joint-employer analysis to essential terms. That said, the Board has long focused the joint-employer analysis primarily on a putative joint employer's control over essential terms and conditions of

[184] Id.

[185] Comment of HR Policy Association.

[186] Comment of RILA.

[187] Comment of HR Policy Association.

[188] Comments of CDW (supporting the general framework of the proposed rule's focus on essential terms and conditions of employment); U.S. House of Representatives Committee on Education and the Workforce (supporting a rule that examines an employer's control over essential terms and conditions of employment); SEIU (agreeing that the common law requires the Board to examine control over essential terms and conditions of employment); United Brotherhood of Carpenters and Joiners of America (same).

[189] Comments of UAW; IUOE; AFL–CIO.

[190] Comments of General Counsel Robb; IUOE.

[191] Comments of National Retail Federation; United Brotherhood of Carpenters and Joiners of America.

[192] Comments of SEIU Local 32BJ; Jenner & Block, LLP.

[193] Comments of General Counsel Robb; SEIU Local 32BJ.

[194] Comments of 1199SEIU United Healthcare Workers East; IUOE.

[195] Comment of IUOE.

[196] Comment of SEIU Local 32BJ.

[197] Id.

employment. See, *e.g., Browning-Ferris,* 362 NLRB at 1613 (adhering to the Board's traditional focus on ''those matters governing the essential terms and conditions of employment''); *Laerco Transportation,* 269 NLRB at 325 (the ''joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment''); *Greyhound Corp.,* 153 NLRB at 1495 (finding joint-employer relationship where an employer shared or codetermined ''matters governing essential terms and conditions''); *Maas Bros.,* 88 NLRB 129, 135 (1950) (employees working for entrepreneurs that ran individual departments within a larger department store not included in a storewide unit where the entrepreneurs, not the department store, controlled ''the essential terms and conditions of employment'' governing the employees).

Two commenters argue that the Ninth Circuit's decision in *Sun-Maid Growers of California* v. *NLRB,* 618 F.2d 56 (9th Cir. 1980), supports a standard that renders an entity a joint employer if it controls any term or condition of employment, regardless of whether the term or condition is deemed ''essential.'' [198] The Board finds this argument unpersuasive. To be sure, in *Sun-Maid,* the court stated that a ''joint employer relationship exists when an employer exercises authority over employment conditions which are within the area of mandatory collective bargaining.'' Id. at 59. However, the court in *Sun-Maid* was not called upon to decide whether joint-employer status may be established absent control over essential terms and conditions, since the court found that the putative joint employer in *Sun-Maid* did control at least one essential term (hours of work) and possibly two (hours of work and direction). Id. at 59 (finding joint-employer status where entity controlled ''work schedules, assigned the work and decided when additional electricians were needed''); see also *Tanforan Park Food Purveyors Council* v. *NLRB,* 656 F.2d 1358, 1361 (9th Cir. 1981) (finding joint-employer relationship where putative joint employer controlled ''wage rates, vacation, holiday, and work schedules, and employee supervision[, which] lie within the core of mandatory collective bargaining'').

Moreover, several federal appellate courts have approved the Board's longstanding insistence on control of essential terms and conditions of employment to make an entity a joint employer. See *Adams & Assoc., Inc.* v. *NLRB,* 871 F.3d 358, 377 (5th Cir. 2017); *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc.* v. *NLRB,* 363 F.3d 437, 440 (D.C. Cir. 2004); *Rivera-Vega* v. *ConAgra, Inc.,* 70 F.3d 153, 163 (1st Cir. 1995); *Carrier Corp.* v. *NLRB,* 768 F.2d 778, 781 (6th Cir. 1985); *NLRB* v. *Browning-Ferris Indus. of Pennsylvania, Inc.,* 691 F.2d at 1124; ; see also *Browning-Ferris* v. *NLRB,* 911 F.3d at 1220 (''[G]lobal oversight' is a routine feature of independent contracts. Wielding direct and indirect control over the 'essential terms and conditions' of employees' work lives is not.'') (internal citation omitted).

Some commenters argue that the Board should require direct and immediate control of *all* essential terms and conditions of employment to subject an entity to the duty to bargain collectively as a joint employer.[199] The Board rejects this position. The Board has never required direct and immediate control of all essential employment terms in order to deem an entity a joint employer of another employer's employees. Rather, it has consistently evaluated joint-employer status based on the totality of the relevant facts in each case.

Contrary to a commenter's contention, the Board's longstanding requirement of control over essential terms and conditions of employment, to which both the proposed and final rules adhere, is consistent with the Supreme Court's decision in *Boire* v. *Greyhound Corp.,* 376 U.S. 473 (1964).[200] In *Boire,* the question presented was a narrow one: Whether an employer could challenge in federal district court the Board's determination that two entities constituted a joint employer of a group of employees and its direction of an election in a unit composed of those employees based on a petition that named both entities as the employer. See id. at 476–477. The Court held that Congress had limited judicial review to the courts of appeals and that Greyhound could not challenge the Board's decision and direction of election in federal district court. See id. The Court did not reach the merits of the Board's joint-employer finding, but it observed that ''whether Greyhound possessed sufficient indicia of control to be an 'employer' is essentially a factual issue.'' Id. at 481. The commenter asserts that because the Court did not reference ''essential terms and conditions of employment,'' the Board may not require control over essential terms. However, the Court did not pass on the joint-employer determination in *Greyhound,* much less preclude the standard adopted in the final rule. Indeed, the final rule is consistent with the Court's observation that joint-employer status is ''essentially a factual issue.'' Under the final rule, ''[j]oint-employer status must be determined on the totality of the relevant facts in each particular employment setting.'' Rule Sec. 103.40(A).

We also disagree with the assertion that requiring control of essential terms and conditions cannot be squared with *Management Training Corp.,* 317 NLRB 1355 (1995).[201] Prior to *Management Training,* the Board asserted jurisdiction over a government contractor only if the contractor controlled ''the entire package of employee compensation, *i.e.,* wages and fringe benefits.'' *Res-Care, Inc.,* 280 NLRB 670, 674 (1986). In *Management Training,* the Board rejected this standard. 317 NLRB at 1358. In doing so, the Board criticized the ''emphasis in *Res-Care* on control of economic terms and conditions [as] an oversimplification of the bargaining process.'' Id. at 1357. The Board explained:

> While economic terms are certainly important aspects of the employment relationship, they are not the only subjects sought to be negotiated at the bargaining table. Indeed, monetary terms may not necessarily be the most critical issues between the parties. . . . [I]t may be that the parties' primary interest is in the noneconomic area. It was shortsighted, therefore, for the Board to declare that bargaining is meaningless unless it includes the entire range of economic issues.

Id.

The proposed rule was, and the final rule is, consistent with *Management Training.* The Board in *Management Training* faulted *Res-Care* for making wages and benefits the *sine qua non* of collective bargaining. The proposed and final rules do not limit essential terms and conditions to wages and benefits. Essential terms and conditions include non-economic as well as economic terms, and joint-employer status may be found under the rule based on an entity's control over non-economic essential terms only.

Nothing in Section 8(a)(5) and (d) of the Act prohibits the Board from promulgating a joint-employer rule that requires control over essential terms and conditions of employment. Under Section 8(a)(5) and (d), an employer is obligated to bargain with its unit employees' representative ''with respect to wages, hours, and other terms and conditions of employment,'' commonly

[198] See comments of UAW; AFL–CIO.

[199] See, *e.g.* comment of General Counsel Robb.

[200] See comment of UAW.

[201] See comment of AFL–CIO.

referred to as ''mandatory'' subjects of bargaining. *NLRB* v. *Borg-Warner Corp.,* 356 U.S. 342, 349 (1958). But there is no inconsistency between this obligation and basing joint-employer status on control over a subset of mandatory subjects, *i.e.,* essential terms and conditions. The two issues are widely different. Section 8(d) mandates what the unit employees' undisputed employer must bargain *about*; the instant joint-employer rule provides the standard for determining whether an entity *other than* the unit employees' undisputed employer is also an employer, *i.e.,* a joint employer, with a duty to bargain. Whether one has a duty to bargain is analytically prior to, and distinct from, what one must bargain about *if* one has a duty to bargain.[202]

That said, the Board believes, after considering the relevant comments, that control over mandatory subjects other than essential terms and conditions should play a role in the joint-employer analysis. Accordingly, the final rule provides that evidence of such control is probative of joint-employer status ''to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment.'' Rule Sec. 103.40(A).

Several commenters addressed whether the final rule should make the list of essential terms and conditions of employment exhaustive—*i.e.,* the enumerated terms and conditions and no others—and how many essential terms and conditions an entity must control to be deemed a joint employer. As to the latter, comments suggest a range of possibilities—from any essential term and condition,[203] to more than one,[204] a significant number,[205] or all essential terms and conditions of employment.[206]

After careful consideration, the Board has decided to modify the proposed rule in two relevant respects. First, the final rule makes the list of essential terms and conditions of employment exclusive. This will provide clarity and predictability for the regulated community and remove an issue from litigation. Second, under the final rule, an entity must ''possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of . . . employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship'' with another employer's employees. This reflects the Board's recognition that direct and immediate control over one essential term may warrant a finding of joint-employer status—but on the other hand, it may not, and control even over more than one essential term may fall short of the mark where an entity has exercised such control so infrequently that the evidence fails to support a finding that the entity meaningfully affects matters relating to the employment relationship.

Finally, the Board agrees that wages, benefits, and hours of work should be included in the list of essential terms and conditions of employment. The language of the Act supports including wages and hours of work. Section 8(d) defines collective bargaining as the ''performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages, hours,* and other terms and conditions of employment'' (emphasis added). Section 9(a) provides that ''[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment,* or other conditions of employment'' (emphasis added). Congress clearly understood that wages and hours of work would be central to collective bargaining, and this supports adding them to the list of essential terms and conditions of employment.

Board precedent likewise supports including wages, hours of work, and benefits among the essential terms and conditions. See, *e.g., Quantum Resources Corp.,* 305 NLRB at 760–761 (finding that entity shared or codetermined ''those matters governing the essential terms and conditions of employment'' based in part on evidence of its substantial control over ''levels of compensation . . . hours . . . and benefits''); *Lee Hospital,* 300 NLRB at 950 (corporation hired by hospital to operate anesthesia department and recovery room not a joint employer of nurses where hospital exclusively determined essential terms and conditions of employment, including ''wages'' and ''fringe benefit policies''); *Pacific Mutual Door Co.,* 278 NLRB 854, 858–859 (1986) (finding joint-employer status based on entity's sufficient control over essential terms and conditions of employment, including hours, wages, and ''benefits received as paid holidays and paid vacations'').

The courts, too, have understood essential terms and conditions of employment to include wages, hours of work, and benefits. See *Adams & Assoc., Inc.* v. *NLRB,* 871 F.3d at 378 (finding joint-employer status where entity ''jointly developed the wage structure'' and exclusively determined ''the holiday schedule'' for all employees) (internal quotation marks omitted); *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc.* v. *NLRB,* 363 F.3d at 440–441 (finding joint-employer status where entity determined ''employee wage and benefit rates . . . discontinued an employee bonus program . . . [and set] rating categories used to determine whether drivers received incentive awards''); *Rivera-Vega* v. *ConAgra, Inc.,* 70 F.3d at 163 (factors in a joint-employer determination include ''ultimate power over changes in employer compensation [and] benefits''); *Carrier Corp.* v. *NLRB,* 768 F.2d at 781 (finding joint-employer status where employer ''consulted the [putative joint employer] over wages and fringe benefits''); *Jefferson County Cmty. Ctr. For Developmental Disabilities, Inc.* v. *NLRB,* 732 F.2d 122, 127 (10th Cir. 1984) (employer maintained sufficient control over terms and conditions of employment ''to be capable of effective bargaining'' where it had ''final decision-making authority over the essential terms and conditions of employment, including wages [and] fringe benefits'') (internal quotation marks omitted); *NLRB* v. *Browning-Ferris Indus. of Pennsylvania, Inc.,* 691 F.2d 1117, 1124 (3d Cir. 1982) (finding joint-employer status where entity ''established work hours'' and ''determined [employees'] compensation'').

Two commenters contend that the list of essential terms and conditions of employment must or should include each of the indicia of supervisory status set forth in Section 2(11).[207] The final

[202] This distinction was clearly recognized in *Browning-Ferris,* where the Board majority stated:

> For example, it is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining. Moreover, as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control.

362 NLRB at 1614.

[203] See comment of AFL–CIO.

[204] See comment of American Staffing Association.

[205] See comment of Jenner & Block, LLP.

[206] See comments of International Warehouse Logistics Association; Association of Corporate Counsel.

[207] See comments of AFL–CIO; UAW. Sec. 2(11) defines ''supervisor'' as ''any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to

Continued

rule's list of essential terms and conditions does not include several of these supervisory indicia,[208] but there is no contradiction between the final rule and Section 2(11) of the Act. Nothing in the text of the Act or its legislative history links Section 2(11) and joint-employer status. Nor does the Act or its legislative history otherwise suggest that the Board must find that an entity is a joint employer of another employer's employees based solely on supervisory indicia such as the authority to lay off, recall, promote, etc. To the contrary, under longstanding Board precedent, it is possible for two businesses to remain separate employers despite the fact that employees of the first business assertedly exercise Section 2(11) authority over employees of the second business. *Crenulated Co.,* 308 NLRB at 1216 (''It is well established that an individual must exercise supervisory authority over employees of the employer at issue, and not employees of another employer, in order to qualify as a supervisor under Section 2(11) of the Act''); *Eureka Newspapers, Inc.,* 154 NLRB 1181, 1185 (1965) (finding that district dealers employed by newspaper were not statutory supervisors despite alleged supervisory authority over carriers who were not employed by newspaper). See also Section V.C, ''Response to Comments: Comments Regarding Contractually Reserved But Unexercised Control,'' supra.

Two additional points should be emphasized here. First, as described above, control over a mandatory subject of bargaining that is not an ''essential'' term is relevant in a joint-employer analysis under this final rule. Such control can supplement and reinforce evidence of possession or exercise of direct and immediate control over a particular essential term and condition of employment, as discussed above. Second, when applying this final rule, the Board will not be bound by a putative joint employer's characterization of its conduct. For example, under the circumstances of a particular case, an employment action codetermined by a putative joint employer and characterized as a ''layoff'' could in fact be a discharge. Similarly, ''rewarding'' another employer's employee could, depending on the circumstances, be tantamount to bestowing a benefit. Relatedly, if a putative joint employer directly and immediately resolved (*i.e.,* adjusted) another employer's employee's grievance over rate of pay or suspension for misconduct, that would evidence direct and immediate control over the essential terms and conditions of wages and discipline.

H. Comments on Employer Status Under Other Statutes and the Common Law

Several comments address the doctrine of joint employment as it has been interpreted under other statutes. In general, as explained below, we believe that joint-employer determinations under other statutes are instructive but of limited utility to the joint-employer inquiry under the NLRA.

Several commenters observe that the FLSA broadly defines ''employ'' as to ''suffer or permit to work'' and ''employer'' as ''any person acting directly or indirectly in the interest of an employer in relation to an employee.'' [209] But Congress defined ''employer'' in the FLSA more broadly than under the NLRA. Joint-employer determinations under the FLSA, therefore, are unreliable guides for determining joint-employer status under the NLRA.

Two commenters assert that courts consider evidence of indirect control and the ''economic realities'' of the work relationship when determining whether an entity is a joint employer under the FLSA.[210] Again, however, joint-employer status under the FLSA is based on that statute's expansive definition of ''employer,'' and has been based as well on federal regulations providing that joint-employer determinations under the FLSA may be based solely on evidence of indirect control. See *In re Enter. Rent–A–Car Wage & Hour Emp't Practices Litig.,* 683 F.3d 462, 468 (3d Cir. 2012) (finding joint employment ''[w]here the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, *directly or indirectly*'' (quoting 29 CFR Sec. 791.2(b))) (emphasis added).[211] The NLRA does not define ''employer'' thus broadly.

Other commenters point out that the Occupational Safety and Health Administration (OSHA) applies a policy under which, on multi-employer worksites, more than one employer may be cited for a hazardous condition that violates an OSHA standard.[212] See *Solis* v. *Summit Contractors, Inc.,* 558 F.3d 815 (8th Cir. 2009) (holding that OSHA regulations (29 CFR Sec.1910.12) permitted the issuance of citations to ''controlling employers,'' even when they did not create the safety hazard and when its employees were not exposed to the hazard). Likewise, a commenter observes that IRS regulations provide that an entity may be considered an employer based on the *right* to control the way services are performed, and that the right need not be exercised.[213] The Board's task, however, is to formulate a joint-employer standard based on the common law applied in the context of the NLRA. Since a joint-employer finding under the NLRA entails a duty to bargain, the Board must consider when a putative joint employer's participation in collective bargaining is required for such bargaining to be meaningful. And since such a finding renders otherwise secondary activity primary, the Board also must consider Congress's concern with limiting third parties' exposure to economic warfare in labor disputes. These considerations have no bearing on joint-employer determinations by OSHA or the IRS, which therefore shed little light on joint-employer determinations under the Act.

Some commenters observe that the joint-employer inquiry under the FLSA is performed on a case-by-case basis, and that this inquiry is always fact-specific under the common law.[214] Consistent with these comments, joint-employer determinations under the final rule will be determined on the totality of the relevant facts in each particular employment setting.

Some commenters contend that the proposed joint-employer standard will impact numerous areas of labor-management relations and federal and state workplace laws.[215] Such impact is the inevitable consequence of any joint-employer standard, and the Board believes that the final rule sets forth a standard that best furthers the purposes and policies of the NLRA.

One commenter observes that indirect and reserved control are relevant factors in joint-employer determinations under Title VII, citing, inter alia, *Myers* v. *Garfield & Johnson Enters.,* 679 F. Supp. 2d 598, 611 (E.D. Pa. 2010) (''[A]n

adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.''

[208] The essential terms and conditions of employment set forth in Sec. 103.40(C)(1)–(8) does not include transfer, lay off, recall, promote, reward, or adjustment of grievances.

[209] See comments of NELP; UA; Professor Kulwiec.

[210] See comments of Greater Boston Legal Services; Justice at Work.

[211] On January 16, 2020, the Department of Labor issued a final rule that made relevant revisions to the regulatory text quoted above. See 85 FR 2820 (Jan. 16, 2020).

[212] See comments of NELP; UA.

[213] See comment of UA.

[214] See comments of NELP; SEIU.

[215] See comments of NELP; Weinberg, Roger & Rosenfeld.

employee may be considered 'employed' by a third party as well as by the nominal employer if the third party has a right to control the employee's conduct, either directly or through the third party's control over the employer.''), and *Virgo* v. *Riviera Beach Assocs., Ltd.,* 30 F.3d 1350, 1361 (11th Cir. 1994) (''We find that actual control is a factor to be considered when deciding the 'joint employer' issue, but the authority or power to control is also highly relevant.'') [216] Under the final rule, evidence of indirect and reserved but unexercised control are probative of joint-employer status, but only to the extent that such evidence supplements and reinforces evidence of direct and immediate control. To the extent the latter proviso makes the joint-employer standard under the Act narrower than the comparable standard under Title VII, our task is to formulate a joint-employer standard based on the common law applied in the particular context of the NLRA, as explained above. In any event, the decisions in *Myers* and *Virgo* relied on evidence of direct and immediate control over essential terms and conditions of employment. In *Myers,* which was before the court on a motion to dismiss for failure to state a claim, the court cited a complaint allegation that the putative joint employer participated in the daily supervision of the direct employer's employees. 679 F. Supp. 2d at 610. In *Virgo,* the court cited evidence that the putative joint employer paid all costs and expenses related to all the employees of the direct employer. 30 F.3d at 1361.

Several commenters cite the Restatement (Second) of Agency, in particular Sections 2(2) and 220, for the proposition that an employee is a worker who is subject to the employer's ''control or *right to control*'' and complain that the proposed rule ''wholly discounts'' reserved control.[217] These commenters also point out that Restatement (Second) of Agency Sec. 220 cmt. d states that this right of control may be ''very attenuated.'' Some commenters observe that in *Browning-Ferris* v. *NLRB,* 911 F.3d at 1211, the D.C. Circuit stated that ''the 'right to control' runs like a *leitmotif* through the Restatement (Second) of Agency (emphasis in original).'' [218] Other commenters contend that the ''right to control'' standard is a core component and widely recognized feature of case law applying common-law agency principles and assert that the right of control is sufficient to establish a common-law master-servant relationship.[219]

Initially, as explained more fully below, a master-servant relationship under the common law of independent-contractor status is not synonymous with joint-employer status.

In any case, the Board agrees with one commenter that, although the court in *Browning-Ferris* v. *NLRB* stated that the Board is required to ''color within the common-law lines'' with respect to its joint-employer rule, 911 F.3d at 1208, the final rule does not exceed the bounds of common-law principles.[220] Like that commenter, the Board is aware of no court that has found that reserved, unexercised control, standing alone, was sufficient to create a joint-employer relationship under the NLRA. Moreover, the final rule does not ''wholly discount'' or otherwise exclude consideration of reserved, unexercised control. Rather, it provides that contractually reserved but never exercised authority over essential terms and conditions of employment of another employer's employees is probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control. Again, the narrowing proviso reflects a joint-employer standard based on the common law applied in the particular context of the NLRA.

One comment contends that consideration of indirect control over employees' wages and working conditions is consistent with common-law agency doctrine.[221] The Board agrees, and observes that the D.C. Circuit has likewise held that an entity's ''indirect control over employees can be a relevant consideration'' in the common-law inquiry. *Browning-Ferris* v. *NLRB,* 911 F.3d at 1209. Accordingly, under the final rule, evidence of an entity's indirect control over essential terms and conditions of employment of a direct employer's employees is probative of joint-employer status to the extent it supplements and reinforces evidence of direct and immediate control over a particular essential term and condition of employment.

One commenter observes that Section 220 of the Restatement (Second) of Agency includes many considerations that are broader and less formalistic than the proposed rule, such as whether the one employed is engaged in a distinct occupation or business and whether the work is a part of the regular business of the putative employer.[222] However, these considerations relate to determining whether a worker is an employee or an independent contractor. As explained more fully below, they are instructive but of limited utility in the joint-employer context.

Another commenter argues that when determining what the D.C. Circuit and the common law mean by indirect control, it may be useful to consider the so-called subservant doctrine, under which employer-employee relationships are established by indirect control.[223] See Restatement (Second) of Agency Sec. 5(2); see also id., cmt. e. In defining indirect control in the final rule, the Board has focused on the connection between the entity's actions and the employees' essential terms and conditions of employment, not on how alleged control is communicated. However, the final rule is not intended to immunize an entity from joint-employer status based solely on how its control is exercised. Direct and immediate control exercised through an intermediary remains direct and immediate. See *Browning-Ferris* v. *NLRB,* 911 F.3d at 1217 (''[T]he common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.'').

I. Comments on Independent-Contractor Precedent

Many commenters address the relevance—or lack of relevance—of independent-contractor precedent to the joint-employer inquiry. As noted by one commenter, in NLRB v. United Insurance Co. of America, 390 U.S. at 256, the Supreme Court held that the determination of whether a worker is a statutorily protected employee or a statutorily exempt independent contractor is governed by common-law agency principles.[224] In *Community for Creative Non-Violence* v. *Reid,* the Supreme Court listed common-law factors relevant to making the employee-versus-independent contractor determination:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the

[216] See comment of UA.

[217] See comments of IBT; Greater Boston Legal Services; State Attorneys General; AFL–CIO; SEIU (citing Sec. 220(1) (emphasis added)).

[218] See comments of State Attorneys General; Spivak Lipton LLP.

[219] See comments of SEIU; UA.

[220] See comment of CDW.

[221] See comment of Labor Law, Antitrust Law, and Economics Professors (Law and Economics Professors).

[222] See comment of NELP.

[223] See comment of SEIU.

[224] See comment of State Attorneys General.

skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

490 U.S. at 751–752; see also *Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. at 323–324. These so-called *Reid* factors are largely adopted from Section 220(2) of the Restatement (Second) of Agency. As another commenter notes, the Supreme Court has instructed that, in assessing employee status, ''all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'' United Ins., 390 U.S. at 256.[225]

Several commenters acknowledge that various elements of the independent-contractor test are inapplicable to determining joint-employer status.[226] These commenters point out that where there is no dispute that certain workers are employees of some entity, many of the factors of the common-law test are already satisfied and provide no meaningful guidance to help determine whether another entity constitutes a joint employer. Cf. *Clackamas Gastroenterology Assoc., P.C.* v. *Wells,* 538 U.S. 440, 445 fn. 5 (2003) (explaining that the independent-contractor factors ''[we]re not directly applicable'' in determining whether physician shareholders who owned a professional corporation were ''employees'' because the court was ''not faced with drawing a line between independent contractors and employees'').

Moreover, as observed by one commenter, in *Browning-Ferris* v. *NLRB,* 911 F.3d at 1212–1213, the D.C. Circuit rejected the contention that the independent-contractor and joint-employer inquiries are ''essentially the same,'' adding that the argument ''lacks any precedential grounding.'' [227] As noted by another commenter, the court explained that although independent-contractor cases can be ''instructive in the joint-employer inquiry to the extent that they elaborate on the nature and extent of control necessary to establish a common-law employment relationship,'' the independent-contractor inquiry omits the key questions, for deciding the joint-employer issue, of who controls the workers and when and how that control is exercised. Id. at 1215.[228] ''In short,'' the court concluded, ''using the independent-contractor test exclusively to answer the joint-employer question would be rather like using a hammer to drive in a screw: it only roughly assists the task because the hammer is designed for a different purpose.'' Id.

Consistent with these commenters, the Board believes that the common-law factors relative to determining employee or independent-contractor status are instructive but of limited utility in the joint-employer context. Application of those factors is appropriate to determine whether a putative employer has the ''right to control the manner and means by which the product is accomplished,'' *Reid,* 490 U.S. at 751–752, and therefore independent-contractor principles assist in determining whether a putative employer has such a ''right to control.'' But they do not assist in answering the key questions in the joint-employer inquiry: *who* is exercising that control, *when,* and *how*. This is consistent with the court's decision in *Browning-Ferris* v. *NLRB,* 911 F.3d at 1214–1215.

A commenter contends that the common law of independent-contractor status is instructive in the joint-employer context to the extent it assists in identifying the *forms* of control that are relevant to employer status.[229] In this regard, the Board agrees with a different commenter that under the *Reid* factors, both indirect and reserved control are relevant to determining employer status under the common law. 490 U.S. at 751–752.[230] The Board further agrees that independent-contractor precedent also makes reserved control relevant to determining employer status. Thus, under the final rule, evidence of indirect control and of unexercised, contractually reserved authority is relevant in the joint-employer inquiry to the extent such evidence supplements and reinforces evidence of direct and immediate control over essential terms and conditions.

One of the above commenters further argues that the common law of independent-contractor status—specifically, the Restatement (Second) of Agency—makes clear that contractually reserved authority, standing alone, is sufficient to establish an employment relationship.[231] The commenter cites, inter alia, Sections 2 and 220, which define a ''master'' as someone who ''controls *or has the right to control*'' another and a ''servant'' as someone employed by the master who is ''subject to the [master's] control or *right to control*'' (commenter's emphasis). But ''sufficient to establish an employment relationship'' under the Restatement of Agency, which summarizes the common law of independent-contractor status, is not the same as sufficient to establish joint-employer status under the NLRA for all the reasons explained above.

J. Comments About the Impact of the D.C. Circuit's Decision in Browning-Ferris Industries of California, Inc. v NLRB

The Board received many comments regarding the impact of the D.C. Circuit's decision in *Browning-Ferris* v. *NLRB* on this rulemaking. Commenters debate whether the court's decision permits the proposed rule, requires changes to the proposed rule, or removes the authority of the Board to engage in this rulemaking at all. Those comments and the Board's responses are described below.

Some commenters contend that the proposed rule is inconsistent with the D.C. Circuit's conclusions in *Browning-Ferris* v. *NLRB.*[232] They point out that the court upheld the *Browning-Ferris* standard's consideration of reserved and indirect control as rooted in the common law and instructed the Board to color within common-law lines in the joint-employer rulemaking. They argue that the final rule must include consideration of reserved and indirect control, and they claim that the proposed rule, which did not expressly acknowledge a role for those forms of control, contradicts the D.C. Circuit's decision.

Some commenters, on the other hand, argue the proposed rule is consistent with the D.C. Circuit's decision.[233] One commenter, for example, argues that although the court held that consideration of indirect and reserved control is rooted in the common law, it did not hold that the joint-employer standard must be coextensive with the common law. To the contrary, the court acknowledged the *Browning-Ferris* two-

[225] See comment of AFL–CIO.

[226] See comments of AFL–CIO; Restaurant Law Center; COLLE.

[227] See comment of State Attorneys General.

[228] See comment of CDW.

[229] See comment of AFL–CIO.

[230] See comment of CDW.

[231] See comment of AFL–CIO.

[232] See, *e.g.,* comments of Legal Aid Society; United Brotherhood of Carpenters and Joiners of America; Congressional Progressive Caucus; UAW; IBT; National Women's Law Center; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, SEIU; 1199SEIU United Healthcare Workers East; SEIU National Fast Food Workers Union; LIUNA; IUOE; Senator Murray and Representative Scott; NELP; AFT; James van Wagtendonk.

[233] See comments of Restaurant Law Center; CDW.

step standard: A necessary-but-not-sufficient common-law analysis at step one, followed by an NLRA-based analysis of whether the common-law joint employer exercises sufficient control over the terms and conditions of employment of another employer's employees to permit meaningful collective bargaining. A second commenter also points out that the proposed rule does not expressly prohibit consideration of indirect or reserved control and therefore does not contradict the court's decision.

Another commenter argues that it is irrelevant whether the rule is consistent with *Browning-Ferris* v. *NLRB* because the court's decision does not control the Board's rulemaking.[234] Because the propriety of the rulemaking was not before the court, the commenter maintains that the court's instruction that the rulemaking must ''color within the common-law lines identified by the judiciary,'' 911 F.3d at 1208, is dicta. The commenter also states that rulemaking is an executive function, not a judicial one, and he concludes from this that the judiciary cannot dictate what the Board's rule should say unless the rule contradicts the Act or Supreme Court precedent, and the proposed rule does not.

The Board believes that the final rule is consistent with *Browning-Ferris* v. *NLRB*. It incorporates indirect and reserved-but-unexercised control over essential terms and conditions and treats them as probative of joint-employer status to the extent they supplement and reinforce evidence of direct and immediate control. The latter limitation serves a purpose similar to the second step of the *Browning-Ferris* standard—*i.e.,* to ensure that only those entities that ''meaningfully affect[] matters relating to the employment relationship'' are found to be joint employers. Rule Sec. 103.40(A). But whereas *Browning-Ferris* left the regulated community utterly at sea as to what ''sufficient control . . . to permit meaningful collective bargaining'' actually meant, the final rule provides ample guidance. Moreover, the final rule's treatment of these factors as non-dispositive does not contradict the court's decision because the court did not decide whether either indirect or reserved-but-unexercised control can be dispositive of joint-employer status. 911 F.3d at 1213, 1218. The final rule thus comports with the court's decision.

Commenters propose multiple changes to the proposed rule based on the D.C. Circuit's criticisms of *Browning-Ferris*. Specifically, commenters propose (1) to provide legal scaffolding distinguishing between control over essential terms and conditions of employment and control over the basic contours of contracted-for service; and (2) to specify the terms and conditions that are essential to meaningful collective bargaining, and to clarify what meaningful collective bargaining entails.[235] As explained below, we believe the final rule appropriately resolves the court's critiques of the *Browning-Ferris* standard.

The first set of comments responds to the court's criticism of the Board's application of the indirect control factor in *Browning-Ferris*. The court criticized the *Browning-Ferris* Board for failing ''to hew to the relevant common-law boundaries that prevent the Board from trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts.'' Id. at 1219. The court remanded the case with instructions ''to erect some legal scaffolding that keeps the inquiry within traditional common-law bounds.'' Id. at 1220.

Commenters make various proposals for how the rule could erect the ''legal scaffolding'' the D.C. Circuit directed the Board to provide. One commenter proposes that the Board list and define essential terms and conditions of employment.[236] Two other commenters propose that the rule explain the difference between global oversight of a company-to-company business relationship and actual control over the essential terms and conditions of employment of another employer's employees.[237]

Some commenters propose that the rule exclude from the joint-employer inquiry specific actions they say fall within the routine contours of most joint undertakings. One commenter, for example, proposes the rule state that the following factors do not support joint-employer status: Decisions that set the objectives, basic ground rules, and expectations for a third-party contractor; use of a cost-plus contract; routine contractual terms; supervision that is inherent to any joint undertaking; global oversight; cooperation and coordination between a service recipient and a contractor's employees; and the basic contours of a contracted-for service.[238] A second commenter proposes that the rule define ''substantial control'' to exclude control asserted for the following reasons: To achieve compliance with legally mandated requirements, to enforce product and service standards in the franchise industry, to implement corporate social responsibility initiatives, to establish deadlines, to preserve quality control, to protect the brand, to implement and enforce employee uniform guidelines, to implement third-party delivery and courier services, to provide optional training programs, and to authorize multi-employer associations to bargain on behalf of employer-members.[239]

The final rule provides the legal scaffolding the D.C. Circuit found lacking in the Board's *Browning-Ferris* standard. It responds to the Court's holding that indirect control over the basic contours of a contracted-for service does not support joint-employer status by defining ''indirect control'' to exclude ''setting the objectives, basic ground rules, or expectations for another entity's performance under a contract.'' It also addresses the D.C. Circuit's admonishment that ''not every aspect of control counts. . . . The critical question is *what* is being controlled,'' 911 F.3d at 1220 (emphasis in original), by requiring that indirect control be asserted over essential terms and conditions of employment and by listing those essential terms exhaustively. The rule thus provides the legal scaffolding necessary to keep the joint-employer inquiry within common-law bounds and to ensure that routine control inherent to any joint undertaking does not support joint-employer status.

The final rule should also provide a satisfactory response to the specific exclusions sought by several commenters because it provides examples of specific acts that will not constitute direct and immediate control over essential terms and conditions.[240] The rule provides, for example, that allowing another employer's employees to participate in benefit plans, establishing an enterprise's operating hours, setting deadlines for services, setting minimal hiring, performance, or conduct standards pursuant to regulatory requirements, bringing misconduct or poor performance to another employer's attention, entering into a cost-plus contract, or instructing employees regarding what work to perform and where and when to perform it but not how to perform it, among other similar actions, will not

[234] See comment of General Counsel Robb.

[235] See comments of CDW; RILA; HR Policy Association; Associated Builders and Contractors Inc.; IFA; American Hotel & Lodging Association; General Counsel Robb; Jenner & Block, LLP; Restaurant Law Center.

[236] See comment of Restaurant Law Center.

[237] See comments of Job Creators Network; IFA.

[238] See comment of RILA.

[239] See comment of CDW.

[240] See comments of RILA; CDW.

constitute direct and immediate control. These examples provide the specificity sought by some commenters and further clarify the distinction between control over essential terms of employment that supports joint-employer status and routine features of company-to-company contracting that do not.[241]

The second set of comments responds to the court's criticism of the *Browning-Ferris* standard's second step, which requires consideration of ''whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.'' *Browning-Ferris,* 362 NLRB at 1600. Regarding this step, the Court criticized the *Browning-Ferris* Board on two counts. First, it said that ''the Board never delineated what terms and conditions are 'essential' to make collective bargaining 'meaningful.' '' *Browning-Ferris* v. *NLRB,* 911 F.3d at 1221–1222 (quoting *Browning-Ferris,* 362 NLRB at 1600). Second, it said that the Board failed to ''clarify what 'meaningful collective bargaining' might require.'' Id. at 1222.

In response to the Court's critique, commenters request that the rule define the terms and conditions ''essential'' to make collective bargaining ''meaningful'' and clarify what ''meaningful collective bargaining'' requires. To that end, one commenter proposes the rule identify the subjects over which a joint employer must negotiate and specify that they do not include decisions to change aspects of the contracting arrangement affecting employment terms, to reallocate bargaining responsibilities between employers, or to end a service arrangement.[242]

The final rule addresses the shortcomings the court identified in *Browning-Ferris'*s treatment of the second step of its framework by eliminating that step and returning to the traditional standard requiring substantial direct and immediate control over essential terms and conditions of employment. Moreover, the final rule lists the essential terms and conditions, thus providing the definition the court requested. The final rule also sheds light on what meaningful collective bargaining requires by specifying that to qualify as a joint employer of another employer's employees, an entity ''must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.'' Rule Sec. 103.40(A).

Concerned that the court's decision in *Browning-Ferris* v. *NLRB* may lead the Board to give indirect and reserved control too much weight, several commenters propose that the rule limit the roles that these forms of control play in the joint-employer analysis. One commenter, for example, requests that the rule specify that indirect and reserved control are relevant only insofar as they are asserted over essential terms and conditions of employment.[243] Another commenter proposes limiting indirect and reserved control to a specific right to displace a contractor and directly control its employees, or alternatively, to decisions made by the putative joint employer and conveyed indirectly using the contractor as intermediary.[244]

The final rule clarifies the contours and limits of indirect and reserved control consistent with both the commenters' requests and the D.C. Circuit's opinion. The final rule specifies that indirect and reserved control are probative of joint-employer status only to the extent they supplement and reinforce evidence of direct and immediate control. However, for reasons explained above, the Board has not limited indirect and reserved control to a specific right to displace a contractor and directly control its employees,[245] and has not alternatively defined indirect control as control conveyed through an intermediary.[246]

Other comments advance additional proposals based on *Browning-Ferris* v. *NLRB*. One commenter, for example, proposes that the Board create a two-part standard to comply with the court's decision.[247] The first part would require the putative joint employer to be a joint employer under the common law, and the second part would be the standard in the proposed rule. The Board declines this proposal because the final rule does not need to consist of a two-part standard to comply with the court's decision. The court did not require a two-part structure for the joint-employer standard. It held only that the standard must stay within the bounds of the common law. *Browning-Ferris* v. *NLRB,* 911 F.3d at 1208. As explained above, the final rule is consistent with that holding.

Another commenter requests that the Board add ''significant'' to the rule to match the phrasing used by the D.C. Circuit where it stated that ''for roughly the last 25 years, the governing framework for the joint-employer inquiry has been whether both employers 'exert significant control over the same employees' in that they 'share or co-determine those matters governing the essential terms and conditions of employment.' '' Id. at 1209 (quoting *NLRB* v. *Browning-Ferris Indus. of Pennsylvania, Inc.,* 691 F.2d at 1124).[248] The Board declines the invitation because the final rule already requires significant control for joint-employer status. It requires an entity to share or codetermine employees' essential terms and conditions of employment, which is what the D.C. Circuit referred to as ''significant'' control. Again, in the quote above, the D.C. Circuit explained that the traditional standard required joint employers to ''exert significant control . . . *in that* they share or codetermine those matters governing the essential terms and conditions of employment.'' Id. (emphasis added). The Third Circuit posited the same equivalence, stating that ''where two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' within the meaning of the NLRA.'' *Browning-Ferris Indus. of Pennsylvania* v. *NLRB,* 691 F.2d at 1124. Thus, ''significant'' control *means* sharing or codetermining those matters governing essential terms and conditions of employment. The proposed and final rules require as much and thus require ''significant'' control as defined by the D.C. Circuit.

Commenters also discuss whether the D.C. Circuit's decision affects the Board's authorization to promulgate a joint-employer standard via rulemaking rather than case adjudication, or at least the propriety of doing so. Two commenters argue that by advising that the rulemaking must color within common-law lines rather than directing the Board to adopt a specific rule or no

[241] As explained above, however, not every instance of control that fails by definition to qualify as direct and immediate control necessarily also fails to qualify as indirect control as a routine feature of company-to-company contracting. Although this will typically be the case, it remains a question of fact to be resolved on a case-by-case basis. See Sec. II.B, ''Summary of Changes to the Proposed Rule: Indirect Control,'' supra; Sec. V.B, ''Response to Comments: Comments Regarding Indirect Control,'' supra.

[242] See comment of RILA.

[243] See comment of Associated Builders and Contractors, Inc.

[244] See comment of RILA.

[245] See Sec. V.C, ''Response to Comments: Comments Regarding Contractually Reserved But Unexercised Control,'' supra.

[246] See Sec. V.B, ''Response to Comments: Comments Regarding Indirect Control,'' supra.

[247] See comment of World Floor Covering Association.

[248] See comment of Jenner & Block, LLP.

rule at all, the court acknowledged the propriety of the rulemaking.[249] Another commenter notes the court appeared deferential to the rulemaking process because it emphasized that it issued its decision only after the Board specifically requested it to proceed notwithstanding the rulemaking process.[250]

Other commenters argue that *Browning-Ferris* v. *NLRB* undermines the authority of the Board to engage in rulemaking on the joint-employer standard. One commenter, for example, argues that under the logic of the court's decision, the Board's authority extends only to applying common-law principles to specific facts, thus rendering the rulemaking beyond its statutory authority.[251] Another commenter argues that the Board cannot engage in rulemaking regarding the meaning of Section 2(2) of the Act because it does not have discretion to define the employment relationship other than how it is defined by the common law, which the Board must apply in adjudication.[252]

The Board does not agree that *Browning-Ferris* v. *NLRB* limits its authority to engage in rulemaking on the joint-employer standard. That issue was not before the court. Moreover, the D.C. Circuit did not indicate at any point in its decision that rulemaking regarding joint-employer status is inappropriate. If anything, the court's majority decision implicitly accepted the rulemaking as appropriate by acknowledging it and instructing the Board, in its rulemaking, to ''color within the common-law lines identified by the judiciary.'' *Browning-Ferris* v. *NLRB,* 911 F.3d at 1208. The dissent also acknowledged that ''the Board may establish standards through rulemaking or adjudication.'' Id. at 1226 (citing 29 U.S.C. 156). There is thus nothing in the court's decision indicating that the Board does not have the authority to engage in this rulemaking, and much to indicate the opposite.

Moreover, the arguments against the rulemaking mistake substance for process. The common law of agency must inform the substance of the joint-employer rule, not the process by which it is promulgated. The Board is free to establish the joint-employer standard through rulemaking or case adjudication, so long as the substance of the standard colors within common-law lines. The final rule stays within those bounds and is therefore consistent with *Browning-Ferris* v. *NLRB*.

One commenter argues that any rulemaking is premature while *Browning-Ferris* v. *NLRB* is pending and could still be reviewed en banc by the full D.C. Circuit or appealed to the Supreme Court.[253] The Board does not agree that the status of *Browning-Ferris* v. *NLRB* undermines the rulemaking process because, as the Board informed the D.C. Circuit, the final rule will be prospective only and thus not affect that case. Id. at 1206. Also, as explained in the NPRM, the Board initiated this rulemaking to invite broad public participation in formulating a joint-employer standard and to provide certainty and stability that will allow employers, unions, and employees to plan their affairs free of the fear that the standard may change at any time through case adjudication, and possibly retroactively. *See* Standard for Determining Joint-Employer Status, 83 FR 46681, 46686. *Browning-Ferris* v. *NLRB* does not affect the validity of these reasons and therefore does not affect the propriety of the rulemaking.

K. Comments Regarding Empirical Data on the Joint-Employer Standard's Impact on Workplaces With Multiple Possible Employer Entities

Many commenters cite the rise of contingent employment and alternative workforce arrangements as a significant reason for opposing the proposed rule, and many commenters have described this economic trend in detail. For example, one commenter represents that the percentage of U.S. workers who participate in flexible contract work as their primary job increased 56 percent between 2007 and 2017, and that roughly 10 percent of workers in 2017 were employed in ''alternative work arrangements,'' including 10.6 million independent contractors, 2.6 million on-call workers, 1.4 million temporary help agency workers, and 933,000 workers provided by contract firms.[254] Another commenter similarly asserts that 94 percent of the net growth in employment between 2005 and 2014 involved alternative work arrangements.[255] Many commenters contend that contingent employment results in lower wages and poor workplace conditions.[256]

Relatedly, other commenters argue that the increased outsourcing of business functions to contractors and subcontractors has resulted in the ''fissuring'' of the workplace, where two or more firms control the terms and conditions of employment.[257] Often, the commenter argues, large corporations enter into contracts that restrict subcontractors' ability to grant wage increases or institute other changes in the workplace. The commenter further contends that for workers in such circumstances to be able to engage in meaningful collective bargaining, the law must bring large corporations that reserve control over or indirectly control those workers' terms and conditions of employment to the bargaining table along with the subcontractors. Without such a requirement, it contends, companies can use alternative workforce arrangements to evade liability for violations of labor standards and avoid collective bargaining.[258]

Other commenters argue that the Board's refusal to address these issues would constitute a failure on the part of the Board to adapt the Act to the changing patterns of industrial life.[259] Numerous commenters cite these trends as reasons why the Board should retain the *Browning-Ferris* standard, arguing that it better enables workers to bargain with entities like franchisors and contractors and hold them accountable for labor law violations.[260] Moreover, several commenters argue or suggest that the Board should consider economic factors when determining whether an entity is a joint employer.[261]

After considering these comments, the Board is not persuaded that the trend toward increased contingent or temporary employment relationships warrants abandoning the initial proposal to restore to the joint-employer standard the requirement that a putative joint employer exercise substantial direct and immediate control over essential terms and conditions of employment. Instead, meaningful collective bargaining is best promoted by a standard that places at the bargaining table only those entities that actually control, directly and immediately, the essential terms and conditions of employment of another

[249] See comments of HR Policy Association; General Counsel Robb.

[250] See comment of Chamber of Commerce.

[251] See comment of Paul Thomas.

[252] See comment of Professor Michael Harper.

[253] See comment of SEIU National Fast Food Workers Union.

[254] See comment of SEIU.

[255] See comment of Congressman Scott, Senator Murray, et al.

[256] See comments of Law and Economics Professors; Congressman Scott and Senator Murray; Legal Aid at Work; APALA.

[257] See, *e.g.,* comment of EPI.

[258] See also comments of Attorneys General of New York, Pennsylvania, et al.; AFT; Teamsters Local 848.

[259] Comments of Congressman Scott and Senator Murray; see also IUOE; Wimmer.

[260] See comments of Members of Congress; EPI; Congressman Scott and Senator Murray; Justice in Motion; Karyn Panitch.

[261] See comments of Law and Economics Professors; Southern Poverty Law Center; CWA.

employer's employees. That said, the final rule makes indirect and reserved-but-unexercised control over essential terms and conditions probative of joint-employer status to the extent they supplement and reinforce direct and immediate control. Accordingly, the final rule does make indirect and reserved control relevant to the joint-employer analysis.

Opponents of the proposed rule cite research purportedly indicating that the proposed rule would have negative economic consequences for workers. Specifically, one commenter contends that the proposed rule would make collective bargaining among subcontracted and temporary workers nearly impossible, and that this would result in an annual transfer of $1.3 billion from workers to employers.[262]

In contrast, supporters of the proposed rule contend that *Browning-Ferris* has had negative economic consequences, including causing franchisors to ''distance'' themselves from franchisees so that franchisors will not be found joint employers.[263] One commenter cites as an example a franchisee who stopped receiving employee handbooks, job application materials, and recruitment assistance from the franchisor.[264] According to a study by economist Ronald Bird, franchisor ''distancing'' has resulted in lost output of between $17.2 billion and $33.3 billion per year.[265] Additionally, commenters cite a study claiming that *Browning-Ferris* has caused job growth in the hotel industry to slow.[266] Many commenters argue that the *Browning-Ferris* standard has subjected potential joint employers to higher litigation costs.[267] Against these negative consequences, one commenter suggests that the *Browning-Ferris* standard would not necessarily improve economic outcomes for workers.[268] It also argues that it is proper for the Board to rely on the experience of commenters in this rulemaking, especially in the absence of comprehensive data.

One commenter contends that the negative economic and social effects of outsourcing cited by critics of the proposed rule have to be weighed against the economic opportunities that outsourcing provides.[269] The commenter also contends that the growth of contingent employment was not a valid reason for adopting the *Browning-Ferris* standard and is not a valid reason for keeping it. Further, the commenter argues that a joint-employer standard based on economic influence would be unworkable and would not necessarily result in better outcomes for employees. The commenter adds that it is not the purpose of the Act to support collective bargaining outcomes favoring labor. Relatedly, another commenter points out that 500,000 SEIU members provide security services and are employed by contractors, and it argues this shows that outsourcing has not prevented unionization or stifled collective bargaining.[270]

The final rule is not based on a prediction by the Board regarding purported economic impacts, if any, on workers' wages or the economy generally. Rather, as explained throughout, returning to the joint-employer framework that predated *Browning-Ferris*—a framework that no court has ever found impermissible on common-law grounds—is warranted on policy grounds. Its requirement of direct and immediate control over essential terms and conditions of employment will best promote meaningful collective bargaining. That same requirement, plus the rule's exhaustive enumeration of those essential terms and conditions and its descriptions of what does and does not count as direct and immediate control with respect to each essential term or condition all draw clear and readily discernible lines. Thus, the final rule should produce predictable outcomes, and accordingly provide members of the regulated community with the ability to structure their affairs with at least one contingency removed from consideration.

L. Comments on the Hypothetical Scenarios Contained in the Text of the Proposed Rule

Many commenters write favorably regarding the hypothetical scenarios—called ''examples'' in the NPRM—contained in the regulatory text of the proposed rule, stating, among other things, that they are helpful;[271] address common situations that the Board has not necessarily had the opportunity to address before;[272] allow the Board to advise, now, whether those situations satisfy the proposed rule's standard rather than leaving them unresolved to some indefinite future time;[273] and provide the type of additional ''scaffolding'' that the D.C. Circuit in *Browning-Ferris* v. *NLRB* said was missing from the *Browning-Ferris* joint-employer standard.[274]

By contrast, many commenters criticize the scenarios, stating, among other things, that they are unhelpful;[275] some of them are inconsistent with the text of the proposed rule or the commentary in the NPRM;[276] many of them raise unanswered questions;[277] the NPRM failed to explain their regulatory force;[278] they assume that employers make explicit exercises of power that are not always made explicit in the real world;[279] they fail to consider the interplay of multiple factors, which is what actual cases almost always involve;[280] and they suggest that exercising control over a single term of employment, without regard to its significance, could create joint-employer status.[281]

Having considered these comments and on further review, the Board has decided not to include in the final rule the examples from the proposed rule. As several commenters note, real-life fact patterns are likely to be far more complex than those portrayed in the examples' hypothetical scenarios, and therefore the scenarios are not that useful. Nevertheless, as discussed elsewhere, the Board has sought to clarify the joint-employer standard by adding definitions of its key terms to the regulatory text. The Board believes that this captures the benefits of the examples while avoiding the more negative aspects noted by some commenters. The Board also believes that this approach helps provide the ''scaffolding'' that the court in *Browning-Ferris* v. *NLRB* found lacking in the *Browning-Ferris* standard.

Additionally, one commenter states that the Board should consider the totality of the circumstances in each case, including both evidence of a putative joint employer's control as well as evidence of its lack of control.[282]

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[262] See comment of EPI; see also comments of IBT; Equal Justice Center.

[263] See comments of IFA; Johnson and Graham.

[264] Comment of Ranking Member Foxx.

[265] Comment of Chamber of Commerce.

[266] Comments of American Action Forum; U.S. Senate Committee on Health, Education, Labor, and Pensions (Senate HELP Committee).

[267] Comments of International Warehouse Logistics Association; Competitive Enterprise Institute; Restaurant Law Center.

[268] Comment of IFA.

[269] Comment of Chamber of Commerce.

[270] Comment of FordHarrison LLP.

[271] Comments of the Restaurant Law Center; International Bancshares Corporation; and Associated Builders and Contractors, Inc.

[272] Comment of COLLE.

[273] Id.

[274] Id.

[275] Comment of 1199SEIU United Healthcare Workers East.

[276] Comments of 1199SEIU United Healthcare Workers East; SEIU; Employment Law Alliance.

[277] Comment of SEIU.

[278] Id.

[279] Comment of IBT.

[280] Comments of General Counsel Robb; AFL–CIO; SEIU Local 32BJ; 1199SEIU United Healthcare Workers East; IUOE; SEIU; Employment Law Alliance.

[281] Comments of General Counsel Robb; SEIU; Employment Law Alliance.

[282] Comment of the Employment Law Alliance.

Consistent with this comment, the final rule makes clear that joint-employer status ''must be determined on the totality of the relevant facts in each particular employment setting.'' Rule Sec. 103.40(A).

The final rule also incorporates, in various ways, other feedback received on the hypothetical scenarios from the proposed rule. Specifically, one commenter notes that Examples 1 and 2 did not provide any guidance as to the impact of a finding of control over the wage rate.[283] The final rule clarifies what ''direct and immediate control'' over wages is and is not.

Regarding Examples 2 and 11, one commenter states that, in the contract-security industry, a company must be able to impose certain requirements and should be able to have a contract employee removed from its property for poor or unprofessional performance or for engaging in illegal activities.[284] The final rule clarifies that an entity does not exercise ''direct and immediate control'' where it refuses to allow another employer's employee to access its premises or to continue performing work under a contract.

Regarding Example 6, one commenter suggests making it clear that Franchisor has not exercised direct and immediate control over essential terms and conditions of employment of Franchisee's employees to the extent Franchisor merely recommends or coordinates the availability of certain benefits that Franchisee is not obligated to offer to its employees.[285] The final rule makes clear that an entity does not exercise direct and immediate control over benefits by permitting another employer, under an arms-length contract, to participate in its benefit plans.

Regarding Example 2, one commenter notes that some employers may use unfounded complaints from other entities to terminate employees' employment.[286] Regarding Example 3, one commenter asks whether a user entity that makes use of coded language and thinly veiled complaints to direct a supplier of temporary employees not to furnish African-American employees would qualify as having exercised ''direct and immediate'' control over those workers' terms of employment.[287] The final rule makes clear that joint-employer status will be determined ''on the totality of the relevant facts in each particular employment setting.'' Thus, the Board will consider the facts of each case, including the degree of control that the putative joint employer exercises.

One commenter states that the examples do not indicate how many instances of direct and immediate control are required and that, while several examples describe control that is ''direct and immediate,'' none explains whether an entity would be deemed a joint employer based on the facts in those examples, or how many other ''essential terms and conditions'' an employer must control.[288] As discussed above, the definition of ''substantial direct and immediate control'' in the final rule states that the entity must ''possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of . . . employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship'' with another employer's employees.

M. Comments Regarding the Propriety of Using Rulemaking To Revisit the Joint-Employer Standard and of the Adequacy of the Rulemaking Process

The Board's general rulemaking authority has been recognized both by commenters supporting the rule and by those opposing the rule.[289] Several commenters favor using rulemaking to revise the joint-employer standard. They contend that rulemaking will promote predictability and stability in a way that ''sequential adjudications'' will not,[290] that rulemaking allows for the submission of comments that are not tied to the particular facts in a specific case,[291] and that rulemaking permits more thorough deliberation via the notice-and-comment process.[292] In addition, some commenters argue that the proposed rule would further policy goals that have been stalled in Congress.[293]

One commenter acknowledges that the Board has statutory authority to promulgate a rule on joint-employer status, but urges the Board to rely on several other provisions of the Act, as well as Section 6, in promulgating this rule.[294] As noted by that commenter, Section 6 authorizes the Board to make rules and regulations ''as may be necessary to carry out the provisions of this Act.'' [295] The commenter cites *Chamber of Commerce of the United States* v. *NLRB,* 721 F.3d 152, 160 (4th Cir. 2013), where the court explained that Section 6 requires some other section of the Act to provide either explicit or implicit authority to issue a particular rule. The court there found that the Board had exceeded its statutory authority when it promulgated a rule requiring employers to post in the workplace a notice informing employees of their rights under the Act. As noted above, the Board has determined that Section 6 authorizes the final rule as necessary to carry out Sections 2, 7, 8, 9, and 10 of the Act, 29 U.S.C. 152, 157, 158, 159, and 160, respectively.

In contrast, other commenters oppose the Board's use of rulemaking to establish the joint-employer standard. For the following reasons, the Board finds these arguments unpersuasive.

One commenter states that a desire by the Board to avoid policy oscillation cannot serve as a proper basis for rulemaking because the proposed rule would represent further oscillation with respect to the joint-employer standard.[296] However, the Board's desire is not to avoid change in this area of the law altogether but to best effectuate the policies of the Act, consistent with the common law and informed by the comments we have received. Further, the Board believes that rulemaking will provide greater predictability for members of the regulated community than a standard established through adjudication, where retroactive application of new policies and standards is the Board's usual practice. See, *e.g., SNE Enterprises,* 344 NLRB 673, 673 (2005).

Some commenters argue that the Board's reference in the NPRM to ''continuing uncertainty'' in the labor-management community in the wake of the Board's decision in *Browning-Ferris* was unfounded.[297] The Board disagrees. The continuing uncertainty referred to arose from the adjudicatory shifts in the joint-employer standard that had taken place within a relatively short period of

[283] Comment of General Counsel Robb.

[284] Comment of John B. Hirsch.

[285] Comment of Polsinelli PC.

[286] Comment of Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial and Allied Workers, Local 848, IBT.

[287] Comment of Legal Aid Justice Center.

[288] Comment of SEIU.

[289] See Comment of Senate HELP Committee; Society of Human Resource Management; see also comment of IUOE (acknowledging as a general matter that Sec. 6 authorizes the Board to engage in rulemaking, but arguing that rulemaking is not necessary in these circumstances).

[290] Comment of Jenner & Block, LLP.

[291] Comment of Restaurant Law Center.

[292] Comment of Chamber of Commerce.

[293] See comments of Members of Congress; Society of Human Resource Management.

[294] Comment of National Federation of Independent Businesses (NFIB).

[295] Comment of NFIB at 2. See also comment of Professor Harper (arguing that the proposed rule was not within the Board's authority because it purports to articulate an abstractly stated law defining the employment relationship, rather than the relevance of that relationship to particular provisions of Sec. 8 or 9 of the Act).

[296] See comment of IUOE.

[297] Comment of Law and Economics Professors at 10; EPI at 2–3.

time beginning with *Browning-Ferris,* as noted above.[298] Moreover, the vacatur of *Hy-Brand I* in *Hy-Brand II* did not reflect a Board majority to return to the *Browning-Ferris* standard on doctrinal grounds, and this certainly prompted reasonable doubt among the Board's stakeholders regarding the post–*Hy-Brand II* status of the *Browning-Ferris* standard, which sprang back into place by default rather than conviction. It is surely the case that this state of affairs was unstable and demanded resolution.

One commenter argues that rulemaking is inappropriate because the reasons justifying past rulemakings by the Board—judicial rejection of adjudicatory attempts to formulate a standard regarding bargaining units in the healthcare industry; the purported need to provide a comprehensive update of the Board's representation-election rules—are absent here.[299] But Section 6 of the Act broadly authorizes the Board to make rules and regulations ''as may be necessary to carry out the provisions of [the Act],'' and the Board has identified the provisions of the Act that this rulemaking effectuates.[300] Supreme Court precedent also supports the Board's discretion to act through rulemaking rather than adjudication. See *NLRB* v. *Bell Aerospace Co.,* 416 U.S. at 294 (''[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.''). Nothing in the Act or judicial precedent warrants a conclusion that the Board may only engage in rulemaking for reasons the Board has cited in the past.

Another commenter suggests that rulemaking is suspect because it is a ''purely political process'' and because adjudication is the Board's ''normal'' process.[301] Preliminarily, it is not clear what the commenter means by a ''purely political process.'' To the extent the commenter refers to policy-based views that influence how a Board member applies the Act and that tend to correlate with a member's party affiliation, case adjudication is no less ''political'' than rulemaking. No less than case adjudication, rulemaking involves reasoned decision-making, conducted within the constraints of the APA and subject to judicial review. As demonstrated below, the Board has carefully considered all comments with an open mind, and the final rule we have formulated represents our reasoned determination regarding the appropriate standard for determining joint-employer status. The fact that the Board has not routinely engaged in rulemaking in the past does not preclude us from doing so now (see *Bell Aerospace Co.,* 416 U.S. at 294), and while the Board typically makes substantive policy determinations through adjudication rather than rulemaking, this has been criticized by numerous commentators.[302]

Several commenters contend that adjudication is preferable to rulemaking because adjudication assertedly permits the Board to develop joint-employer doctrine more carefully, one case at a time.[303] But rulemaking enables the Board to provide the regulated community greater certainty beforehand, as the Supreme Court has instructed that we should do. *First Nat'l Maint. Corp.* v. *NLRB,* 452 U.S. at 679. The Board also observes that in substance, the final rule codifies the Board's joint-employer law as it existed before *Browning-Ferris,* and therefore it reflects the Board's application of the joint-employer doctrine in numerous pre–*Browning-Ferris* cases. Moreover, disputes over joint-employer status will continue to arise and be resolved through adjudication under the standard set forth in the final rule, and the joint-employer doctrine will therefore continue to develop.

One commenter argues that it is a vice, rather than a virtue, that a standard codified in a regulation is more difficult to change than one developed through adjudication, especially because a regulation would, in its view, deprive the Board of the flexibility needed to take into account ''ever-changing factors in our dynamic economy.'' [304] As discussed above, however, we believe that the comparative stability of rulemaking over case adjudication as the means of establishing the joint-employer standard is a virtue, as it will enhance labor-management stability, the promotion of which is one of the principal purposes of the Act. To the extent the commenter is arguing that the Board should consider economic factors, the Board declines to base the final rule on consideration of ''the wider universe of all underlying economic facts that surround an employment relationship,'' as the Board did in *Browning-Ferris* itself. *Browning-Ferris,* 362 NLRB at 1611 fn. 68, 1615. And the Board agrees with former Members Miscimarra and Johnson that ''the inescapable conclusion to be drawn from the Taft-Hartley legislation repudiating [*NLRB* v. *Hearst Publications,* 322 U.S. 111 (1944)] is that Congress must have intended that common-law agency principles, rather than . . . policy-based economic realities . . . govern the definition of employer . . . under the Act.'' *Browning-Ferris,* 362 NLRB at 1625. Moreover, while the Board believes that the stability and predictability provided through rulemaking is both beneficial and consistent with the Supreme Court's guidance in *First National Maintenance,* the final rule will not prevent the Board from implementing change when appropriate, either through adjudication that further refines the rule, consistent with its text, or through additional rulemaking.

One commenter argues that rulemaking is an inefficient use of Board resources.[305] While the Board has devoted significant resources to this effort, we have done so efficiently and reasonably and have concluded that the effort is worth the long-term stability and predictability the final rule will provide.

Another commenter suggests that it would have been more efficient for the Board to have engaged in interpretive rulemaking, as an interpretative rule could accomplish similar goals and would not require the Board to respond to comments.[306] As an initial matter, the commenter does not explain how an interpretive rule would be appropriate

[298] See Sec. III.B, ''Justification for Using Rulemaking, Rather than Adjudication, to Revise the Joint-Employer Standard: The Preference for Rulemaking over Adjudication,'' supra.

[299] Comment of IUOE.

[300] See Sec. III.A, ''Justification for Using Rulemaking, Rather than Adjudication, to Revise the Joint-Employer Standard: Authority to Engage in Rulemaking,'' supra.

[301] Comment of Professor George Gonos at 2–3.

[302] See R. Alexander Acosta, Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB, 5 FIU L. Rev. 347, 351–52 (2010); Merton C. Bernstein, The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act, 79 Yale L.J. 571, 589–90, 593–98 (1970); Samuel Estreicher, Policy Oscillation at the Labor Board: A Plea for Rulemaking, 37 Admin. L. Rev. 163, 170 (1985); Jeffrey S. Lubbers, The Potential of Rulemaking by the NLRB, 5 FIU L. Rev. 411, 414–17, 435 (2010); Kenneth Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 UCLA L. Rev. 63, 84 (1973); Charles J. Morris, The NLRB in the Dog House—Can an Old Board Learn New Tricks?, 24 San Diego L. Rev. 9, 27–42 (1987); Cornelius Peck, The Atrophied Rule-making Powers of the National Labor Relations Board, 70 Yale L.J. 729, 730–34 (1961); Cornelius J. Peck, A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making, 117 U. Pa. L. Rev. 254, 260, 269–72 (1968); David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 922 (1965); Carl S. Silverman, The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction, 25 Lab. L.J. 607 (1974); Berton B. Subrin, Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units, 32 Lab. L.J. 105 (1981).

[303] See comments of NC National Employment Lawyers Association; UA.

[304] Comment of IUOE at 8.

[305] Comment of Cohen.

[306] Comment of Thomas.

in these circumstances. ''[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' '' *Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 97 (2015) (quoting *Shalala* v. *Guernsey Mem'l Hosp.,* 514 U.S. 87, 99 (1995)). ''If the rule cannot fairly be seen as interpreting a statute or a regulation, and if . . . it is enforced, 'the rule is not an interpretative rule exempt from notice-and-comment rulemaking.' '' *Catholic Health Initiatives* v. *Sebelius,* 617 F.3d 490, 494 (D.C. Cir. 2010) (quoting *Cent. Texas Tel. Coop., Inc.* v. *FCC,* 402 F.3d 205, 212 (D.C. Cir. 2005)). ''Joint employer'' is not a statutory term, and no Board rule or regulation currently defines it, so interpretive rulemaking is not an option here. Even if it were, the opportunity to receive input through the notice-and-comment process was one of the reasons the Board decided to embark on this rulemaking, and being able to receive, consider, and respond to comments outweighs any efficiency that might be gained from foregoing that process. Furthermore, an interpretive rule would not provide the stability and predictability that will be provided by the final rule as the culmination of notice-and-comment rulemaking. See *Perez,* 575 U.S. at 101 (''Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.'').

One commenter asserts that the proposed rule runs counter to the APA's ''presumption against changes in current policy.'' [307] The commenter further argues that an agency ''must provide a more substantial explanation for a policy that departs from its former views where 'its new policy rests upon factual findings that contradict those which underlay its prior policy.' '' Comment of Attorneys General of New York, Pennsylvania, et al. (quoting *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

In *Fox,* the Court clarified that its ''opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.'' 556 U.S. at 514. Moreover, the Court explained that while an agency must provide a more detailed justification when, for example, ''its new policy rests upon factual findings that contradict those which underlay its prior policy,'' further explanation was needed ''for disregarding facts'' rather than for ''the mere fact of policy change.'' Id. at 515–516. Because there is no heightened standard that must be met in order to justify a change in the Board's joint-employer standard, and because the Board has fully explained its reasoning and has not disregarded any relevant facts, the claim of the commenter is misplaced.

In any event, the Board is firmly convinced that the final rule is an improvement over the standard set forth in *Browning-Ferris,* for several reasons. As discussed above, at the first step of the *Browning-Ferris* analysis, where the Board considered the putative joint employer's control over the terms and conditions of employment of another employer's workers, the Board failed to draw meaningful distinctions between direct control and indirect and/or reserved-but-unexercised control, giving them equal weight. At the second step of the *Browning-Ferris* analysis, the Board seemingly recognized that these different kinds of control cannot be accorded equal weight by requiring consideration of whether the putative joint employer's control is ''too limited in scope or significance to permit meaningful collective bargaining.'' 362 NLRB at 1614. However, *Browning-Ferris* provided no guidance for determining when ''meaningful collective bargaining'' is possible, and the *Browning-Ferris* Board neglected even to attempt that analysis. Moreover, *Browning-Ferris* failed to provide meaningful guidance on the definition of ''essential'' terms and conditions of employment, and it also provided ''no blueprint for what counts as 'indirect' control.'' *Browning-Ferris* v. *NLRB,* 911 F.3d at 1220. As a result of these flaws, the *Browning-Ferris* Board impermissibly based its joint-employer finding on ''routine feature[s] of independent contracts,'' precluding enforcement of its decision. Id.

The final rule comprehensively addresses all these shortcomings more fully than would be possible in the adjudication of a case. It re-establishes a commonsense hierarchy that recognizes the superior force of evidence of actually exercised direct and immediate control as compared with indirect and reserved-but-unexercised control. It provides an exhaustive list of ''essential'' terms and conditions of employment, and for each essential term it specifies what will and will not count as direct and immediate control over that essential term. In these ways, the final rule provides vital guidance regarding the circumstances in which joint-employer status will and will not attach. The final rule also erects the ''legal scaffolding'' demanded by the D.C. Circuit in *Browning-Ferris* v. *NLRB* to ensure that the joint-employer inquiry will be confined ''within traditional common-law bounds.'' Id. And by defining the relative weight of direct and immediate control and other types of control, the final rule eliminates the cumbersome two-step *Browning-Ferris* analysis, with its standardless inquiry into whether meaningful collective bargaining is possible.

One commenter argues that the Board has failed to adequately consider the costs of the proposed rule relative to its benefits, beyond mere costs to small businesses and labor unions.[308] The commenter argues that courts have required consideration of cost, citing *Michigan* v. *EPA,* 135 S. Ct. 2699, 2711 (2015); *Bus. Roundtable* v. *SEC,* 647 F.3d 1144 (D.C. Cir. 2011); and *Corrosion Proof Fittings* v. *EPA,* 947 F.2d 1201 (5th Cir. 1991). The commenter also argues that the Board is ignoring economic theory and research on the consolidation and abuse of indirect power wielded by third parties over market wages and, hence, direct employers' wage-setting decisions. In addition, the commenter contends that the NPRM fails to comply with Executive Order 13725, ''Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy,'' which, the commenter asserts, encourages agencies to ''build upon efforts to detect abuses such as . . . anticompetitive behavior in labor and other input markets, exclusionary conduct, and blocking access to critical resources that are needed for competitive entry.'' Law and Economics Professors at 16 (ellipsis in original) (quoting Executive Order 13725, Sec. 2(b), 81 FR 23417 (Apr. 15, 2016)). In this regard, the commenter argues that the Board must at least explain why it failed to deem franchisors that include no-poaching clauses in franchise agreements as joint employers.

Contrary to the suggestion of the commenter, and for reasons already explained, it is inappropriate to base the joint-employer standard on studies regarding economic impact because the Board is constrained to base the standard on the common law, applied in the particular context of the Act.

[307] See comment of Attorneys General of New York, Pennsylvania, et al., at 8 (citing *Motor Vehicle Manufacturers Assn.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983)).

[308] See comment of Law and Economics Professors.

Moreover, the cases cited by the commenter involve statutes that, unlike the Act, contain wording indicating that costs must be considered. See *Michigan* v. *EPA,* 135 S. Ct. at 2704, 2707–2708, 2711–2712 (finding provision of the Clean Air Act directing agency to regulate emissions from power plants if the agency finds regulation ''appropriate and necessary'' indicated, when read naturally and in context with related provision concerning costs, that agency had to consider cost when making the finding); *Business Roundtable,* 647 F.3d at 1146, 1156 (finding agency failed to adequately consider effect on efficiency, competition, and capital formation, as required by Section 3(f) of the Exchange Act and Section 2(c) of the Investment Company Act of 1940, in promulgating rule at issue); *Corrosion Proof Fittings,* 947 F.2d at 1207–1208, 1215 (finding agency failed to give adequate weight to the requirement under the Toxic Substances Control Act that it promulgate the least burdensome reasonable regulation required to protect the environment). Accordingly, this argument is misplaced.

With respect to Executive Order 13725, that order encourages, but does not require, independent agencies to comply with the order. Id. Sec. 3(b). As the NLRB is an independent agency, see 44 U.S.C. 3502(5), it is not required to comply with Executive Order 13725.

Finally, the Board does not agree with the notion that joint-employer status should arise from the purported effect on competition for labor from franchisor-franchisee no-poaching agreements. For one thing, competition for labor is only one factor in the wage an employer offers. Moreover, the disputed no-poaching agreements, as described by the commenter, limit the ability of franchisees to hire employees of the franchisor or other franchisees of that franchisor. Such provisions place no limit on cross-franchise competition for labor. Regardless of whether one fast food franchise can hire an employee away from another franchisee of the same franchisor, a no-poaching agreement between a franchisee and franchisor would not prevent the franchisee from hiring an employee away from franchisees of a different franchisor. Whatever highly attenuated influence no-poaching agreements may have on market wages, it is a far cry from direct and immediate control over wages as defined in the final rule—the kind of control that warrants placing the entity that exercises it at the bargaining table.

One commenter argues that the proposed rule violates Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' which requires that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.'' [309] However, Executive Order 13371 does not govern independent regulatory agencies, such as the NLRB, under 44 U.S.C. 3502(5). OMB Memorandum M–17–21–OMB, Guidance Implementing Executive Order 13771, Titled ''Reducing Regulation and Controlling Regulatory Costs'' (Apr. 5, 2017) at 3, 9. Accordingly, the Board is not obligated to eliminate any regulations in connection with promulgating this final rule.

Several commenters argue that the Board failed to properly consider the value of taking no action, or the value of promulgating a standard that makes entities with sufficient market power joint employers, because the Board did not base its decision on empirical data or economic and public policy research.[310]

To the extent the commenters are contending that the Board failed to consider alternatives, the contention is incorrect. The Board sought comment on ''all aspects'' of the proposed rule, including whether the common law dictated the approach of the proposed rule or of *Browning-Ferris* or left room for either approach, and the Board has received and considered thousands of comments concerning the proper joint-employer standard. Standard for Determining Joint-Employer Status, 83 FR at 46687; see also id. at 46696 (noting that Board considered and rejected possibility of taking no action).

To the extent the commenters are arguing that the Board should have engaged in an economic analysis assessing the value of taking no action, the argument has no merit. As stated repeatedly herein, the joint-employer standard is governed by the common law as applied within the context of the Act, not by broader economic factors. See, *e.g., Browning-Ferris,* 362 NLRB at 1611 fn. 68, 1615 (rejecting consideration of ''the wider universe of all underlying economic facts that surround an employment relationship''); id. at 1625 (dissenting opinion) (indicating that common-law agency principles, rather than an expansive policy-based economic realities and statutory purpose approach, govern the definition of employer and employee under the Act).

One commenter asserts that the Board has failed to provide sufficient time for comments.[311] Specifically, it contends that the NPRM provided only seven days after initial comments were due for the filing of reply comments, and that this amount of time was insufficient to review the 26,197 comments that had been submitted as of January 28, 2019.

Contrary to this commenter, the time provided for comments was more than sufficient. Preliminarily, the APA provides no minimum comment period, and many agencies, including the Board in past rulemaking proceedings, have afforded comment periods of only 30 days. Agencies have discretion to provide still shorter periods and are simply ''encouraged to provide an appropriate explanation for doing so.'' Administrative Conference of the United States Recommendation 2011–2 (June 16, 2011), at 3.

The NPRM, which issued September 14, 2018, announced a deadline for initial comments of November 13, 2018, and that reply comments needed to be received on or before November 20, 2018. The Board then extended the comment period three times, for a total of 76 additional days. This included an extension the Board granted following the D.C. Circuit's decision in *Browning-Ferris* v. *NLRB* in order to permit the public an opportunity to address that decision. Ultimately, comments needed to be received on or before January 28, 2019, and comments replying to the comments submitted during the initial comment period needed to be received no later than 14 days later, February 11, 2019.[312] Although the APA does not require this reply period, the Board provided it to give itself the best opportunity to gain all information necessary to make an informed decision. The nearly 29,000 comments submitted and the depth of analysis many of them provide are ample testament to the adequacy of the comment period.

Several commenters argue that the Board should have held public hearings in connection with this rulemaking, as it has done in prior rulemakings. Commenters assert that hearings would provide more input and would help dispel the impression that the outcome was preordained.[313] However, the APA

[309] See comment of Texas RioGrande Legal Aid at 4 (quoting Executive Order 13371, 82 FR 9339 (Jan. 30, 2017)).

[310] See comments of Law and Economics Professors; CWA; SEIU.

[311] See comment of AFL–CIO.

[312] NLRB Further Extends Time for Submitting Comments on Proposed Joint-Employer Rulemaking in Light of D.C. Circuit's Recent *Browning-Ferris* Decision, NLRB (Jan. 11, 2019), *https://www.nlrb.gov/news-outreach/news-story/nlrb-further-extends-time-submitting-comments-proposed-joint-employer-1.*

[313] See comments of AFL–CIO; IUOE; Members of Congress; Cohen; IBT.

does not require public hearings. Further, while the Board understands the value of public hearings and is willing to hold hearings in appropriate circumstances, it has seen public hearings devolve into nothing more than individuals reading their already-submitted written comments aloud. In those circumstances, the Board gains little additional information from a public hearing while expending significant time and resources to hold it.[314] In light of these considerations, the Board decided not to hold public hearings in connection with this rulemaking. However, as noted above, the nearly 29,000 comments submitted and the depth of analysis many of them provide are ample testament to the adequacy of the opportunities for public participation in this rulemaking process. In addition, the Board stated in the NPRM that it would review the public's comments and consider joint-employer issues ''afresh, with the good-faith participation of all members of the Board,'' 83 FR at 46687, and has done so. The Board thus rejects the suggestion that the outcome of this rulemaking was preordained. Indeed, the several changes to the proposed rule reflected in the final rule, based on comments received, clearly demonstrate the contrary.

The AFL–CIO argues that the Board violated the APA by relying on arguments and evidence outside the rulemaking record [315]—specifically, petitions for rulemaking filed by the CDW and other organizations (including the HR Policy Association, the Restaurant Law Center, and the IFA). The AFL–CIO notes that the Board did not mention the petitions in the NPRM, that the petitions had not otherwise been disclosed, that the AFL–CIO did not learn about the petitions until December 6, 2018, and that the petitions were not made part of the rulemaking record. Further, the AFL–CIO asserts that the Board departed from past practice by failing to disclose the petitions in the NPRM. Additionally, the AFL–CIO asserts that the NPRM did not explain the change in practice.

The HR Policy Association counters that the Board did not act improperly, and it asserts that (1) the Board did not rely on the petitions; (2) the Board was not required to include the petitions in the record; (3) by submitting the petitions with its comments, the AFL–CIO has provided the public an opportunity to comment on the petitions; and (4) many of the organizations involved issued press releases regarding their petitions, and there was media coverage about potential rulemaking. HR Policy Association at 3–5 and fn. 8 (citing June 2018 press releases and news reports regarding rulemaking petitions).[316]

The Board has not relied on materials outside of the administrative record in this rulemaking. The administrative record contains each of the petitions for rulemaking, including those cited by the AFL–CIO. In addition, the Board did not undertake this rulemaking based on any of these petitions. Each of the petitions was filed *after* the Board had publicly announced that it planned to promulgate a rule on the joint-employer standard.

One commenter also argues that changes made to the proposed rule in response to the D.C. Circuit's decision in *Browning-Ferris* v. *NLRB* would likely result in a final rule that is not a logical outgrowth of the proposed rule.[317] In this regard, the commenter asserts that the D.C. Circuit has held that ''a final rule was not a logical outgrowth of the proposed rule because the court could not conclude 'that petitioners, ex ante, should have anticipated the changes to be made in the course of the [2012] rulemaking.' '' Comment of AFL–CIO at 62 (alteration in original) (quoting *Daimler Trucks North America, LLC* v. *EPA,* 737 F.3d 95, 103 (D.C. Cir. 2013)). The commenter asserts that interested parties could not anticipate and meaningfully comment on changes made in response to the D.C. Circuit's decision. In addition, the commenter argues that '' '[a]gency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking.' '' Id. at 63 (quoting *Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506, 549 (D.C. Cir. 1983)).

Apparently assuming that the commenter's ''logical outgrowth'' argument concerns the role that indirect and reserved-but-unexercised control may play in the final rule, other commenters counter that the proposed rule did not require the Board to ignore indirect or reserved control.[318] One such commenter contends that Examples 4 and 11 in the proposed rule concerned indirect control.[319] Moreover, the commenter argues that the NPRM asked for feedback regarding the common law and thus indicated that such feedback could result in changes to the proposed rule.

''To satisfy the [APA]'s notice requirement, 5 U.S.C. Sec. 553(b)(3), an agency's final action must be a logical outgrowth of its proposed rule.'' *Idaho Conservation League* v. *Wheeler,* 930 F.3d 494, 508 (D.C. Cir. 2019). ''A final rule qualifies as a logical outgrowth 'if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.' '' Id. (quoting *CSX Transp., Inc.* v. *Surface Transp. Board,* 584 F.3d 1076, 1079 (D.C. Cir. 2009)). ''On the other hand, a final rule is not a logical outgrowth if 'interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.' '' Id. (quoting *CSX Transp.,* 584 F.3d at 1080 (alteration in original)).

Here, the rule proposed in the NPRM relevantly stated: ''A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.'' The NPRM stated that the proposed rule ''reflects the Board's preliminary view, subject to potential revision in response to comments, that the Act's purposes of promoting collective bargaining and

[314] See Letter from Chairman Ring to Senator Murray (Nov. 8, 2019), *https://www.nlrb.gov/sites/default/files/attachments/news-story/node-7827/ring-murray-rulemakings-final.pdf.*

[315] The AFL–CIO contends that an agency ''cannot rely on arguments or evidence that are not made part of the rulemaking record.'' Comment of AFL–CIO at 59. For support, the AFL–CIO states that 5 U.S.C. Sec. 706 ''direct[s] courts to 'review the whole record or those parts of it cited by a party' in determining whether agency action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' '' Id. (quoting 5 U.S.C. Sec. 706).

[316] Specifically, HR Policy Association cites the following: Callie Harman, NAM Joins Business Groups to Petition NLRB on Joint-Employer Rulemaking, National Association of Manufacturers (June 14, 2018), *https://www.shopfloor.org/2018/06/nam-joins-business-groups-petition-nlrb-joint-employer-rulemaking/;* Sean P. Redmond, Coalition Files Petition for Joint Employer Rulemaking, U.S. Chamber of Commerce (June 19, 2018), *https://www.uschamber.com/article/coalition-files-petition-joint-employer-rulemaking;* Joyce Hanson, Restaurant Group Pushes NLRB on Joint Employer Issue, Law360 (June 20, 2018), *https://www.law360.com/articles/1055108/restaurant-group-pushes-nlrb-on-jointemployer-issue;* CDW Seeks Rulemaking to Remedy BFI, CDW (June 13, 2018), *https://myprivateballot.com/2018/06/13/cdw-seeks-rulemaking-remedy-bfi/;* Industry Petitions NLRB for Joint-Employer Rulemaking, Independent Lubricant Manufacturers Association (June 18, 2018), *https://www.ilma.org/ILMA/ILMA/ILMA-News/June/Industry_Petitions_NLRB_for_Joint-Employer_Rulemaking.aspx.*

[317] See comment of AFL–CIO.

[318] See, *e.g.,* comment of CDW.

[319] Id.

minimizing industrial strife are best served by a joint-employer doctrine that imposes bargaining obligations on putative joint employers that have actually played an active role in establishing essential terms and conditions of employment.'' The NPRM also stated that the Board ''seeks comment on all aspects of its proposed rule,'' including whether ''the common law dictate[s] the approach of the proposed rule or of *Browning-Ferris*.''

In *Browning-Ferris* v. *NLRB,* the D.C. Circuit partially affirmed the Board's articulation of the joint-employer test in *Browning-Ferris,* ''including [its] consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment.'' 911 F.3d at 1199–1200. The court expressly did not decide, however, whether either reserved or indirect control, without more, could establish a joint-employer relationship. Id. at 1213, 1218.

Consistent with the D.C. Circuit's decision in *Browning-Ferris* v. *NLRB,* the final rule refines the rule proposed in the NPRM by providing that an entity's indirect control and unexercised, contractually reserved authority over essential terms and conditions of employment of another employer's employees are probative of joint-employer status. For the reasons explained herein, the final rule provides that these factors are probative only to the extent that they supplement and reinforce evidence of direct and immediate control over essential terms and conditions of employment.

Although the final rule modifies the proposed rule in this and other respects, the final rule remains a logical outgrowth of the proposed rule. First, the final rule, like the proposed rule, requires proof of ''substantial direct and immediate control'' to establish joint-employer status. The final rule provides that indirect and reserved control are also probative, but the proposed rule was merely silent regarding those forms of control. The proposed rule did not expressly exclude them. The proposed rule also made clear the Board's understanding that the joint-employer standard had to be consistent with the common law, and it referred to the *Browning-Ferris* standard and requested comments regarding whether the common law dictated that standard. Thus, the proposed rule reasonably signaled that inclusion in the final rule of indirect and reserved-but-unexercised control was entirely possible. Moreover, the NPRM described the development of the joint-employer doctrine, including cases such as *Floyd Epperson,* 202 NLRB at 23, in which the Board considered evidence of both direct and indirect control in finding joint-employer status. Given all this, interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. See *Idaho Conservation League,* 930 F.3d at 508. In short, the final rule is a logical outgrowth of the proposed rule.

N. Comments Regarding the Practical Consequences of Adopting the Final Rule Versus Retaining Browning-Ferris

Many commenters argue that clarifying the joint-employer standard as proposed in the NPRM will make joint-employer determinations more predictable, and that greater predictability in this regard is desirable.[320] More specifically, commenters contend that businesses desire guidance on this issue and have delayed plans to grow as they wait for a ''permanent fix.'' [321] On the other side, commenters argue that retaining the *Browning-Ferris* standard will promote predictability because it is a recent precedent that the Board has infrequently applied,[322] and it will continue to govern in pending cases given the final rule's prospective application.[323] Some commenters claim that while the NPRM cited a need to counteract uncertainty, it cited no evidence that *Browning-Ferris* actually created uncertainty.[324]

Having considered these comments, the Board believes that the final rule will promote predictability and certainty and will do so more effectively than retaining the *Browning-Ferris* standard. As recounted in the NPRM, the last several years have seen oscillation in this area of labor law, starting with *Browning-Ferris'*s overruling of preexisting precedent, the overruling of *Browning-Ferris* in *Hy-Brand I,* and the vacatur of *Hy-Brand I* in *Hy-Brand II,* which reinstated *Browning-Ferris* by default, not based on the doctrinal convictions of a Board majority. See 83 FR at 46682. Thereafter, the D.C. Circuit remanded the Board's decision in *Browning-Ferris,* citing its overbroad and erroneous application of the ''indirect control'' factor and its failure to explain or apply the second step of the standard announced in that decision. In addition to the uncertainties created by this recent history, there is the vagueness of the *Browning-Ferris* standard itself, which failed to draw meaningful distinctions between direct control and indirect and/or reserved-but-unexercised control. The final rule addresses these shortcomings, better effectuates applicable common-law principles, provides more guidance to the regulated community, and prevents the unsettling of expectations that occurs when precedent is overruled by adjudication and the new standard is applied retroactively.

Commenters also variously claim that retaining or discarding *Browning-Ferris* will have an adverse effect on the economy. Some contend that *Browning-Ferris* encourages entities to bring job functions in-house, which can increase costs.[325] Others argue that *Browning-Ferris* discourages entities from contracting with small businesses, which may be owned by minorities.[326] In contrast, some commenters argue that exempting from joint-employer status entities that exercise only indirect control will encourage ''fissuring'' of the workplace through widespread outsourcing of contract work.[327] Commenters argue that such contracting shifts costs onto employees and unions,[328] allows companies to evade their legal obligations,[329] impedes employees from organizing and engaging in other protected activities to improve their working conditions,[330] and harms minority workers employed by subcontractors,[331] among other deleterious consequences.[332] In addition, the one commenter contends that no commenter has provided specific evidence of *Browning-Ferris'*s adverse economic impact.[333]

[320] Comments of Senate HELP Committee; Polsinelli PC; Carpets Plus Color Tile.

[321] Comment of Tamra Kennedy, small business owner; see also comments of Food Marketing Institute; IFA Franchisee Forum.

[322] Comments of AFL–CIO; IUOE; CWA.

[323] Comments of Attorneys General of New York, Pennsylvania, et al.

[324] Comments of AFL–CIO; Attorneys General of New York, Pennsylvania, et al.

[325] Comments of Competitive Enterprise Institute; American Staffing Association.

[326] Comments of Chamber of Commerce; IFA.

[327] Comments of Law and Economics Professors; Attorneys General of New York, Pennsylvania et al.; Southern Poverty Law Center.

[328] Comments of Law and Economics Professors; SEIU.

[329] Comments of LIUNA; 1199SEIU United Healthcare Workers East.

[330] Comments of NELP; Jobs with Justice; Karyn Panitch.

[331] Comments of APALA.

[332] See, *e.g.,* comment of Law and Economics Professors (arguing that to protect competition in fissured labor markets, the Board should retain *Browning-Ferris* or, alternatively, adopt a test similar to those used by antitrust authorities that asks whether an entity has sufficient market power to justify joint-employer status).

[333] See comment of AFL–CIO; see also comment of Pacific Management Consulting Group (asserting the absence of reliable evidence that *Browning-Ferris* negatively impacted the revenues of publicly-traded franchise restaurants).

In determining the appropriate joint-employer standard, the Board does not rely on the various purported economic effects that commenters predict the final rule will have on the economy at large or on workers' wages. The final rule is governed by the common law of joint-employer relationships in the particular context of the Act and further based on a policy judgment that it would frustrate, rather than promote, national labor policy to draw into a collective-bargaining relationship an entity that has never exercised any substantial direct and immediate control over essential terms and conditions of employment of another employer's employees. Thus, as it did in *Browning-Ferris,* the Board rejects consideration of ''the wider universe of all underlying economic facts that surround an employment relationship.'' 362 NLRB at 1611 fn. 68, 1615 (citing, inter alia, *Hearst,* 322 U.S. 111) (internal quotes omitted). The Board also finds unpersuasive comments stating that this approach will limit employees' rights under the Act when an entity is found not to be a joint employer because it has not actually exercised substantial direct and immediate control over the essential terms and conditions of another employer's employees. In that situation, the employees will still have a statutory employer, and they will have all the rights safeguarded by Section 7 of the Act: The right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for mutual aid or protection, and to refrain from any or all of these activities. None of those rights will be forfeited. Again, the standard is based on applicable common-law principles in the context of the Act, not on favoring more (or fewer) statutory employers of a given group of employees as a matter of socio-economic policy.

Some commenters argue that legally required actions franchisors take to protect their trademark and service mark should not be considered evidence of joint-employer status.[334] Relatedly, some commenters argue that corporate social responsibility standards, or ethics-based policies that entities require their subcontractors to follow, should not be considered evidence of joint-employer status.[335]

By contrast, the one commenter argues that the Board should not disregard evidence of influence where it is subjectively motivated by concerns such as compliance with the law or protection of a brand.[336] The commenter also argues that any negative impact of *Browning-Ferris* on franchising is minimal given that a franchisor can allocate liability by imposing an indemnification clause on its franchisees. Other commenters argue that, under a narrower joint-employer standard, franchisors will exert more control because there is less risk of liability, and this will undermine franchisees' independence.[337] And according to another commenter, *Browning-Ferris* or a similar standard is necessary to countermand ''blatant restrictions'' on labor-market competition in the franchising industry, such as franchisors' use of ''no-poaching'' agreements.[338]

As explained elsewhere, the Board has decided not to include in the final rule any provisions that are tailored to particular industries or business models. Instead, the final rule establishes a single, generally applicable standard that assesses the ''totality of the relevant facts in each particular employment setting.'' As appropriate, the Board will take the nature of the particular business or industry into consideration in applying the standard articulated in the final rule to the facts of the specific case.

Importantly, however, we note that routine contracting practices of independent businesses will not evidence joint-employer status under the final rule. Such practices include provisions in business contracts that set the objectives, basic ground rules, or expectations for another entity's performance under a contract. As discussed above, and in agreement with the D.C. Circuit, the final rule differentiates ''those aspects of indirect control relevant to status as an employer'' from ''those quotidian aspects of common-law third-party contract relationships,'' which ''cast no meaningful light on joint-employer status.'' *Browning-Ferris* v. *NLRB,* 911 F.3d at 1220. For example, a franchisor's maintenance of brand-recognition standards (*e.g.,* a requirement that the employees of its franchisees wear a particular uniform) will not evidence direct control over employees' ''essential'' working conditions. See *Love's Barbeque Restaurant No. 62,* 245 NLRB 78, 120 (1979), and cases cited therein, enfd. in part sub nom. *Kallmann* v. *NLRB,* 640 F.2d 1094 (9th Cir. 1981).

Of course, the Board will examine the circumstances of the franchisor-franchisee relationship in each particular case to determine whether the franchisor has exercised direct and immediate control over the essential terms and conditions of employment of the franchisee's employees. Whether a franchisor exercises control over essential working conditions is measured objectively and is not based on the franchisor's subjective intent. The possibility that the franchisor can ''work around'' joint-employer liability by negotiating an indemnification clause is not a sufficient reason to find that its brand-protection measures should be considered evidence of joint-employer status. Put somewhat differently, as between franchisors and franchisees, we decline to put our thumb on the scale. That is exactly what we would do if we imposed a joint-employer standard that compels franchisors to contract around an otherwise forced choice between protecting their brand and incurring joint-employer status, or avoiding joint-employer status by abandoning their legal duty to protect their brand.

Similarly, a variety of corporate social responsibility standards are routine contracting practices and will not be considered evidence of joint-employer status. Examples include an entity's requirement that another employer adopt safety and quality standards[339] or harassment guidance.[340] As to the claimed economic effects of no-poaching agreements on market wages, the Board has addressed that comment already.[341]

Commenters present conflicting views regarding the effect the proposed rule would have on collective bargaining. Some contend that *Browning-Ferris* improperly places at the negotiating table entities with widely different interests or attenuated control over employment terms.[342] Others say that a more restrictive standard will impede meaningful bargaining. These commenters argue that workers will be unable to bargain with the entity that effectively controls their working

[335] Comments of HR Policy Association; Competitive Enterprise Institute.

[336] See Comment of AFL–CIO.

[337] Comments of Chairman Scott and Ranking Member Murray; Franchisee Advocacy Consulting.

[338] See comment of Law and Economics Professors; see also comment of American Association of Franchisees & Dealers (arguing that the Board should determine whether a franchisor's direct economic control, such as over the cost of labor, undermines the franchisee's equity ownership in the business).

[339] See comments of COLLE; Restaurant Law Center.

[340] See comments of HR Policy Association; Center for Workplace Compliance.

[341] See Sec. V.M, ''Response to Comments: Comments Regarding the Propriety of Using Rulemaking to Revisit the Joint-Employer Standard and of the Adequacy of the Rulemaking Process,'' supra.

[342] Comments of General Counsel Robb; CDW.

conditions [343]—an entity that can terminate its contract with the subcontractor without any legal consequences [344]—or that they will be unable to bargain over a particular issue if the entity that controls that issue and that issue only is not their joint employer,[345] among other things.[346] And some commenters, citing *Management Training Corp.,* 317 NLRB 1355 (1995), argue that limiting consideration of control to ''essential'' working conditions will frustrate bargaining.[347]

The Board shares the concerns of those commenters who observe that the *Browning-Ferris* standard may place at the table entities that lack sufficient control over terms and conditions of employment to warrant their participation in collective bargaining. The Board recognizes that the second step of that standard addressed that concern, but the *Browning-Ferris* Board's failure to flesh out the requirements of that step or provide illustrative guidance through application rendered that step effectively meaningless. In contrast, the Board believes that the final rule fosters meaningful bargaining by requiring that an entity exercise such substantial direct and immediate control over one or more essential working conditions ''as would warrant a finding that the entity meaningfully affects matters relating to the employment relationship.'' [348] Contrary to commenters who cite *Management Training* against the proposed rule, that decision supports the standard adopted in the final rule. See 317 NLRB at 1355, 1357–1359. In *Management Training,* a government entity that was exempt from the NLRA had to approve certain economic terms and conditions before the private-sector government contractor could implement them. However, the contractor was able to effect noneconomic terms without approval. Despite the government entity's control over some working conditions, the Board found it appropriate to assert jurisdiction over the contractor. The Board's decision in *Management Training* demonstrates its conviction that employees can engage in meaningful collective bargaining with their employer even though another entity controls some essential terms and conditions and cannot be compelled to participate in collective bargaining, whether on jurisdictional grounds as in *Management Training* or because it is not a joint employer of the employees at issue.[349]

One commenter contends that an entity's requirement that another employer comply with government regulations should be considered evidence of direct control, citing *Watsonville Register-Pajaronian,* 327 NLRB 957 (1999), and related cases.[350] In those cases, the Board held that an employer has a duty to bargain over ''discretionary action taken to comply with [a government regulation].'' 327 NLRB at 959; accord *Dickerson-Chapman, Inc.,* 313 NLRB 907, 942 (1994); *Long Island Day Care Services,* 303 NLRB 112, 116–117 (1991); *Hanes Corp.,* 260 NLRB 557, 557, 562 (1982).

This argument is misplaced. The rule does not provide that employers have no duty to bargain over discretionary action taken to comply with a government regulation. Rather, it addresses which entity—the employees' direct employer, or a third party—must engage in such bargaining. Requiring the direct employer to comply with government regulations does not evidence joint-employer status because requiring such compliance is part of the basic ground rules or expectations for that employer's performance under a contract. Thus, considering such requirements as evidence of joint-employer status would be contrary to the common-law principles stated in *Browning-Ferris* v. *NLRB,* 911 F.3d at 1219–1220.

Commenters argue that by eliminating the bargaining obligation of an entity that exercises indirect control over the terms and conditions of employment of another employer's employees, the proposed rule will cause labor unrest, such as strikes.[351] This concern is overstated. The commenters present no evidence that there was more labor unrest prior to *Browning-Ferris,* when indirect control alone was not dispositive of joint-employer status. In any event, the Board has modified the proposed rule to make indirect control of essential terms and conditions probative of such status, provided it supplements and reinforces evidence of direct and immediate control.

Some commenters advance arguments related to Section 8(b)(4)'s prohibition on secondary picketing. For example, the one commenter contends that joint-employer status should not render an otherwise neutral entity a ''primary'' employer lawfully subject to picketing unless the entity is directly and substantially involved in controlling the term or condition of employment in dispute.[352] In contrast, some commenters argue that by narrowing the joint-employer standard, the proposed rule undermines First Amendment and other precedent that grants employees wide leeway to engage in picketing.[353]

This rulemaking solely concerns the joint-employer standard, not other legal doctrines. The Board therefore declines the request to modify standards regarding secondary picketing. Certainly, as was stated in the NPRM, a finding of joint-employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful. In that sense, the final rule's clarification of the joint-employer standard should make it easier to determine whether an entity is a joint employer and thus a lawful target of picketing along with employees' direct employer. The Board is not inclined, however, to rule that an entity may be a joint employer *and* remain shielded from picketing under certain circumstances, as the above comments effectively request. By the same token, the Board is equally unwilling to use this rulemaking to narrow the range of activity prohibited by Section 8(b)(4). Both goals are extraneous to the task at hand.

In addition, commenters argue that narrowing the joint-employer standard

[343] Comments of NELP; EPI; and SEIU Local 32BJ.

[344] Comment of Professor Kulwiec (citing *Local No. 447, Plumbers (Malbaff Landscape Construction),* 172 NLRB 128 (1968)); see also James Hannley (noting that a franchisor can terminate its relationship with the franchisee if employees of the franchisee engage in organizing).

Professor Kulwiec also posits that the concern over having too many employers at the bargaining table is overstated because the existence of a joint-employer relationship does not require bargaining unless the Board finds that the unit is appropriate for collective bargaining.

[345] Comments of AFL–CIO; SEIU Local 32BJ.

[346] See, *e.g.,* Law and Economics Professors (citing Sec. 1 of the NLRA in arguing that the NLRA was designed to restore ''equal[ ] . . . bargaining power between employers and employees'' and ''stabiliz[e] . . . competitive wage rates and working conditions within and between industries,'' through bargaining between workers with ''full freedom of association [and] actual liberty of contract'' and employers ''organized in the corporate or other forms of ownership association'').

[347] Comments of AFL–CIO; SEIU Local 32BJ.

[348] In this regard, we adhere to the view articulated in the NPRM that the NLRA's ''policy of promoting collective bargaining to avoid labor strife and its impact on commerce is not best effectuated by inserting into a collective-bargaining relationship a third party that does not actively participate in decisions establishing unit employees' wages, benefits, and other essential terms and conditions of employment.'' 83 FR at 46687.

[349] See also Supplementary Information Sec. V.G, ''Response to Comments: Comments Regarding 'Essential' Terms and Conditions of Employment,'' supra.

[350] See comment of AFL–CIO.

[351] Comment of UA.

[352] See comments of General Counsel Robb; World Floor Covering Association.

[353] Comments of SEIU Local 32BJ; AFT.

will cause small employers to become solely liable for the NLRA violations of larger contracting entities.[354] However, this rulemaking is not outcome-driven. The Board's task is not to craft a rule that either maximizes or minimizes third-party exposure to unfair labor practice liability. It is to ensure that a third party genuinely *is* the joint employer of a separate employer's employees before exposing it to such liability and to otherwise-secondary economic pressures, and before imposing on it a duty to bargain with the representative of those employees. For all the reasons stated herein, the final rule fulfills that task and does so with greater clarity, predictability, and fidelity to the purposes and policies of the Act than did *Browning-Ferris*.

Finally, one commenter argues that eliminating the relevance of contractually reserved authority, which is objective and documentable, will engender litigation and impose recordkeeping and related costs.[355] However, the proposed rule did not eliminate contractually reserved authority, and the final rule deems evidence of contractually reserved authority probative of joint-employer status to the extent it supports and reinforces evidence of direct and immediate control.

O. Comments Regarding the Circumstances Under Which a Joint Employer Will Be Found Liable for Another Employer's Unfair Labor Practices

Many commenters favor the proposed rule to the extent it exposes an entity to unfair labor practice liability as a joint employer only if it exercises substantial direct and immediate control over another employer's employees' terms and conditions of employment.[356] These commenters observe that the ''direct and immediate control'' requirement will allow their members, such as franchisors and large retailers, to oversee the general performance of franchisees or retail business partners without being held liable for events in workplaces over which they have little or no control.

Other commenters urge us to adopt a final rule that would further limit unfair labor practice liability even when an entity is found to be a joint employer of another's employees. One commenter, for example, suggests imposing liability only where the joint employer is involved in the unlawful act or controls the essential term or condition of employment at issue in the unlawful act, or where the unfair labor practice cannot be adequately remedied without its participation.[357] Similarly, another commenter urges the Board to adopt an ''instrumentality test,'' under which liability would be imposed on a joint employer only if it controls or has the right to control the particular instrumentality alleged to have caused the harm.[358] Other commenters urge the Board to apply the standard set forth in *Capitol EMI Music,* 311 NLRB 997 (1993), enfd. 23 F.3d 399 (4th Cir. 1994), and impose liability on a joint employer for non-bargaining-related unfair labor practices only where the joint employer knew or should have known of the unlawful act and acquiesced in it by failing to protest or otherwise resist it.[359] Finally, some commenters request that the rule eliminate joint-employer liability altogether and state that a joint employer is not liable for actions taken by another employer.[360]

The Board declines to expand the scope of the proposed rule to change Board precedent regarding the joint-and-several liability of one joint employer for the unfair labor practices committed by another joint employer. Although joint-employer status is a predicate of joint liability, the analyses of the two concepts have often been distinct, each with its own considerations and caselaw. *Capitol EMI Music,* for example, is longstanding precedent regarding an exception to joint-and-several liability of the kind some commenters request, but it and other precedent regarding exceptions to joint liability are not cited or discussed in the NPRM. It is thus doubtful that the public has been properly apprised that this issue could be addressed in the instant rulemaking. See *Idaho Conservation League* v. *Wheeler,* 930 F.3d at 508 (''[A] final rule is not a logical outgrowth if interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.'') (second alteration in original) (internal quotation marks omitted).

Moreover, as explained in the NPRM, a significant motive for this rulemaking is to resolve the recent oscillations in Board law regarding joint-employer status that have occurred in the past several years. The NPRM explained that the rule was necessary ''[i]n light of the continuing uncertainty in the labor-management community created by these adjudicatory variations in defining the appropriate joint-employer standard under the Act.'' 83 FR at 46682. There has been no recent oscillation in the law, however, regarding the issue of joint liability, which the Board did not change or even address in *Browning-Ferris*. Indeed, the Board majority in *Browning-Ferris* emphasized that the decision ''[did] not modify any other legal doctrine, create 'different tests' for 'other circumstances,' or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act.'' *Browning-Ferris,* 362 NLRB at 1618 fn. 120.

The issue of joint liability is also best resolved on a case-by-case basis. Determining whether one joint employer is jointly and severally liable for the other joint employer's unfair labor practices depends on the nature of the joint-employment relationship and the type of violation alleged. As the Board explained in *Capitol EMI Music,* ''traditional'' joint-employment relationships, where each joint employer has a representative at a worksite and shares supervision of the employees, might call for a different analysis of liability than an arrangement where one joint employer simply supplies employees to another but takes no part in their daily direction. 311 NLRB at 1000. The Board was also careful to limit the exception to joint liability announced in *Capitol EMI Music* not just to a specific kind of joint-employment relationship but also to a specific unfair labor practice, one that depends on an unlawful motive. Id. at 1001. The Board also observed that the result might be different where a purportedly ''innocent'' joint employer nevertheless benefits from a co-employer's unlawful conduct, or where an employer arrangement allows a joint employer to inquire into its co-employer's actions. Id. at 999. The Board believes this case-by-case approach is sound, and therefore decline the invitation to address joint liability in the final rule.

P. Comments Regarding Industry-Specific Standards

Several commenters discuss particular industries or business relationships,[361] such as home

[354] Comments of AFL–CIO; IUOE.

[355] See comment of AFL–CIO. Conversely, the IFA argues that *Browning-Ferris* has increased legal spending by encouraging individuals to pursue the ''deeper pockets'' of larger entities.

[356] See comments of the Restaurant Law Center; National Retail Federation; American Road & Transportation Builders Association.

[357] See comment of Job Creators Network.

[358] See comment of IFA.

[359] See comments of General Counsel Robb; HR Policy Association.

[360] See comments of World Floor Covering Association; Glover.

[361] Comments of General Counsel Robb; World Floor Covering Association.

builders,[362] the contract-security industry,[363] retailers,[364] and the franchisor-franchisee relationship.[365] As to franchising, for example, some commenters contend that legally required actions franchisors take to protect their trademark and service mark should not be considered evidence of joint-employer status.[366] Commenters say that franchisors protect their brand by providing franchisees, among other things, training,[367] information systems,[368] and guidance on marketing [369] and customer service.[370] The Board has decided not to address particular industries or types of business relationships in the final rule, because doing so would unnecessarily lengthen and complicate the rule. Instead, the final rule provides definitions and other clarifications that are intended to apply to a wide range of industries and business relationships, and the final rule also emphasizes that joint-employer status ''must be determined on the totality of the relevant facts in each particular employment setting.'' The rule addresses contracting practices common to many industries, such as the use of cost-plus contracts and control asserted pursuant to regulatory requirements. The Board anticipates that any industry-specific refinements will be developed case by case through adjudication.

VI. Justification for the Final Rule

The joint-employer doctrine plays an important role in the administration of the National Labor Relations Act (NLRA or the Act). Most notably, the doctrine determines when an entity other than the direct employer of certain employees has a duty to bargain with the representative of those employees, may be liable for unfair labor practices it did not directly commit, and may be targeted as a primary employer in a labor dispute. The joint-employer analysis set forth in this final rule is based on the common law as applied in the particular context of the NLRA. Certain considerations must be taken into account under the Act that may not apply in other contexts. The Board must consider when an entity's participation in collective bargaining is required for there to be meaningful bargaining over the terms and conditions of employees directly employed by another employer. The Board also must consider under what circumstances it is appropriate to impose liability on an entity that did not directly commit an unfair labor practice. And the Board must consider Congress's concern with limiting third parties' exposure to economic warfare in labor disputes.

The Board intends in this final rule to return, with clarifying guidance, to the carefully balanced law as it existed before the Board's departure in *Browning-Ferris*. Before, the Board found joint-employer status only when the additional entity had direct and immediate control, as opposed to indirect influence or unexercised, contractually reserved authority, over one or more of the most contextually meaningful, essential terms and conditions of employment such that, considering all of the circumstances, the entity meaningfully affected matters relating to the employment relationship. Indirect influence or unexercised, contractually reserved authority were considered, in weighing the circumstances, as supplementing and reinforcing evidence of direct and immediate control, but neither was dispositive. The *Browning-Ferris* Board disrupted this precedent—without due regard to issues of liability and limiting the scope of labor disputes, and with inadequate consideration of meaningful bargaining—to establish that indirect or unexercised, contractually reserved control could alone be dispositive.

As noted above, in reviewing the Board's *Browning-Ferris* decision, the United States Court of Appeals for the District of Columbia Circuit held that, under the common law, indirect and unexercised reserved control can factor in the Board's joint-employer analysis, but the Board exceeded the bounds of the common law by ''failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting.'' *Browning-Ferris* v. *NLRB,* 911 F.3d at 1213, 1216. The court did not pass on whether indirect or unexercised reserved control could ever alone be dispositive.

By returning to the Board's prior precedent, this final rule answers that open question. In applying the common law in the context of the NLRA, the Board will not find indirect or unexercised reserved control, alone, dispositive, but such control will be relevant to the extent it supplements and reinforces evidence of direct and immediate control. The Board's analysis here, in the words of the D.C. Circuit, ''color[s] within the common-law lines identified by the judiciary.'' Id. at 1208. The standard we adopt in this final rule dates back at least to the Board's adoption in *Laerco Transportation,* 269 NLRB 324 (1984), and *TLI, Inc.,* 271 NLRB at 798–799, of the United States Court of Appeals for the Third Circuit's explication of the joint-employer doctrine in *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1124 (3d Cir. 1982). In the ensuing decades, no reviewing court ever suggested the Board's standard was at variance with the common law, or that it must be extended to the outer bounds of the common law. Nevertheless, the Board's 2015 *Browning-Ferris* decision departed from this established body of precedent.

With this final rule, the Board has endeavored to provide greater clarity, guided by the many comments received, as to how it will determine joint-employer status. Joint-employer determinations have always been fact-intensive, and they will continue to be so. The Board is confident, however, that a more precise definition of the key terms and analytical points will facilitate consistent application of the standard across a broad spectrum of industries and business-to-business relationships. This specificity stands in contrast to the uncertainty the Board's *Browning-Ferris* decision created and that the D.C. Circuit justifiably criticized, including by its failure to stay within common-law bounds in its treatment of indirect control and to give any content whatsoever to the second, NLRA-based step of the standard announced therein.

Broadly, an entity shares or codetermines the essential terms and conditions of another employer's employees—that is, may be considered a joint employer of those employees—when it possesses and exercises substantial direct and immediate control over the employees' essential terms and conditions. The final rule's definitions of ''essential terms and conditions of employment,'' ''direct and immediate control,'' and when direct and immediate control is ''substantial'' are explained below, as is the final rule's treatment of indirect control and unexercised, contractually reserved authority and of certain common business practices.

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[362] Comment of National Association of Home Builders.

[363] Comment of John B. Hirsch.

[364] Comment of National Retail Federation.

[365] Comment of IFA.

[366] Comments of General Counsel Robb; David Kaufmann, lead author of ABA Franchise Law Journal article (discussing the Lanham Act, 15 U.S.C. Secs. 1051–1141, the FTC Franchise Rule, 16 CFR part 436, Secs. 436.1 *et seq.,* and the FTC 2007 Franchise Rule Compliance Guide); see also comment of Kaufmann (discussing various state laws).

[367] Comments of IFA; CDW; Polsinelli PC.

[368] Comment of IFA.

[369] Comments of Kaufmann; Keith Randall, franchise business owner.

[370] Comments of CDW.

A. Essential Terms and Conditions of Employment

In *Laerco Transportation,* the Board first described the essential terms and conditions of employment in the joint-employer analysis as including, non-exhaustively, ''hiring, firing, discipline, supervision, and direction.'' 269 NLRB at 325. *Browning-Ferris* aside, the Board has repeated this non-exclusive list ever since, including in the NPRM. The final rule adds wages, benefits, and hours of work to this list, and it makes the list of essential terms and conditions of employment an exclusive, closed list.

First, the inclusion of these three terms and conditions, urged by many commenters, is a commonsense addition. ''Wages'' and ''hours'' feature prominently in the NLRA. See Sections 8(d) and 9 of the Act. And Board precedent has assumed wages, benefits, and hours of work are essential terms and conditions of employment for purposes of the joint-employer analysis. See, *e.g., Quantum Resources Corp.,* 305 NLRB at 760–761 (wages); *G. Heileman Brewing Co.,* 290 NLRB 991, 1000 (1988) (benefits), enfd. 879 F.2d 1526 (7th Cir. 1989); *Gourmet Award Foods, Northeast,* 336 NLRB 872, 874–875 (2001) (hours of work).

Second, setting essential terms and conditions of employment as including *only* wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction brings much needed certainty to the joint-employer analysis. An entity's control relating to these matters, moreover, has proven most relevant, in the Board's experience, in determining when it is warranted to find a bargaining obligation, liability for unfair labor practices, and status as a primary in a labor dispute. Indeed, no Board case has been identified where control over any other term or condition of employment carried the day in a joint-employer analysis. As provided in the final rule, however, control over other mandatory subjects of bargaining is also probative, but only to the extent it supplements and reinforces evidence of direct and immediate control over essential terms and conditions of employment.

B. Direct and Immediate Control

Direct and immediate control distinguishes the obvious, meaningful control exercised over employees from attenuated indirect and unexercised reserved control, which is much less significant in identifying a joint employer, and from routine features of company-to-company contracting that are not relevant to joint-employer status at all. The final rule defines direct and immediate control with respect to each of the eight essential terms and conditions of employment based on lines drawn in the Board's pre-*Browning-Ferris* precedent. The Board determined that this approach provided better and more precise guidance than the hypothetical factual examples in the proposed rule, which were widely criticized in the comments.

Over wages, an entity exercises direct and immediate control if it actually determines the wage rates, salary, or other rate of pay that is paid to another employer's individual employees or job classifications. See, *e.g., Quantum Resources Corp.,* 305 NLRB at 760–761 (finding the user employer jointly employed the supplier employer's employees in part because the user employer designated wage rates, authorized changes in wage rates, and pushed through raises for employees). But it does not exercise such control by entering into a cost-plus contract (with or without a maximum reimbursable wage rate). See, *e.g., Goodyear Tire & Rubber Co.,* 312 NLRB 674, 678 (1993) (a cost-plus contract setting forth the wage reimbursement is not evidence of a joint-employer relationship); see also *Browning-Ferris,* 911 F.3d at 1220. Over benefits, an entity exercises direct and immediate control if it actually determines the fringe benefits to be provided or offered to another employer's employees. This would include selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided. Compare *G. Heileman Brewing,* 290 NLRB at 1000 (finding joint-employer status in part because the user employer exercised authority over granting benefits), with *TLI, Inc.,* 271 NLRB at 798–799 (attendance of the user employer's representative at bargaining sessions and outlining the user employer's need to cut labor costs did not show direct control over terms and conditions because the representative made no specific proposals; it was up to the supplier employer and union to work out needed savings from wages and benefits). An entity does not exercise direct and immediate control by permitting another employer, under an arm's-length contract, to participate in its benefit plans.

Over hours of work, an entity exercises direct and immediate control if it actually determines work schedules or the work hours, including overtime, of another employer's employees. See *Gourmet Award Foods,* 336 NLRB at 874–875 (finding joint-employer status in part because the user employer determined hours of work and work schedules, including overtime); *G. Heileman Brewing,* 290 NLRB at 1000 (finding joint-employer status in part because the user employer set work schedules). An entity does not exercise such control by establishing an enterprise's operating hours or the times when it needs the services provided by another employer. See *Service Employees Local 254 (Women & Infants Hospital),* 324 NLRB 743, 749 (1997) (''The contractual provisions affecting when work must be performed are not indicia of joint employer status. It is not surprising that [the user employer] would require that cleaning be done at times most convenient for the college, or that a cleaner be available at all times to handle emergencies.'').

Over hiring, an entity exercises direct and immediate control if it actually determines which employees will be hired and which employees will not. Compare *Le Rendezvous Restaurant,* 332 NLRB 336, 336 (2000) (finding joint-employer status in part because of the user employer's active involvement in hiring a nonunion workforce to replace its existing workforce), with *Flagstaff Medical Center,* 357 NLRB at 667 (interviewing candidates and making recommendations on whom the primary employer should hire did not prove joint-employer status; the direct employer retained final authority over hiring decisions and, in fact, did not follow all the recommendations), and *AM Property Holding Corp.,* 350 NLRB at 1002 (not indicative of joint-employer status for the user employer to suggest individuals for the supplier employer to hire whom the supplier employer independently interviewed before making hiring decisions). An entity does not exercise such control by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation. See *Aldworth Co.,* 338 NLRB at 139 (''[A]ctions taken pursuant to government statutes and regulations are not indicative of joint employer status.'').

Over discharge, an entity exercises direct and immediate control if it actually decides to terminate the employment of another employer's employee. See, *e.g., Whitewood Maintenance Co.,* 292 NLRB 1159, 1162–1163 (1989) (finding joint-employer status in part because the user employer made the decision to discharge the supplier employers' employees, which the supplier employer carried out), enfd. sub nom. *Texas World Serv. Co.* v. *NLRB,* 928 F.2d 1426 (5th Cir. 1991). An entity does not exercise such control by bringing misconduct or poor performance to the attention of another

employer that makes the actual discharge decision, by expressing a negative opinion of another employer's employee, by refusing to allow another employer's employee to continue performing work under a contract, or by setting minimal standards of performance or conduct, such as those required by government regulation. See *Aldworth Co.,* 338 NLRB at 139 (''[A]ctions taken pursuant to government statutes and regulations are not indicative of joint employer status.''); *Southern California Gas Co.,* 302 NLRB 456, 462 (1991) (not evidence of joint-employer status for the user employer to indicate it no longer wanted a particular employee to work at the facility; the user employer was only ''exercis[ing] . . . the right of an owner or occupant to protect his premises''); *Chesapeake Foods,* 287 NLRB 405, 407 (1987) (user employer did not exercise control by referring complaints about supplied employees to the supplier employer, and the supplier employer made the decision whether to discharge an employee); *H&W Motor Express, Inc.,* 271 NLRB 466, 468 (1984) (not evidence of joint-employer status for user employer to ask that certain employees to be removed from work under its contract).

Over discipline, an entity exercises direct and immediate control if it actually decides to suspend or otherwise discipline another employer's employee. See *Hobbs & Oberg Mining Co.,* 297 NLRB 575, 587 (1990) (finding joint-employer status partly in reliance on the user and supplier employer jointly giving a supplied employee a written reprimand), affd. 940 F.2d 1538 (10th Cir. 1991), cert. denied 503 U.S. 959 (1992); *G. Heileman Brewing,* 290 NLRB at 1000 (finding joint-employer status in part because the user employer exercised authority over discipline). An entity does not exercise such control by bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision, by expressing a negative opinion of another employer's employee, or by refusing to allow another employer's employee to access its premises or perform work under a contract. See *TLI, Inc.,* 271 NLRB at 799 (finding the user employer did not control discipline because ''[w]hen a driver engages in conduct adverse to [the user employer's] operation, [it] supplies [the supplier employer], not the employee, with an 'incident report' whereupon a [supplier employer] representative investigates. Disciplinary notices, or necessary actions, are issued by [the supplier employer]. In addition, although accidents on the road are reported to [the user employer], it is [the supplier employer] which investigates and determines whether or not the accident was preventable and whether further action is necessary'').

Over supervision, an entity exercises direct and immediate control by actually instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals. See, *e.g., International Transfer of Florida, Inc.,* 305 NLRB 150, 150 (1991) (finding the user employer jointly employed the supplier employer's employees because the user employer exercised exclusive daily supervision and direction over those employees, including as to the manner and means of performing the work). An entity does not exercise such control when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it. See *AM Property Holding Corp.,* 350 NLRB at 1001 (supervision is ''limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work''); see also *G. Wes Ltd. Co.,* 309 NLRB 225, 226 (1992) (concluding user employer's day-to-day supervision was limited and routine where employees were not told ''specifically how to do the work or the manner in which they were to perform the assigned tasks . . . . [they] were told what areas were to be worked and with whom the employees were to work, and the work was then left to the employees to perform''); *Southern California Gas,* 302 NLRB at 462 (finding that the ''[r]espondent's orders and directions to the day-shift employees were in the nature of routine directions of what tasks were required and where they were to be performed . . . such direction [was] consistent with [r]espondent's object of obtaining results, *i.e.,* the work it contracted for''); *Laerco Transportation,* 269 NLRB at 326 (finding only limited and routine supervision where the user employer resolved ''minor problems such as employee personality conflicts'' and its involvement was ''limited both as to the nature and number of employee problems''; major problems were referred to the supplier employer).

Over direction, an entity exercises direct and immediate control by assigning particular employees their individual work schedules, positions, and tasks. See, *e.g., G. Heileman Brewing,* 290 NLRB at 1000 (finding joint-employer status in part because the user employer assigned work and schedules). An entity does not exercise such control by setting schedules for completion of a project or by describing the work to be accomplished on a project. See *Chesapeake Foods,* 287 NLRB at 407 (finding it was not significant control for the user employer to ''schedul[e] . . . the farms to be worked''); *TLI, Inc.,* 271 NLRB at 799 (finding it was not evidence of joint-employer status where ''[t]he Crown foreman instruct[ed] the drivers as to which deliveries [were] to be made on a given day,'' but ''the drivers themselves select[ed] their own assignments, on a seniority basis''); *Laerco Transportation,* 269 NLRB at 325–326 (finding it was not evidence of joint-employer status where the user employer set routes to be followed and the supplier employer provided drivers for those predetermined routes).

C. When Direct and Immediate Control Is Substantial

It is a well-settled principle in Board law that ''[t]o establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship.'' *Laerco Transportation,* 269 NLRB at 325. This has required careful consideration of the totality of the relevant facts in each particular employment setting. *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 481 (1964) (''[W]hether Greyhound possessed sufficient indicia of control to be an 'employer' is essentially a factual issue.''); *AM Property Holding Corp.,* 350 NLRB at 1000 (''The question of joint employer status turns on the facts of each particular case.''); *Southern California Gas,* 302 NLRB at 461 (''Primarily, the question of joint employer status must be decided on the totality of the facts of the particular case.''). Under precedent predating the sharp departure in *Browning-Ferris,* the Board reasonably found entities meaningfully affected matters relating to the employment relationship only where they had direct and immediate control over at least one essential term or condition of employment.

Depending on the circumstances, however, direct and immediate control over only one essential term or condition of employment, or even more than one, has sometimes been found insufficient to meaningfully affect matters relating to the employment relationship. The direct-and-immediate control may be too isolated or sporadic to be meaningful for purposes of imposing bargaining obligations and potential unfair labor practice liability.

See *G. Wes Ltd.,* 309 NLRB at 225 fn. 5 (one isolated incident of user employer interviewing employee whom the supplier employer later hired insufficient to prove that the user employer controlled hiring); *International Shipping Assn.,* 297 NLRB 1059, 1067 (1990) (finding evidence insufficient to prove a joint-employer relationship where the ''few occasions when [the user employer] asked certain [supplied] workers to do certain tasks were isolated,'' and there was ''one isolated, vague incident'' of the user employer telling an applicant he should tell the supplier employer he should be hired, and he was). Likewise, the direct and immediate control an entity exercises may fall short of meaningfully affecting the employment relationship in the context of other control not exercised. See *Flagstaff Medical Center,* 357 NLRB at 666–667 (the putative joint-employer's limited direct and immediate control was insufficient to establish joint-employer status under the circumstances); *AM Property Holding Corp.,* 350 NLRB at 1001–1002 (user employer's direct and immediate control regarding hiring and setting the wages and benefits of one particular employee and ''occasional assignment of work'' to other employees was not enough to establish joint-employer relationship under the circumstances); *Women & Infants Hospital,* 324 NLRB at 749 (recurring direction by the user employer necessitated by the lack of a supplier-employer onsite supervisor was not itself enough to warrant a joint-employer finding absent other meaningful evidence); *Pitney Bowes, Inc.,* 312 NLRB 386, 387 (1993) (user employer's issuing undocumented verbal warnings and routine instructions did not meaningfully affect the employment relationship in light of the supplier employer's ''nearly complete control over all other significant aspects of the employment relationship, such as hiring, wages, benefits, work rules, assignment of tasks, transfers to other [supplier-employer] customers, and termination'').

The final rule reflects this precedent by providing that the Board will consider the totality of the relevant facts in each particular employment setting and that ''[s]ubstantial direct and immediate control'' means ''direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. Such control is not 'substantial' if only exercised on a sporadic, isolated, or de minimis basis.'' The final rule also specifies, as has always been the case, that the party asserting joint-employer status bears the burden of proof. See, *e.g., Hobbs & Oberg Mining Co.,* 297 NLRB at 586.

D. The Role of Indirect Control and Unexercised, Contractually Reserved Authority

As referenced above, indirect control and unexercised, contractually reserved authority generally reference control that is not direct and immediate. However, the final rule specifies that, within the meaning of the rule, indirect control does not encompass indirect control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract. This distinction is discussed further in the following section on business practices that are not probative of joint-employer status. By contractually reserved authority, the final rule means the authority that an entity reserves to itself, under the terms of a contract with another employer, over the essential terms and conditions of employment of that other employer's employees, but that has never been exercised.

Under Board law as it existed prior to *Browning-Ferris,* indirect control and unexercised, contractually reserved authority were not alone dispositive of joint-employer status. See *AM Property Holding Corp.,* 350 NLRB at 1000, 1002 (''We find that the contractual provision giving AM the right to approve PBS hires, standing alone, is insufficient to show the existence of a joint employer relationship. In assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties . . . . The Board's inquiry with regard to the direction and supervision of Servco employees is properly focused on the practice of the parties, not the language of the contract.''); *National Metal Processing, Inc.,* 331 NLRB 866, 869 (2000) (finding user employer was not a joint employer where it only affected unit employees indirectly and had unexercised contractual authority to suspend employees up to 3 days); *J. P. Mascaro & Sons,* 313 NLRB 385, 389 (1993) (''Respondent of necessity may exercise some implicit or indirect control over the operations of [the subcontractor] at the facility to ensure against disruption of its own operations or to assure it secures the services promised, but this is no basis to find the customer-employer is a joint employer of its contractor's employees.''), enfd. sub nom. *NLRB* v. *Solid Waste Services, Inc.,* 38 F.3d 93 (2d Cir. 1994); *Goodyear Tire & Rubber,* 312 NLRB at 677 (contractual provision reserving operational control, including over direction and supervision, ''in and of itself, was not evidence of joint employer status . . . . [I]t was more appropriate to look to the actual handling of day-to-day business''). But the Board did consider such evidence insofar as it supplemented and reinforced evidence of direct and immediate control over essential terms and conditions of employment. See, *e.g., Le Rendezvous Restaurant,* 332 NLRB at 336 (considering evidence of contractually reserved authority in conjunction with user employer's exercise of direct and immediate control over hiring and discipline); *M.B. Sturgis, Inc.,* 331 NLRB 1298, 1301–1302 (2000) (finding that the contract's broad grant of authority to the user employer over supervision and direction supported evidence of exercised direct control over supervision, direction, and discipline). The final rule is in lockstep with this approach. Indirect control or unexercised, contractually reserved authority cannot alone be dispositive, but either or both are probative of joint-employer status to the extent they supplement or reinforce evidence of direct and immediate control over essential terms and conditions of employment.

E. Business Practices That Are Not Probative of Joint-Employer Status

The Board is mindful, as was implicit in its pre–*Browning-Ferris* precedent, that there are business practices that are merely ''quotidian aspects of common-law third-party contract relationships'' that do not make joint-employer status any more or less likely. *Browning-Ferris* v. *NLRB,* 911 F.3d at 1220. A contracting entity commonly seeks to ''set the objectives, basic ground rules, and expectations for a third-party contractor,'' and doing so is not indicative of joint-employer status. Id. This includes contractual provisions obligating the third party to maintain certain practices to comply with legal requirements or for corporate social responsibility reasons. See *Doe I* v. *Wal-Mart Stores, Inc.,* 572 F.3d at 680–683 (contracts that contained a code of conduct requiring Wal-Mart's foreign suppliers to comply with foreign labor laws and permitting Wal-Mart to monitor compliance, and that set forth ''deadlines, quality of products, materials used, prices, and other common buyer-seller contract terms'' were not evidence that Wal-Mart was a common-law joint employer of its suppliers' employees); *Aldworth Co.,*

338 NLRB at 139 (''[A]ctions taken pursuant to government statutes and regulations are not indicative of joint employer status.'').

Accordingly, under the final rule, the Board does not intend the following to be evidence of joint-employer status: Entering a cost-plus contract (with or without a maximum reimbursable rate); setting minimal standards for hiring, performance, or conduct, such as those required by government regulation; requiring the contractor to institute safety or sexual-harassment policies; a franchisor's protection of its trademark or service mark; or anything else that promotes legal compliance or sets the objectives, basic ground rules, or expectations for a contractor's performance.

VII. Other Statutory Requirements

A. The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (RFA), 5 U.S.C. 601–612, requires an agency promulgating a final rule to prepare a Final Regulatory Flexibility Analysis (FRFA) when the regulation will have a significant impact on a substantial number of small entities. An agency is not required to prepare a FRFA if the Agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). In the NPRM, although the Board believed that this rule would not have a significant economic impact on a substantial number of small entities, the Board issued its Initial Regulatory Flexibility Analysis (IRFA) to provide the public the fullest opportunity to comment on the proposed rule. See 83 FR at 46693. The Board solicited comments from the public that would shed light on potential compliance costs that may result from the rule that it had not identified or anticipated.

The RFA does not define either ''significant economic impact'' or ''substantial number of small entities.'' [371] Additionally, ''[i]n the absence of statutory specificity, what is 'significant' will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations.'' [372] The Board anticipates low costs of compliance with the rule for small entities, related to reviewing and understanding the substantive changes to the joint-employer standard.

1. Statement of the Need for, and Objectives of, the Rule

The final rule establishes the standard for determining, under the NLRA, whether a business is a joint employer of a group of employees directly employed by another employer. This rule is necessary to foster predictability and consistency in joint-employer determinations under the NLRA, particularly in light of considerable uncertainty regarding the status of the current standard, which was established through adjudication. The guidance furnished by the final rule will enable regulated parties to determine in advance whether their actions are likely to result in a joint-employer finding, which entails or may entail significant consequences under the NLRA: A duty to bargain collectively, exposure to what would otherwise be unlawful secondary union activity, and derivative unfair labor practice liability. Accordingly, a final rule setting forth a comprehensive and detailed standard is vitally important to businesses covered by the NLRA, employees employed by those businesses, and labor organizations that represent or seek to represent those employees. Defining the joint-employer standard through rulemaking also permits the Board to provide more guidance than would be readily achievable through adjudication. The final rule accomplishes these objectives by defining critical elements of the joint-employer standard that have heretofore been undefined and by focusing the inquiry on the factors most relevant to joint-employer status in light of the policies and purposes of the NLRA.

2. Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

a. Response to Comments Concerning Economic Impact on Small Employers

As stated in the Board's IRFA, the rule ''will only be applied as a matter of law when . . . businesses are alleged to be joint employers in a Board proceeding.'' 83 FR at 46693. After analyzing recent case statistics, the Board found that only .028% of *all* 5.9 million American business firms with employees (both large and small) found themselves in that position between 2013 and 2017. Id. Because a significant number of these Board proceedings involved large employers, the IRFA concluded that ''an even lower percentage of small businesses [would] be most directly impacted by the Board's application of the rule.'' Id. The Board also examined less direct impacts to small entities—that is, impacts that might arise ''[i]rrespective of an Agency proceeding,'' id.—but found those impacts to be very limited in scope or modest in size. For example, the Board acknowledged that a variety of small entities would bear compliance costs related to reviewing and understanding the rule but found that those costs would not be considered ''significant'' under the RFA. Id. at 46693–95 (estimating compliance costs of $80.26 for unions and $124.37 for small employers).

Some comments criticized the Board's IRFA for finding that the businesses ''most directly impacted by the proposed rule'' are those alleged to be joint employers in a Board proceeding. 83 FR at 46693. By measuring ''most direct[] impact'' in this manner, one commenter argues that the Board has ignored that businesses structure their transactions based in part on the applicable legal costs of compliance and that workers and small businesses bear these costs when the indirect employers have substantial market power, whether or not they are subject to a Board proceeding.[373] Another commenter believes that the Board's approach fails to account for the current, stable joint-employer bargaining relationships that might be disrupted by the rule.[374] Thus, that commenter's view, the proposed rule would cause prolonged labor disputes because larger entities with control over certain terms and conditions of employment would no longer be at the bargaining table.

Other comments similarly criticized the Board for failing to analyze whether the proposed rule would cause competitive harm to small businesses on a broad basis. According to these comments, because the proposed rule allows indirect employers to avoid the cost and responsibility of complying with the NLRA, the rule places small employers at a competitive disadvantage to larger employers.[375] For example, a commenter argues that the revised definition will provide indirect employers that possess substantial

[371] 5 U.S.C. 601.

[372] U.S. Small Business Administration (SBA) Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (SBA Guide) 18 (Aug. 2017), *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

[373] See comment of Law and Economics Professors.

[374] See comment of AFT.

[375] See Center for American Progress Action Fund; CWA; NELP.

market power greater leverage in their contracting arrangements with businesses that supply labor.[376] Accordingly, larger indirect employers will use this added leverage to siphon off profits from smaller direct employers, limiting the ability of those small businesses to grow. As a result, the commenter argues, the rule will cause a further shift in market power away from small employers. It states that harm to the competitive ability of small businesses, vis-à-vis larger firms, is a direct, cognizable economic impact under the RFA that the Board should have considered.

Respectfully, the foregoing commenters do not raise direct economic impacts under the RFA. The RFA does not require an agency to consider speculative and wholly discretionary responses to the rule, or the indirect impact on every stratum of the economy. What the statute requires is that the regulatory agency consider the direct burden that compliance with a new regulation will likely impose on small entities. *See Mid-Tex Elec. Co-op* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985) (''[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities''); *accord White Eagle Co-op. Ass'n* v. *Conner,* 553 F.3d 467, 478 (7th Cir. 2009); *Colorado State Banking Bd.* v. *Resolution Trust Corp.,* 926 F.2d 931, 948 (10th Cir. 1991).

This construction of the RFA, requiring agencies to consider only direct compliance costs, finds support in the text of the Act. Section 603(a) of the RFA states that if an IRFA is required, it ''shall describe the impact of the proposed rule on small entities.'' 5 U.S.C. 603(a). Although the term ''impact'' is undefined, its meaning can be gleaned from Section 603(b), which recites the required elements of an initial regulatory flexibility analysis. One such element is ''a description of the projected *reporting, recordkeeping and other compliance requirements* of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.'' 5 U.S.C. 603(b)(4) (emphasis added). Section 604 further corroborates the Board's conclusion, as it contains an identical list of requirements for a FRFA (if one is required). 5 U.S.C. 604(b)(4).

Additional support for confining the regulatory analysis to direct compliance costs is found in an authoritative guide published by the Office of Advocacy of the SBA. In the SBA Guide, the SBA explains that ''other compliance requirements'' under Section 603 include the following examples:

> (a) Capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures to comply with the proposed rule; (c) lost sales and profits resulting from the proposed rule; (d) changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; (e) extra costs associated with the payment of taxes or fees associated with the proposed rule; and (f) hiring employees dedicated to compliance with regulatory requirements.

SBA Guide at 37. These are all direct, compliance-based costs.

In the IRFA, the Board noted that the only identifiable compliance cost imposed by the proposed rule for entities not named in a Board proceeding related to reviewing and understanding the substantive changes to the joint-employer standard. 83 FR at 46695. Otherwise, there will be no ''reporting, recordkeeping and other compliance requirements'' for these small entities. See 5 U.S.C. 603(b)(4) & 604(b)(4). The same is true of the final rule. And the final rule imposes no mandatory capital costs, no mandatory costs of modifying existing process, no costs of lost sales or profits, and, as discussed further below, no appreciable changes in market competition. See SBA Guide at 37. Lastly, for small entities not party to Board proceedings, there are no costs associated with taxes or fees and no costs for additional employees dedicated to compliance, as no compliance requirements exist. Id.

Consistent with these principles, the Board rejects the view that it must analyze how indirect employers exercise market power within their contracting arrangements to determine the impact upon small businesses, as suggested by the comments discussed above. The D.C. Circuit has firmly rejected the notion that a regulating agency must analyze every indirect and remote economic impact. See *Mid-Tex Elec. Co-op., Inc.* 773 F.2d at 343 (''Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.''). ''[R]equir[ing] an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.'' *Cement Kiln Recycling Coal.* v. *EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001) (citing *Mid-Tex Elec. Coop.,* 773 F.2d at 343).

But a massive exercise in economic modeling is exactly what the commenter asks the Board to undertake. The rule does not require contracting parties to alter their arrangements now or in the future. If indirect employers with market power drive harder bargains with direct employers than they do now, as the commenter predicts, such outcomes will result from the individual choices of economic actors, not from actions required to comply with the rule.[377]

Notwithstanding the indirect nature of the potential impacts raised by these comments, the Board also disagrees that the rule will upset existing collective-bargaining relationships. The Board believes that the rule will promote labor-management stability because it simplifies the test for joint employment, provides for a more consistent standard, and ends the unpredictable oscillations between differing tests for joint employment.

Furthermore, the Board finds no evidence to support the notion that the rule places small employers at a competitive disadvantage to large employers. Employers of all sizes routinely enter into service contracts, and all have an interest in the applicable joint-employer standard. Those private-sector employers that exercise substantial direct and immediate control over the essential working conditions of employees maintain the same legal responsibilities under the NLRA as they had before the rule. And while the rule does decrease liability and responsibilities of employers that do not exercise such control over those essential terms and conditions of employment, the rule does not intrude upon the contractual liberties of direct and indirect entities. Those employers may negotiate contractual terms of their choosing without the undue burden of a complicated joint-employer standard. Accordingly, this rule would provide no additional leverage for employers of any size to manipulate the supply of and demand for labor, nor interfere with market access.

One commenter argues that ''[u]nder the proposed narrow standard, small businesses that can't afford to

[376] See comment of Law and Economics Professors.

[377] According to the Law and Economics Professors, large indirect employers with substantial market power will have greater leverage to artificially suppress workers' wages and capture these asserted monetary losses experienced by workers affected by the rule. Assuming solely for the sake of argument that this is true, it would not constitute an RFA concern because such transfers would not result in changes to small direct employers' bottom-line profitability.

subcontract out operations will be at a competitive disadvantage to large corporations that can and do outsource.'' [378] The commenter presented no evidence to support this conclusion. And other comments in support of the proposed rule note that there is no empirical evidence supporting the proposition that the new rule will place small businesses at a competitive disadvantage to larger companies just because the latter are better situated to subcontract their operations.[379] Absent empirical evidence, the Board is not persuaded that the new standard impacts outsourcing in this manner.

Many critics of the Board's IRFA contend that the Board did not fully consider the impact of requiring direct employers, including small businesses, to bear the full cost of liability under the NLRA. For example, one commenter contends that, since the rule applies to business relationships where the larger entity contracts for services of the smaller employer, the smaller employer will shoulder all liability under the NLRA.[380] This increased legal exposure, says another commenter, will cause significant harm to small businesses because their large customers or franchisors will not be jointly responsible for bargaining, or jointly and severally liable for unfair labor practices. Many other comments offered the same argument.[381]

In the NPRM, the Board noted that liability and liability insurance costs may increase for small entities because they may no longer have larger entities with which to share the cost of any NLRA backpay remedies ordered in unfair labor practice proceedings. There, the Board further stated that these costs could arguably fall within the SBA Guide's category of ''extra costs associated with the payment of taxes or fees associated with the proposed rule.'' [382] Having reviewed the comments and further considered the subject, the Board no longer believes that these can be characterized as direct compliance costs since these costs are not directly mandated by the rule. Unfair labor practice liability is the cost of not complying with the NLRA, not a cost of compliance with the Board's joint-employer rule.[383]

Even if increased unfair labor practice liability were a direct cost attributable to the rule, those costs would not impact a substantial number of small entities. As the Board explained in the NPRM, only .028% of all 5.9 million business firms in the United States were alleged to be joint employers in Board proceedings from 2013 to 2017. *See* 83 FR at 46693. And since the data counts only allegations, not prosecutions or Board decisions, the number of employers who were actually impacted by the Board's joint-employer standard in recent years is even smaller. Accordingly, the Board is not persuaded that any changes to unfair labor practice liability arising from this rule will impact a substantial number of small entities.

Nor does the Board believe the rule creates the prospect of added liability for direct employers subject to organizing campaigns or engaged in collective bargaining. These direct employers have always been the primary target of union organizing aimed at their workers by virtue of their direct control over payroll and other essential terms and conditions of employment. And as the Board stated in the NPRM, the proposed rule may make it easier for employers to collectively bargain without the complications of fragmented bargaining while providing much greater certainty as to their bargaining obligations. See 83 FR at 46695. As was also pointed out there, for at least 30 years (from no later than 1984 to 2015) evidence of indirect control was typically insufficient to prove that one company was the joint employer of another business's workers. See id. at 46693. And the contrary *Browning-Ferris* standard was under challenge for the entirety of its relatively brief existence and, therefore, shrouded in uncertainty. Given this history, the possibility of disturbing existing labor relations for direct employers is very small. But again, the Board believes that these types of costs, if any, are indirect; they arise from a series of subsequent decisions made by individual actors that are not compelled by the rule itself.

b. Response to Comments Concerning Economic Impact on Small Labor Unions

Several comments assert that the Board should have provided a more detailed consideration of the impact upon labor unions, a specific category of small entities directly impacted by the proposed rule. One commenter, for example, believe that the alleged shift in market power away from direct employers will reduce employment and suppress pay and, in turn, cause a reduction in dues contributions to labor unions.[384] Another commenter similarly predicts that, by removing franchisors and larger indirect employers from reach of the NLRA, the proposed rule might frustrate collective bargaining and, thereby, alienate employees.[385] These comments assert that labor unions will find it more difficult to organize employees and maintain existing membership, which will adversely impact dues income. Thus, one commenter contends that the Board should estimate the additional organizing, communications, and bargaining costs imposed upon small unions.[386] Other labor organizations offer similar comments.[387]

The comments on this issue present no reliable empirical evidence to show that the rule would have a significant economic impact on a substantial number of small entity labor unions. One commenter estimates $1.3 billion in yearly transfers from workers in contract firms and temporary help agencies to employers as a result of the rule, and argues that this $1.3 billion annual transfer will necessarily reduce union dues since dues are often calculated as a percentage of gross pay.[388]

The Board finds this analysis unreliable because it makes several critical and unsubstantiated assumptions.[389] Based on the disparity in pay between union and nonunion employees in the economy as a whole (from other research), the comment first assumes that union-organized workers in contract firms and temporary help

[378] See comment of NELP.

[379] See comments of Chamber of Commerce; IFA.

[380] See comment of IUOE.

[381] See comment of AFL–CIO; see also comments of AFT; SEIU; Congressmen Scott and Senator Murray; EPI; CWA; Texas Rio-Grande Legal Aid.

[382] The Board also observed that it is without the means to quantify such costs. The RFA explains that in providing initial and final regulatory flexibility analyses, ''an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, *or more general descriptive statements if quantification is not practicable or reliable.*'' 5 U.S.C. Sec. 607 (emphasis added).

[383] Likewise, liability insurance is also a cost not mandated by the rule. In response to the NPRM's statement that there may be compliance costs that are unknown to the Board such as potential increases in liability insurance costs, one comment states that on a local level even minimal impacts on insurance rates could hurt small businesses. The commenter did not provide any supporting data, and the Board believes any potential increases in insurance rates would be minimal and not a direct impact of the rule.

[384] See comment of Law and Economics Professors.

[385] See comment of AFL–CIO.

[386] See comment of AFT. Comments offered in support of the proposed rule suggest just the opposite—that the narrower standard could be beneficial to labor unions because they will no longer be expending resources seeking to establish bargaining relationships with larger indirect employers that have thousands of employees.

[387] See, *e.g.,* comments of CWA; AFT.

[388] See comment of Law and Economics Professors. This estimate is based on information from the comment submitted by EPI.

[389] We refer here to the analysis contained in the comment of EPI, on which the Law and Economics Professors rely.

agencies, on average, earn $146 more per week (or $1.3 billion per year on an aggregate basis) than their nonunion counterparts in these same industries. Then, without any empirical evidence, the comment assumes that the new rule would automatically eliminate the higher pay afforded unionized workers and transfer the $1.3 billion to employers. The stated rationale for taking this analytical leap is that ''the narrow proposed joint-employer standard will make collective bargaining among subcontracted and temporary workers nearly impossible.'' [390]

This analysis is flawed. Initially, it assumes that a pay disparity exists between union and nonunion workers in these industries, that the assumed disparity is consistent in magnitude with the disparity that exists in the overall economy, and that the impact of unionization (and not, for example, cost of living differentials) is the sole explanation for any pay disparity. The commenter presented no evidence to support these assumptions. But, most troublesome, the comment assumes that the new rule will cause union workers to *automatically* lose their union wages because, in its view, subcontracted and temporary workers will immediately forego union representation rather than bargain with just their direct employers. There is no reason to accept the proposition that workers in these industries will abandon collective bargaining en masse. At the very least, the comment presented no evidence to back it up. The contract firms and temporary help agencies that directly control employee payrolls and other essential terms and conditions of employment will continue to do so before and after the rule takes effect. Since the relationships between direct employers, their employees, and employee bargaining representatives will remain intact, there is no reason to assume that unionized employees will automatically lose their union wages. The Board, therefore, rejects this comment's prediction and the corollary assertion advanced by another commenter concerning union dues.[391]

In the NPRM, the Board's IRFA assumed for purposes of analysis that a substantial number of small entity labor unions would be impacted by the rule. See 83 FR at 46693. But the Board also stated its belief that the cost of compliance with the rule would be very low, related to reviewing and understanding the substantive changes to the joint employer standard, meaning that there would not be a significant impact on a substantial number of small unions. See 83 FR at 46693 and 46695. In reviewing the comments on this subject, the Board finds no other compliance costs to labor unions, and no evidence showing a significant impact. Labor unions certainly have an interest in the rule, as with any other standard or substantive application of the NLRA, but the negative economic impacts on labor unions raised by the comments are wholly speculative and based upon perceived indirect consequences of the rule.

In fact, the rule leaves undisturbed the statutory duties and bargaining obligations of those employers that directly control payroll and other essential terms and conditions of employment for employees. As such, labor unions will still be able organize the workforces of direct employers, engage in collective bargaining with direct employers, and file unfair labor practices charges against direct employers. And the Board has made clear that the new standard will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability. Hence, the Board finds that there is no reliable evidence to support the proposition that the rule will have a significant impact on union organizing or union membership.

c. Response to Comments Concerning Reporting Requirements

The Board's IRFA stated that the Board did not believe that the rule would impose any new recordkeeping or reporting requirements on small entities. See 83 FR at 46695. One commenter speculates that the rule will actually impose more onerous recordkeeping costs because small businesses will be required to maintain more detailed records of the actual control exercised upon their employees (by those small employers and their larger business partners).[392] The commenter further suggests that the proposed rule may increase litigation costs to small businesses and labor unions because they would have to invest more resources in developing witness-intensive facts in support of a joint-employer theory. But the commenter has not identified cognizable recordkeeping requirements. The RFA defines a ''recordkeeping requirement'' as ''a requirement imposed by an agency on persons to maintain specified records,'' 5 U.S.C. 601(8), and the rule imposes no such requirement. Additionally, these suggested costs are speculative. There is no reason for direct employers to maintain more detailed records of their work with indirect employers as a result of this rule than the records that they already keep in the normal course of business. In fact, the opposite would be more likely given that the rule will foster predictability and consistency in determining joint-employer status and will reduce the incentive for indirect employers to maintain records solely for the purpose of defending themselves against liability premised on the existence of an alleged joint-employer relationship.

Nor is the Board persuaded that any changes to the evidentiary burden placed upon parties to establish a joint-employer relationship will meaningfully affect the cost of litigation. Assuming an increase in litigation costs for a particular case, the commenter makes no effort to analyze the impact in order to assess the significance. The Board also expects that the new rule will decrease the overall amount of litigation involving the joint-employer standard, which would also decrease litigation costs to unions. In any event, beyond familiarization costs, the Board finds that the new rule imposes no additional costs for reporting, recordkeeping, or other direct compliance requirements, and none of the comments present empirical evidence to the contrary.

d. Response to Comments Concerning Duplication, Overlap, and Conflict With Other Rules

Some comments contend that the Board has failed to identify all relevant rules and regulations which may ''duplicate, overlap or conflict with the proposed rule,'' as Section 603(b)(5) of the RFA requires.[393] These comments argue that the proposed rule is discordant with the standard under the FLSA,[394] or inconsistent with the definition of ''employer'' used by other agencies such as the IRS.[395] These contentions stretch ''duplicate, overlap or conflict'' beyond their intended meanings.[396] The rule does not duplicate or overlap with any other rule for identifying joint employers under

[390] See comment of EPI.

[391] See comment of Law and Economics Professors.

[392] See comment of AFL–CIO.

[393] See Comments of AFL–CIO; United Association of Plumbers and Pipe Fitters (Plumbers).

[394] See Comment of AFL–CIO.

[395] See Comment of Plumbers.

[396] According to the SBA Guide, at 40:

Rules are duplicative or overlapping if they are based on the same or similar reasons for the regulation, the same or similar regulatory goals, and if they regulate the same classes of industry. Rules are conflicting when they impose two conflicting regulatory requirements on the same classes of industry.

the NLRA, and, in fact, will be the only joint-employer standard maintained by the NLRB. Nor does the rule expose regulated entities to conflicting obligations, even if other agencies apply different standards for determining when a joint-employment relationship exists under other statutes.

e. Response to Comments Concerning Public Outreach

One commenter argues that the Board failed to conduct sufficient outreach to small businesses, including small local unions, that will be impacted by the rule. 5 U.S.C. 609.[397] But there have been no surprises: the issues addressed by this rule have been the subject of a robust public debate for several years. And in conjunction with the official publication of the NPRM, the Board worked to widely publicize the proposed rule. Upon issuance, the Board published the NPRM and facts sheets on its website. See The Standard for Determining Joint-Employer Status, NLRB, *https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking/standard-determining-joint-employer* (last visited Feb. 11, 2020). On September 13, 2018, the Board issued a press release, which was published on its website and distributed by email to subscribers, notifying the public of the proposed rule. See NLRB Office of Public Affairs, Board Proposes Rule to Change its Joint-Employer Standard (Sept. 13, 2018) *https://www.nlrb.gov/news-outreach/news-story/board-proposes-rule-change-its-joint-employer-standard*. The press release was also shared on social media through the Board's official Twitter and Facebook accounts. The Board members themselves have also discussed the proposed rule at various public speaking engagements, including the annual meeting of the Labor and Employment Law Section of the American Bar Association. Given the foregoing efforts and the thousands of comments the Board received in response to the NPRM, the Board believes that the public has been well informed, the pros and cons of the rule have been thoroughly examined, and the impact of the rule on the full range of business entities governed by it have been brought into sharp focus by individuals, businesses, labor unions, and industry trade groups.

[397] See Comment of AFL–CIO.

3. Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

The Chief Counsel of Advocacy of the Small Business Administration did not submit comments in response to the NPRM.

4. Description and Estimate of Number of Small Entities to Which the Rule Applies

In order to evaluate the impact of the proposed rule, the Board first identified the entire universe of businesses that could be impacted by a change in the joint-employer standard. According to the United States Census Bureau, there were approximately 5.95 million business firms with employees in 2016.[398] Of those, the Census Bureau estimates that about 5,934,985 million were firms with fewer than 500 employees.[399] While this final rule does not apply to employers that do not meet the Board's jurisdictional requirements, the Board does not have the data to determine the number of excluded entities (nor was data received on this particular issue).[400]

[398] ''Establishments'' refer to single location entities—an individual ''firm'' can have one or more establishments in its network. As we did in the NPRM, the Board has used firm-level data for this FRFA because establishment data is not available for certain types of employers discussed below. Census Bureau definitions of ''establishment'' and ''firm'' can be found at *https://www.census.gov/programs-surveys/susb/about/glossary.html* (last visited Feb. 10, 2020).

[399] The U.S. Census Bureau does not specifically define small business, but does break down its data into firms with 500 or more employees and those with fewer than 500 employees. See U.S Department of Commerce, Bureau of Census, 2016 Statistics of U.S. Businesses (SUSB) Annual Data Tables by Establishment Industry (Dec. 2018), *https://www.census.gov/data/tables/2016/econ/susb/2016-susb-annual.html* (from downloaded Excel Table entitled ''U.S., 6-digit NAICS''). Consequently, the 500-employee threshold is commonly used to describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS), which we set forth below.

[400] Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB* v. *Fainblatt,* 306 U.S. 601, 606–607 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of $500,000 or more. *Carolina Supplies & Cement Co.,* 122 NLRB 88 (1959). But shopping center and office building retailers have a lower threshold of $100,000 per year. *Carol Management Corp.,* 133 NLRB 1126 (1961). The Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least $50,000. *Siemons Mailing Service,* 122 NLRB 81 (1959).

The following employers are excluded from the NLRB's jurisdiction by statute:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations. 29 U.S.C. 152(2).
- Employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery. 29 U.S.C. 153(3).
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines. 29 U.S.C. 152(2).

The final rule will only be applied as a matter of law when small businesses are alleged to be joint employers in a Board proceeding. Therefore, the frequency with which the issue comes before the Board is indicative of the number of small entities most directly impacted by the final rule. A review of the Board's representation petitions and unfair labor practice charges provides a basis for estimating the frequency with which the joint-employer issue comes before the Agency. During the five-year period between January 1, 2013, and December 31, 2017, a total of 114,577 representation and unfair labor practice cases were initiated with the Agency. In 1598 of those filings, the representation petition or unfair labor practice charge filed with the Agency asserted a joint-employer relationship between at least two employers.[401] Accounting for repetitively alleged joint-employer relationships in these filings, the Board has identified 823 separate alleged joint-employer relationships involving an estimated 1646 employers.[402] Accordingly, the joint-employer standard most directly impacted approximately .028% of all 5.95 million business firms (including both large and small businesses) over the five-year period. Since a large share of our joint-employer cases involve large employers, the Board expects an even lower percentage of small businesses to be most directly impacted by the Board's application of the rule.

As discussed in the NPRM, irrespective of an Agency proceeding, the rule may be more relevant to certain types of small employers because their

[401] This includes initial representation-case petitions (RC petitions) and unfair labor practice charges (CA cases) filed against employers.

[402] Since a joint-employer relationship requires at least two employers, the Board has estimated the number of employers by multiplying the number of asserted joint-employer relationships by two. Some of these filings assert more than two joint employers; but, on the other hand, some of the same employers are named multiple times in these filings. Additionally, this number is certainly inflated because the data does not reveal those cases where joint-employer status is not in dispute.

business relationships involve the exchange of employees or operational control.[403] 83 FR at 46693. In addition, labor unions, as organizations representing or seeking to represent employees, will be impacted by the Board's change in its joint-employer standard. Thus, the Board identified the following five types of small businesses or entities as those most likely to be impacted by the rule: Contractors/subcontractors, temporary help service suppliers, temporary help service users, franchisees, and labor unions.

(1) Businesses commonly enter into contracts with vendors to receive a wide range of services that may satisfy their primary business objectives or solve discrete problems they are not qualified to address. And there are seemingly unlimited types of vendors who provide these types of contract services. Businesses may also subcontract work to vendors to satisfy their own contractual obligations—an arrangement common to the construction industry. Businesses that contract to receive or provide services often share workspaces and sometimes share control over workers, rendering their relationships subject to application of the Board's joint-employer standard. The Board does not have the means to identify precisely how many businesses are impacted by contracting and subcontracting within the United States, or how many contractors and subcontractors would be small businesses as defined by the SBA.[404]

(2) Temporary help service suppliers (NAICS #561320) are primarily engaged in supplying workers to supplement a client employer's workforce. To be defined as a small business temporary help service supplier by the SBA, the entity must generate receipts of less than $27.5 million annually.[405] In 2012, there were 13,202 temporary service supplier firms in the U.S.[406] Of these business firms, 6,372 had receipts of less than $1,000,000; 3947 had receipts between $1,000,000 and $4,999,999; 1639 had receipts between $5,000,000 and $14,999,999; and 444 had receipts between $15,000,000 and $24,999,999. In aggregate, at least 12,402 temporary help service supplier firms (93.9% of total) are definitely small businesses according to SBA standards. Since the Board cannot determine how many of the 130 business firms with receipts between $25,000,000 and $29,999,999 fall below the $27.5 million annual receipt threshold (nor were any comments submitted on this topic), it will assume that these are small businesses as defined by the SBA. For purposes of this FRFA, as in the NPRM, the Board assumes that 12,532 temporary help service supplier firms (94.9% of total) are small businesses.

(3) Entities that use temporary help services in order to staff their businesses are widespread throughout many types of industries and include both large and small employers. A 2012 survey of business owners by the Census Bureau revealed that at least 266,006 firms obtained staffing from temporary help services in that calendar year.[407] This survey provides the only gauge of employers that obtain staffing from temporary help services, and the Board is without the means to estimate what portion of those are small businesses as defined by the NAICS. Nor were comments received on this topic. For purposes of this FRFA, the Board assumes that all users of temporary services are small businesses.

(4) Franchising is a method of distributing products or services in which a franchisor lends its trademark or trade name and a business system to a franchisee, which pays a royalty and often an initial fee for the right to conduct business under the franchisor's name and system.[408] The nature and degree of control exercised by franchisors over franchisee operations vary widely and may, depending on the circumstances of a particular franchising relationship, render the relationship subject to application of the Board's joint-employer standard. The Board explained in the NPRM that it does not have the means to identify precisely how many franchisees operate within the United States, or how many are small businesses as defined by the SBA. A 2012 survey of business owners by the Census Bureau revealed that at least 507,834 firms operated a portion of their business as a franchise. But only 197,204 of these firms had paid employees.[409] In the Board's view, only franchisees with paid employees are potentially impacted by the joint-employer standard. Of the franchisees with employees, 126,858 (64.3%) had sales receipts totaling less than $1 million. Based on this available data and the SBA's definitions of small businesses, which generally define small businesses as having receipts well over $1 million, the Board assumes that almost two-thirds of franchisees would be defined as small businesses.[410]

(5) Labor unions, as defined by the NLRA, are entities ''in which employees participate and which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'' [411] By defining which employers are joint employers under the NLRA, the final rule impacts labor unions generally, and more directly impacts those labor unions that organize the specific business sectors discussed above. The SBA's ''small business'' standard for ''Labor Unions and Similar Labor Organizations'' (NAICS #813930) is $7.5

[403] The Board acknowledges that there are other types of entities and/or relationships between entities that may be affected by this change in the joint-employer rule. Such relationships include but are not limited to lessor/lessee and parent/subsidiary. However, the Board does not believe that entities involved in these relationships would be impacted more than the entities discussed below.

[404] The only data known to the Board relating to contractor business relationships involve businesses that contract with the federal government. In 2014, the DOL reported that approximately 500,000 federal contractor firms were registered with the General Services Administration. *Establishing a Minimum Wage for Contractors,* 79 FR 60634, 60697. However, the Board is without the means to identify the precise number of firms that actually receive federal contracts or to determine what portion of those are small businesses as defined by the SBA. No comments were received on this topic. Even if these data were available, the Board does not have jurisdiction over government entities, and therefore business relationships between federal contractors and the federal agencies will not be impacted by the Board's joint-employer rule. The business relationships between federal contractors and their subcontractors could be subject to the Board's joint-employer rule. However, the Board also lacks the means for estimating the number of businesses that subcontract with federal contractors or determine what portion of those would be defined as small businesses, and no comments were received on this subject.

[405] 13 CFR 121.201.

[406] The Census Bureau only provides data about receipts in years ending in 2 or 7. The 2017 data has not been published, so the 2012 data is the most recent available information regarding receipts. See U.S Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, NAICS classification #561320, *https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx.*

[407] See U.S. Department of Commerce, Bureau of Census, 2012 Survey of Business Owners, *https://factfinder.census.gov/bkmk/table/1.0/en/SBO/2012/00CSCB46* (last visited Feb. 11, 2020).

[408] See IFA FAQs, found at *https://www.franchise.org/faqs-about-franchising* (last visited Feb. 10, 2020).

[409] See U.S. Department of Commerce, Bureau of Census, 2012 Survey of Business Owners, *https://factfinder.census.gov/bkmk/table/1.0/en/SBO/2012/00CSCB67* (last visited Feb. 11, 2020).

The Board received comments from the IFA and Chamber of Commerce stating that there are 233,000 small business franchisees in the United States. However, the Board is unable to verify the methodology of the underlying study producing that number. Nevertheless, the statistic supplied by these commenters is not far off from Census data showing the total number of franchisees with paid employees in 2012. In the Board's view, Census data is more reliable than a number that is derived from unknown means. Therefore, the Board has decided to rely on the Census's data in performing this analysis.

[410] *See* 13 CFR 121.201.

[411] 29 U.S.C. 152(5).

million in annual receipts.[412] In 2012, there were 13,740 labor union firms in the U.S.[413] Of these firms, 11,245 had receipts of less than $1,000,000, 2022 labor unions had receipts between $1,000,000 and $4,999,999, and 141 had receipts between $5,000,000 and $7,499,999. In aggregate, 13,408 labor union firms (97.6% of total) are small businesses according to SBA standards.

Based on the foregoing, the Board assumes there are 12,532 temporary help supplier firms, 197,204 franchise firms, and 13,408 union firms that are small businesses; and it further assumes that all 266,006 temporary help user firms are small businesses. Therefore, among these four categories of employers that are most interested in the final rule, 489,150 business firms are assumed to be small businesses as defined by the SBA. The Board believes that all of these small businesses, and also those businesses regularly engaged in contracting/subcontracting, have a general interest in the rule and would be impacted by the compliance costs, discussed below, related to reviewing and understanding the rule. But, as previously noted, employers will only be most directly impacted when they are alleged to be a joint employer in a Board proceeding. Given the Board's historic filing data, this number is very small relative to the number of small employers in these five categories.

Throughout the IRFA, the Board requested comments or data that might improve its analysis, 83 FR at 46693, 46695–46696, but no additional data was received regarding the number of small entities to which the rule will apply, other than the comments referenced in n. 409, above.

5. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities.[414] Thus, the RFA requires the Agency to determine the amount of ''reporting, recordkeeping and other compliance requirements'' imposed on small entities.[415] In providing its FRFA, an agency may provide either a quantifiable or numerical description of the effects of a rule or alternatives to the rule, or ''more general descriptive statements if quantification is not practicable or reliable.''[416]

The Board concludes that the final rule imposes no capital costs for equipment needed to meet the regulatory requirements; no costs of modifying existing processes and procedures to comply with the final rule; no lost sales and profits resulting from the final rule; no changes in market competition as a result of the final rule and its impact on small entities or specific submarkets of small entities; and no costs of hiring employees dedicated to compliance with regulatory requirements.[417] The final rule also does not impose any new information collection or reporting requirements on small entities.

Small entities may incur some costs from reviewing the rule in order to understand the substantive changes to the joint-employer standard. The Board estimates that a labor compliance employee at a small employer who undertook to become generally familiar with the proposed changes may take at most one hour to read the summary of the rule in the introductory section of the preamble. It is also possible that a small employer may wish to consult with an attorney, which we estimated to require one hour as well.[418] Using the Bureau of Labor Statistics (BLS)' most recent estimated wage and benefit costs, the Board has assessed these labor costs to be $144.69.[419]

As to the impact on unions, the Board anticipates they may also incur costs from reviewing the rule. The Board believes a union would consult with an attorney, which is estimated to require no more than one hour of attorney time costing $97.08 (see fns. 418 and 419)) because union counsel should already be familiar with the pre-*Browning-Ferris* standard. Additionally, the Board expects that the additional clarity of the final rule will serve to reduce litigation expenses for unions and other small entities.

The Board does not find the estimated $144.69 cost to small employers and the estimated $97.08 cost to unions in order to review and understand the rule to be significant within the meaning of the RFA. In making this finding, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected.[420] Other criteria to be considered are the following:

—Whether the rule will cause long-term insolvency, *i.e.,* regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;

—Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.[421]

The minimal cost to read and understand the rule, $144.69 for small employers and $97.08 for small unions, will not generate any such significant economic impacts.

In the NPRM, the Board requested comments from the public that would shed light on any potential compliance costs, 83 FR 46693, and considered those responses in the comments section above.

6. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

Pursuant to 5 U.S.C. Sec. 604(a)(6), agencies are directed to examine ''why each one of the other significant

[412] 13 CFR 121.201

[413] See U.S Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, NAICS classification #722513, *https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx.*

[414] See *Mid-Tex Elec. Co-op* v. *FERC,* 773 F.2d at 342 (''[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities.'').

[415] See 5 U.S.C. 604(a)(4).

[416] 5 U.S.C. 607.

[417] See SBA Guide at 37.

[418] The Board does not believe that more than one hour of time by each would be necessary to read and understand the rule. This is because the new standard constitutes a return to the pre-*Browning-Ferris* standard, with which most employers are already familiar if relevant to their businesses, and with which most labor-management attorneys are also familiar.

[419] For wage figures, see May 2018 National Occupancy Employment and Wage Estimates, found at *https://www.bls.gov/oes/current/oes_nat.htm.* The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2018, average hourly wages for labor relations specialists (BLS #13–1075) were $34.01. The same figure for a lawyer (BLS # 23–1011) is $69.34. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

[420] See SBA Guide at 18.

[421] Id. at 19.

alternatives to the rule considered by the agency which affect the impact on small entities was rejected.'' In the NPRM, the Board requested comments identifying any other issues and alternatives that it had not considered. See 83 FR 46696.

Several comments suggest that the Board withdraw the proposed rule and leave in place the *Browning-Ferris* joint-employer standard.[422] We considered and rejected this alternative for the reasons stated in Sections V.N and VI, supra. The Board finds it desirable to revise the *Browning-Ferris* standard and to do so through the rulemaking process. Consequently, the Board rejects maintaining the status quo.

One comment proposes two additional alternatives.[423] It suggests that if the Board is to depart from the *Browning-Ferris* standard, the final rule should expand the definition of ''joint employer'' to explicitly include indirect employers ''with sufficient market power in the direct employer's product market or the relevant labor market to determine workers' wages and/or terms and conditions of work.'' The comment further suggests that the Board should, at a minimum, include franchisors that include no-poaching, non-compete, and similar clauses in their franchise agreements, since those provisions restrict labor market competition. The Board discussed these alternatives in Section V.M and V.N and rejected those alternatives for the reasons explained above.

In the NPRM, the Board considered exempting certain small entities. See 83 FR 46696. The Board received no comments on this potential alternative and again rejects this exemption as impractical because such a large percentage of employers and unions would be exempt under the SBA definitions, thereby substantially undermining the purpose of the final rule. Moreover, as this rule often applies to relationships involving a small entity (such as a franchisee) and a large enterprise (such as a franchisor), exemptions for small businesses would decrease the application of the rule to larger businesses as well, potentially undermining the policy behind this rule. Additionally, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it fell within a particular exempt category might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers.[424] As the Supreme Court has noted, ''[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.'' [425] As such, this alternative is contrary to the objectives of this rulemaking and of the NLRA.

None of the alternatives considered accomplished the objectives of issuing this rule while minimizing costs on small businesses. Accordingly, the Board believes that promulgating this final rule is the best regulatory course of action.

B. Paperwork Reduction Act

In the NPRM, the Board explained that the proposed rule would not impose any information collection requirements and accordingly, the proposed rule is not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521. See 83 FR 46696. No substantive comments were received relevant to the Board's analysis of its obligations under the PRA.

C. Congressional Review Act

In the NPRM, the Board explained that the provisions of the proposed rule were substantive and that the Board would submit this rule and required accompanying information to the Senate, the House of Representatives, and the Comptroller General as required by the Small Business Regulatory Enforcement Fairness Act (Congressional Review Act or CRA), 5 U.S.C. 801–808. Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs designated this rule as a major rule. Accordingly, the rule will become effective April 27, 2020.

Final Rule

This rule is published as a final rule.

List of Subjects in 29 CFR Part 103

Jurisdictional standards, Election procedures, Appropriate bargaining units, Joint Employers, Remedial Orders.

For the reasons stated in the preamble, the National Labor Relations Board amends 29 CFR part 103 as follows:

PART 103—OTHER RULES

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

■ 2. Add subpart D, consisting of § 103.40, to read as follows:

Subpart D—Joint Employers

§ 103.40 Joint Employers.

(a) An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment. To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees. Evidence of the entity's indirect control over essential terms and conditions of employment of another employer's employees, the entity's contractually reserved but never exercised authority over the essential terms and conditions of employment of another employer's employees, or the entity's control over mandatory subjects of bargaining other than the essential terms and conditions of employment is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment. Joint-employer status must be determined on the totality of the relevant facts in each particular employment setting. The party asserting that an entity is a joint employer has the burden of proof.

(b) ''Essential terms and conditions of employment'' means wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

(c) ''Direct and Immediate Control'' means the following with respect to each respective essential employment term or condition:

(1) *Wages.* An entity exercises direct and immediate control over wages if it actually determines the wage rates, salary or other rate of pay that is paid to another employer's individual employees or job classifications. An entity does not exercise direct and immediate control over wages by

[422] See comments of Law and Economics Professors; AFL–CIO; CWA.

[423] See comment of Law and Economics Professors.

[424] However, there are standards that prevent the Board from asserting authority over entities that fall below certain jurisdictional thresholds. This means that extremely small entities outside of the Board's jurisdiction will not be affected by the final rule. See 29 CFR 104.204.

[425] *NLRB* v. *Nat. Gas Util. Dist. of Hawkins Cty., Tenn.,* 402 U.S. 600, 603–604 (1971) (quotation omitted).

entering into a cost-plus contract (with or without a maximum reimbursable wage rate).

(2) *Benefits.* An entity exercises direct and immediate control over benefits if it actually determines the fringe benefits to be provided or offered to another employer's employees. This would include selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided to another employer's employees. An entity does not exercise direct and immediate control over benefits by permitting another employer, under an arm's-length contract, to participate in its benefit plans.

(3) *Hours of work.* An entity exercises direct and immediate control over hours of work if it actually determines work schedules or the work hours, including overtime, of another employer's employees. An entity does not exercise direct and immediate control over hours of work by establishing an enterprise's operating hours or when it needs the services provided by another employer.

(4) *Hiring.* An entity exercises direct and immediate control over hiring if it actually determines which particular employees will be hired and which employees will not. An entity does not exercise direct and immediate control over hiring by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation.

(5) *Discharge.* An entity exercises direct and immediate control over discharge if it actually decides to terminate the employment of another employer's employee. An entity does not exercise direct and immediate control over discharge by bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision, by expressing a negative opinion of another employer's employee, by refusing to allow another employer's employee to continue performing work under a contract, or by setting minimal standards of performance or conduct, such as those required by government regulation.

(6) *Discipline.* An entity exercises direct and immediate control over discipline if it actually decides to suspend or otherwise discipline another employer's employee. An entity does not exercise direct and immediate control over discipline by bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision, by expressing a negative opinion of another employer's employee, or by refusing to allow another employer's employee to access its premises or perform work under a contract.

(7) *Supervision.* An entity exercises direct and immediate control over supervision by actually instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals. An entity does not exercise direct and immediate control over supervision when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it.

(8) *Direction.* An entity exercises direct and immediate control over direction by assigning particular employees their individual work schedules, positions, and tasks. An entity does not exercise direct and immediate control over direction by setting schedules for completion of a project or by describing the work to be accomplished on a project.

(d) ''Substantial direct and immediate control'' means direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. Such control is not ''substantial'' if only exercised on a sporadic, isolated, or de minimis basis.

(e) ''Indirect control'' means indirect control over essential terms and conditions of employment of another employer's employees but not control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract.

(f) ''Contractually reserved authority over essential terms and conditions of employment'' means the authority that an entity reserves to itself, under the terms of a contract with another employer, over the essential terms and conditions of employment of that other employer's employees, but that has never been exercised.

Dated: February 14, 2020.

Roxanne L. Rothschild,

Executive Secretary.

[FR Doc. 2020–03373 Filed 2–25–20; 8:45 am]

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Black Pinesnake; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2014–0065; 4500090023]

RIN 1018–BD52

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Black Pinesnake

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the black pinesnake (*Pituophis melanoleucus lodingi*) under the Endangered Species Act (Act). In total, approximately 324,679 acres (131,393 hectares) in Forrest, George, Greene, Harrison, Jones, Marion, Perry, Stone, and Wayne Counties, Mississippi, and in Clarke County, Alabama, fall within the boundaries of the critical habitat designation. The effect of this regulation is to designate critical habitat for the black pinesnake under the Act.

DATES: This rule becomes effective on March 27, 2020.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2014–0065 and at *http://www.fws.gov/mississippiES/*. Comments and materials we received, as well as some supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov*. All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Mississippi ES Field Office, 6578 Dogwood View Parkway, Jackson, MS; telephone 601–321–1122.

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2014–0065, and at the Mississippi Field Office at *http://www.fws.gov/mississippiES/* (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we developed for this critical habitat designation will also be available at the Fish and Wildlife Service website and Field Office set out above, and may also be included in the preamble and at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Stephen Ricks, Field Supervisor, U.S. Fish and Wildlife Service, Mississippi Fish and Wildlife Office, 6578 Dogwood View Parkway, Jackson, MS; telephone 601–321–1122.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. This document is a final rule to designate critical habitat for the black pinesnake. Under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), if we determine that a species species is endangered or threatened, we must designate critical habitat to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule. We, the U.S. Fish and Wildlife Service (Service), listed the black pinesnake as a threatened subspecies, with a rule issued under section 4(d) of the Act, on October 6, 2015. On March 11, 2015, we published in the **Federal Register** a proposed critical habitat designation for the black pinesnake (80 FR 12846). Section 4(b)(2) of the Act states that the Secretary shall designate critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat.

The critical habitat areas we are designating in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for the black pinesnake. We are designating a total of approximately 324,679 acres (ac) (131,393 hectares (ha)) in eight units as critical habitat in Alabama and Mississippi.

Peer review and public comment. We sought comments from independent specialists to ensure that our designation is based on scientifically sound data and analyses. We obtained opinions from six knowledgeable individuals with scientific expertise to review our technical assumptions, analysis, and whether or not we had used the best scientific data available. These peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve this final rule. Information we received from peer review is incorporated in this final designation of critical habitat. We also considered all comments and information received from the public during the comment period for the proposed designation of critical habitat.

Previous Federal Actions

On October 7, 2014 (79 FR 60406), we published a proposed rule to list the black pinesnake as threatened. On, March 11, 2015 (80 FR 12846), we published a proposed rule to designate critical habitat for the subspecies. On October 6, 2015 (80 FR 60468), we published the final listing rule, which added the black pinesnake to the List of Endangered and Threatened Wildlife in title 50 of the Code of Federal Regulations at 50 CFR 17.11(h). On October 11, 2018 (83 FR 51418), we reopened the public comment period on the proposed critical habitat designation and associated draft economic analysis to revise two units proposed in the original designation and to announce public informational meetings on the proposed designation.

We published public notices in the Hattiesburg American on October 18, 2018, and the Clarke County Democrat on October 18, 2018. We held the two public informational meetings within the subspecies' range with one in Hattiesburg, Mississippi, on October 22, 2018, and a second one on October 24, 2018 in Thomasville, Alabama.

All other previous Federal actions for the black pinesnake are described in one or more of the documents discussed above.

Summary of Comments and Recommendations

We requested written comments from the public on the initial and revised proposed designation of critical habitat for the black pinesnake during two comment periods. The first comment period, associated with the proposed critical habitat designation and notification of the availability of the associated draft economic analysis (80 FR 12846), opened on March 11, 2015, and closed on May 11, 2015. The second comment period, announcing a revised proposed designation (83 FR 51418), opened on October 11, 2018 and closed on November 13, 2018. We contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties, and invited them to comment on the proposed critical habitat designation and draft economic analysis during these comment periods. We also received comments during our two informational meetings held during the last open comment period in October 2018 in

addition to addressing landowners' questions and concerns.

During the first comment period, we received 184 written comments directly addressing the proposed critical habitat designation or the draft economic analysis. During the second comment period, we received 15 comments directly addressing the revised proposed critical habitat designation or the draft economic analysis. All substantive information provided during comment periods either has been incorporated directly into this final determination or is addressed in our responses below.

Peer Review

In accordance with our peer review policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we solicited expert opinions from six knowledgeable individuals with scientific expertise that included familiarity with this or related subspecies, the geographic region in which the subspecies occurs, and conservation biology principles. We received responses from all six of the peer reviewers.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding critical habitat for the black pinesnake. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

Comment 1: Peer reviewers provided additional information and suggestions for clarifying and improving the accuracy of the information in the ''Physical or Biological Features (PBFs)'' and ''Criteria Used to Identify Critical Habitat'' sections of the proposed rule.

Our Response: We appreciate these corrections and suggestions and have made changes to this final rule to reflect the peer reviewers' input. The significant changes are listed as part of the ''Summary of Changes from Revised Proposed Rule,'' below.

Comment 2: Two peer reviewers stated that our characterization of ''open canopy'' as ≤70 percent canopy coverage in our discussion of target suitable black pinesnake habitat, under the ''Physical or Biological Features'' section, and as a component of PBF 1, was not appropriate. They stated that studies have shown that pinesnakes more frequently use areas with <50 percent canopy coverage, which are more conducive to the production of an ''abundant, diverse native groundcover.''

Our Response: The literature varies as to what exact percentage of canopy closure constitutes an open canopy. Therefore, we have removed any reference to a specific value for canopy coverage that is characteristic of optimal habitat for the black pinesnake in this final rule. We have focused instead on the habitat metrics of percent mid-story cover and percent herbaceous groundcover, which are the more important indicators of optimal habitat for this subspecies and are the by-products provided by an appropriately open-canopied forest, and revised our characterization of PBF 1 accordingly.

Comment 3: Several peer reviewers questioned our usage of an elevation threshold as a PBF necessary for the conservation of the black pinesnake.

Our Response: We agree with the reviewers that, while almost all locations of black pinesnakes (96%) were found to be above 150-ft elevation during radio-telemetry studies (see data sources in ''Physical or Biological Features'' section), this should be interpreted as an observation rather than a habitat requirement necessary for the conservation of the subspecies. Thus, the elevation threshold has been removed as a PBF in our final designation.

Comment 4: Two peer reviewers and several public commenters stated that the 1990 record date for determining unit occupancy was questionable, and another public commenter stated that there were too few observations in two units to conclude that the areas still supported a population. One of these peer reviewers suggested the date of his most recent study (1998) was more appropriate than 1990. Conversely, other peer reviewers stated that not having records for a number of years in an area was not sufficient evidence to support the claim that black pinesnakes have been extirpated from there if some suitable habitat still exists.

Our Response: As we discussed in ''Population Estimates and Status'' section, and also in our response to Comment 6 in our final listing rule published in the **Federal Register** on October 6, 2015 (80 FR 60468), we used records dating back to the 1990s, which corresponds to the information used by black pinesnake researchers to evaluate habitat suitability and site occupancy across the range. Because comprehensive surveys of these areas are rare, we included this same dataset to meet the requirement of using the best scientific data available; using records of pinesnakes found only after 1998 would not meet this standard because they did not have a corresponding habitat suitability analysis that was key to our delineating critical habitat. These records and the researchers' reports, combined with new records and our more recent habitat analysis, represent our most informed evaluation of these areas, specifically since there have not been recent range-wide trapping efforts targeting this subspecies.

We are not suggesting that the individual pinesnakes documented in the 1990s are the same ones occupying the units today; a population persisting at the site would likely be made up of the progeny of the pinesnakes documented previously. For our initial analysis of all potential critical habitat areas, the pinesnake records were the primary indicator that the area could support the subspecies, followed by a thorough analysis using updated GIS habitat information of the units. If we found that sufficient forested habitat was still present and available in the vicinity of where the pinesnakes had been documented, we determined that there was a reasonable likelihood that black pinesnake populations still occur in those areas. Evidence supporting this line of reasoning is a record of a black pinesnake documented in July of 2015 in Unit 7 (Jones Branch, Clarke County, Alabama), verifying that pinesnakes still persist on the site even though our other records (four) were from the mid-1990s and surveys in 2008–2009 (Barbour 2009, p. 12) had failed to locate pinesnakes at this site with the notation that suitable habitat existed.

Comment 5: Two peer reviewers suggested we provide further discussion on why all currently known locations were not designated critical habitat and why the eight critical habitat units are considered suitable and sufficient for the subspecies' conservation.

Our Response: We began our analysis in areas where at least two black pinesnakes had been documented within close proximity to one another (detailed in ''Criteria Used to Identify Critical Habitat'' section, below), since these areas have the highest potential of containing a population. Coupled with an examination of available habitat, we believe this focused analysis resulted in the appropriate number, size, and proximity of critical habitat units necessary for the long-term conservation of the subspecies. Several areas with black pinesnake records were located in areas with only small amounts of available habitat, lacking the PBFs essential for the long-term persistence of the subspecies, primarily from fragmentation due to urbanization or

other incompatible land uses. In these areas, where we established that suitable habitat had disappeared in proximity to pinesnake locality records, we concluded that the area could no longer support a population of black pinesnakes in the long term and, therefore, would not be important for its recovery. We conclude that we can assure the species' long-term conservation with focused recovery and protection efforts in the eight critical habitat units designated.

Comment 6: Two peer reviewers stressed the importance of habitat corridors and their contribution to recovery, and one peer reviewer suggested that connectivity corridors between units be included as critical habitat whenever possible, specifically stating the need for such corridors between Units 3 and 4b and Units 1 and 2.

Our Response: We acknowledge that connectivity between populations is a key component of maintaining lasting conservation for many species, and it is our assessment that some of the larger critical habitat units contain enough area where several viable populations of black pinesnakes could persist and be connected. It is important to identify areas where migration between populations may be possible for exchange of genetic material. Our methodology for choosing and delineating critical habitat units (see our response to *Comment 5* above and the ''Criteria Used to Identify Critical Habitat'' section, below) is based on an assessment of areas occupied by black pinesnakes, with sufficient habitat available in a forested condition to maintain a viable population, based on our analysis of PBFs, population structure, and reserve area requirements. Each critical habitat unit separately is capable of supporting a viable population of black pinesnakes, and the unit boundaries were limited by both natural and manmade barriers such as rivers and highways as well as presence of essential habitat features. Connectivity between areas with known pinesnake records was maximized where these PBFs persisted, and delineation of critical habitat unit outer boundaries represents where such features were no longer found.

Comment 7: Four peer reviewers and several others commented on our discussion relating to the viability of black pinesnake populations and the subsequent calculation of a minimum reserve area used in our critical habitat determination. Two of these peer reviewers disagreed with our use of non-overlapping activity ranges in our minimum reserve area estimate, based on our statement of territoriality in black pinesnakes, which they disputed. Despite comments on our lack of viability analysis information, two peer reviewers stated they supported our minimum reserve area estimate, saying that it was as precise as could be given our limited information, but that our recommendation of 5,000 acres should definitely be considered a minimum size threshold.

Our Response: We acknowledge that information such as species viability indices related to abundance and reproductive success would contribute to refining minimum reserve area, but such information is lacking for this subspecies. Under the Act, we are charged with using the best available scientific data in designation of critical habitat. However, in response to comments, we reevaluated our estimate of the minimum reserve area for the black pinesnake by conducting additional literature review and analysis and have provided additional discussion (see ''Space for Individual and Population Growth and for Normal Behavior'' section, below). Upon further investigation of territoriality in black pinesnakes, we concluded that it had not been proven conclusively; therefore, we adjusted our models to calculate minimum reserve area estimates using partially overlapping polygons instead of non-overlapping polygons.

We corroborated our value of minimum reserve area (discussed in ''Criteria Used To Identify Critical Habitat'', below) using a population size of 50 individuals, as this number has been previously proposed as a minimum effective population size for many vertebrate species (Franklin 1980, p. 147). Similar to a method used for Florida pinesnakes (*P.m. mugitus*) by Miller (2008, pp. 27–28), we digitized 50 150-acre (40.5-ha) polygons, and partially overlapped them to get a total reserve area. The 150-acre size represents black pinesnake mean home ranges described in the literature (Duran 1998a, p. 19; Yager *et al.* 2005, p. 27). This exercise using varying degrees of overlap between the home range polygons yielded total estimates between 4,500 to 6,000 ac (1,619 to 2,428 ha), thereby supporting our initial estimate of a 5,000-acre minimum reserve area.

Comment 8: One peer reviewer requested that the activity of stumping be included in our adverse modification standard language as an activity that significantly alters the suitability of habitat for the black pinesnake and should prompt consultation with the Service. Pine stump holes have been specifically highlighted as one of the principal PBFs necessary for the conservation of the subspecies; therefore, the importance of protecting them cannot be overstated. The adverse modification standard in our proposed rule mentions activities that would significantly alter the suitability of pinesnake habitat, including silvicultural activities that involve ground disturbance, but the peer reviewer felt the list of activities should be more specific.

Our Response: As we discussed in our final listing rule published in the **Federal Register** on October 6, 2015 (80 FR 60468), we replaced ''activities causing ground disturbance'' with a more focused statement of those ''activities causing significant subsurface disturbance'' under the possible section 9 violations, and for consistency have made the same change to our list of possible activities that may result in adverse modification in this final critical habitat rule. There are several types of activities that can be termed ''stumping'' and not all would necessarily cause significant subsurface disturbance. One of these is a practice of harvesting green pine stumps, whereby several lateral roots are cut prior to the stump being extracted. In this particular activity, those lateral roots are left intact to eventually rot or burn out to become tunnels and potential pinesnake refugia. However, other types of stumping involving whole root ball removal (where all roots are forcibly extracted) would meet the definition of significant subsurface disturbance. Therefore, this type of activity will be clarified and added to the adverse modification section below.

Comment 9: Two peer reviewers stated that within our ''Criteria Used to Identify Critical Habitat'' section, the 100-meter buffer placed along all Class 1 and 2 roads to help delineate critical habitat units was arbitrary and not based on any literature pertaining to the distance where effects from roads impact snake populations.

Our Response: The 100-meter buffer given to all Class 1 and 2 roads in our designation of critical habitat units was not based on the maximum distance where impacts from roads affect black pinesnake populations (see ''Criteria Used To Identify Critical Habitat'' section). The roads themselves were deleted from the critical habitat polygons the same way attempts were made to avoid other urban structures, and a buffer was placed on either side of these major roads large enough to encompass most rights-of-way, commercial businesses, and residences. Through spatial analysis and aerial imagery this distance was

approximately 100 meters, so that value was used as a buffer around roads for the purpose of delineating the unit polygons and ensuring that the lands that we included in critical habitat did not include areas that we determined did not contribute to the conservation of the species.

Federal Agency Comments

Comment 10: The Department of Defense, Army National Guard (DoD) opposed designation of critical habitat in areas within the Camp Shelby Joint Forces Training Center (hereafter Camp Shelby) in Forrest, George, and Perry Counties, Mississippi. DoD is concerned that the designation may delay or impair the ability of the Army to conduct effective training (due to the requirement for additional consultation); may require restrictions for training exercises; and will subsequently limit the installation's utility for military training. Currently, most of Camp Shelby is designated for military use under a Special Use Permit (permit) from the U.S. Forest Service (USFS), and DoD is requesting that all of Camp Shelby be excluded from black pinesnake critical habitat, as authorized by section 4(b)(2) of the Act, due to significant national security concerns.

Our Response: The Department of Defense has an permit from USFS to conduct military exercises within critical habitat Unit 3 on the De Soto National Forest in Forrest, George, and Perry Counties, Mississippi. Lands within this permit area that overlap with Unit 3 and are owned by the State of Mississippi or DoD (4,054 ac [1,641 ha]) are exempted from critical habitat designation due to their inclusion in Camp Shelby's Integrated Natural Resources Management Plan (INRMP; see *Application of Section 4(a)(3) of the Act* under Exemptions, below). Additionally, in the proposed critical habitat rule (80 FR 12846 published in the **Federal Register** on March 11, 2015), we proposed excluding the area known as the Camp Shelby Impact Area (4,647 ac [1,880 ha]) under section 4(b)(2) of the Act. Further assessment of the area has expanded the section excluded under section 4(b)(2) to include not just the Impact Area, but also the lands surrounding it, known as the Camp Shelby Impact Area Buffer Zone (total acreage of 14,862 ac [6,014 ha]) (see *Exclusions Based on Impacts on National Security and Homeland Security* under Exclusions, below).

The lands in this zone encompass a large percentage of the artillery ranges on the installation; therefore, they are prone to regular range fires that maintain it as highly suitable black pinesnake habitat. While evaluating this area, we determined that because it would continue to be maintained as suitable pinesnake habitat due to the range fires, and because the Service has discretion in removing lands from critical habitat when designating them would impact national security and homeland security, that the removal of these lands was appropriate. Some of these lands overlap with those exempted under section 4(a)(3), so the total area in Unit 3 on Camp Shelby that is either excluded or exempted from critical habitat designation with this final critical habitat designation is 18,901 ac (7,649 ha). As to the remaining area, the Service does not expect critical habitat to affect ongoing military operations over and above the existing protections resulting from the listing of the subspecies.

Because the entire critical habitat unit is considered occupied by the black pinesnake, the Service anticipates that impacts from critical habitat will be limited to administrative impacts (IEc 2014). Any additional incremental impacts to military activities are not expected because areas we designated as black pinesnake critical habitat areas on Camp Shelby are within the same habitats shared by other listed species (*i.e.,* gopher tortoise, dusky gopher frog (critical habitat), red-cockaded woodpecker). As discussed in the economic analysis, the Service anticipates only 2 formal consultations and fewer than 13 informal consultations on military operations at Camp Shelby that will consider pinesnake critical habitat. The results of the economic analysis further supports that the additional per-consultation administrative effort is likely to be minor for both formal and informal consultations; therefore, these efforts are unlikely to result in time delays.

Comments From States

Section 4(b)(5)(A)(ii) of the Act requires the Service to give actual notice of any designation of lands that are considered to be critical habitat to the appropriate agency of each State in which the species is believed to occur, and invite each such agency to comment on the proposed regulation. Only the Louisiana Department of Wildlife and Fisheries (LDWF) provided comment specifically on the proposed critical habitat designation, stating that it did not support designation of critical habitat in Louisiana due to a lack of current occurrence data for the black pinesnake, which was consistent with our proposed designation.

Public Comments

General Comments Issue 1: Procedural and Legal Issues

Comment 11: Several commenters stated that the Service should not designate critical habitat on private lands.

Our Response: According to section 4(a)(3)(A) of the Act, the Secretary of the Interior shall, to the maximum extent prudent and determinable, concurrently with making a determination that a species is an endangered species or a threatened species, designate critical habitat for that species. As directed by the Act, we proposed as critical habitat those areas occupied by the species at the time of listing and that contain the physical or biological features essential for the conservation of the species, which may require special management considerations or protection.

Although the Act does not provide for any distinction between landownerships in those areas that meet the definition of critical habitat, it does allow the Secretary to exclude specific areas from the final critical habitat designation if the benefits of excluding it outweigh the benefits of including it in critical habitat, unless that exclusion would result in the extinction of the species. In this instance, no private lands were excluded from the designation, although lands on Camp Shelby were excluded due to national security impacts.

The designation of critical habitat on private land has no impact on individual landowner activities unless they involve Federal funding, permits or activities. Critical habitat designation does not affect land ownership or establish a refuge, reserve, preserve or other conservation area. Critical habitat designation informs landowners and the public of which specific areas are important to black pinesnake conservation and recovery, but landowners will not be required to convert their land to longleaf pine forests or to conduct black pinesnake monitoring as a result of this designation.

Comment 12: A private forestry association stated that critical habitat designation was unnecessary because the section 4(d) rule provided for the protection of the black pinesnake.

Our Response: When a species is federally listed, protections go into effect, both for the species and its habitat. In 2015, the Service listed the black pinesnake with a 4(d) rule, which exempted certain management activities from take prohibitions under section 9 of the Act that provided an overall conservation benefit to the species [refer

to our October 6, 2015, final listing rule (80 FR 60468)]. However, the Service has an additional obligation under the Act to designate critical habitat for a listed species when prudent and determinable. Critical habitat designation focuses on the overall recovery needs of the species and provides additional protection to a species, as Federal agencies are required to ensure that projects they authorize, fund, or undertake do not adversely modify or destroy critical habitat. Our economic analysis (IEc 2014a), in concluding that the incremental impacts from critical habitat designation were minimal, cited the extensive baseline protection provided to the species based on its listing and presence in the units. However, critical habitat provides other benefits to the species, including serving to educate the public of the potential conservation value of an area, which aids in focusing and promoting conservation efforts.

Comment 13: Several commented that the Service failed to contact all landowners potentially affected by the proposed designation of critical habitat.

Our Response: The Act requires that we publish the proposed regulation in the **Federal Register**, give actual notice of the proposed regulation to each affected State and county (*i.e.,* those in which the species is believed to occur) and appropriate professional organizations, and publish a summary of the proposed regulation in a newspaper of general circulation in each area of the country where the species is believed to occur. We attempted to ensure that as many people as possible would be aware of the proposed critical habitat designation and draft economic analysis by issuing press releases to major media in the affected area, submitting newspaper notices for publication within areas of proposed critical habitat, and directly notifying affected State and Federal agencies, environmental groups, State Governors, Federal and State elected officials, county commissions, academia, and interested parties. Additionally, we opened a second comment period, for which we sent out notifications to commenters from the first comment period that supplied their contact information. We went further in our communication efforts by announcing and holding two public informational meetings on our proposed critical habitat designation in areas central to the proposed critical habitat lands. By these actions, we have complied with or exceeded all of the notification requirements of the Act and the Administrative Procedure Act (5 U.S.C. subchapter II).

General Comments Issue 2: Science

Comment 14: A number of commenters stated that there was adequate critical habitat being designated in Mississippi on the De Soto National Forest (Federal lands); therefore, it was not necessary to have any critical habitat units on private lands in Clarke County, Alabama.

Our Response: As discussed in response to *Comment 11* above, the statutory definition of critical habitat does not include considering land ownership. Critical habitat is a conservation tool, whose measures contribute to reaching recovery until the point at which the measures provided under the Act are no longer necessary. This is a broader standard than simply survival and requires the Service to designate critical habitat that will support recovery of the species. De Soto National Forest (DNF) represents only one area within the distribution of the black pinesnake. DNF has the most robust populations and is crucial to the persistence of the species; however, recovery of the species will require populations of black pinesnakes distributed across the species' range, representative of its genetic variability. The location of populations across a broader range will provide for population expansion and also serve as a buffer in the event of local catastrophic events (also see *Comment 5,* above). A critical habitat designation helps to protect the areas, under various land ownerships, necessary to conserve a species. Critical habitat has value in requiring the Service to analyze and present more detailed information about the specific features of habitat that a species needs than is required for listing, thereby increasing knowledge to share with Federal agencies—and, in turn, increasing their effectiveness to conserve a listed species.

Comment 15: Several commenters stated that a recovery plan was needed prior to designating critical habitat, and in the absence of a recovery plan, the benefits of the critical habitat designation were questionable.

Our Response: During the process of developing a recovery plan, as required by section 4(f) of the Act, the Service determines the threshold that must be met to establish when a species is no longer ''endangered'' or ''threatened.'' The Service has not yet completed a recovery plan for the black pinesnake, and thus, this threshold has not been identified. However, the Act does not require that recovery criteria be established as a precondition to designating critical habitat. Section 3(5)(A)(i) of the Act defines the term ''critical habitat'' as the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. Thus, the Act directs us to designate critical habitat at the time that a species is listed, to the extent prudent and determinable, and does not allow for us to postpone such action until a recovery plan can be developed, which usually occurs witin a few years of listing. The Act does not provide additional guidance on how to determine what habitat is essential for the conservation of the species, nor does it require a minimum population and habitat viability analysis for critical habitat designation. In this case, the Secretary has discretion in determining what is essential for the conservation of a species based on the best available information. The identification of multiple populations known to be occupied at the time of listing is critical to protect the species from extinction and provide for the species' eventual recovery. Therefore, the Service believes that all the areas designated as critical habitat meet the definition under section 3(5)(A) of the Act. If the Service gains knowledge of additional areas that meet the definition of critical habitat, then under section 4(a)(3)(A)(ii) of the Act, the Secretary may revise the designation, as appropriate. The Service has articulated a basis for designating each unit as critical habitat under the individual unit descriptions in the ''Final Critical Habitat Designation'' section below.

General Comments Issue 3: Private Land Issues

Comment 16: A number of commenters stated that critical habitat designation on private land would prevent timber management on those lands or dictate that they be managed in a way to benefit the black pinesnake. One commenter specified that they will now need to undertake modified management practices (*e.g.,* elimination of clearcutting on ridgetops, conversion to longleaf pine forest, and adjustments to stocking levels). Another commenter stated that designation on private lands would prohibit beneficial practices to improve wildlife and natural resources, such as invasive species control and feral hog control.

Our Response: When prudent, the Service is required to designate critical habitat under the Act; however, the Act does not authorize the Service to regulate private actions on private lands

or confiscate private property as a result of critical habitat designation (see response to *Comment 11,* above). We acknowledge that special management consideration or protection is needed to maintain the PBFs; however, critical habitat designation does not require proactive implementation of restoration, recovery, enhancement or other special management measures by private landowners; in other words, it does not shift the responsibility of recovery to the private landowner. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat. Management to control invasive species is expected to improve habitat for the black pinesnake and, therefore, would be encouraged within designated critical habitat and throughout the range of the subspecies, but would not be required.

Comment 17: Several commenters stated that proposed critical habitat Units 7 and 8 in Clarke County, Alabama, do not meet the criteria established for critical habitat since they do not contain all the PBFs described in the rule. Commenters stated that much of the area in both units had been converted to loblolly pine at higher densities to increase economic gain, thus creating conditions that do not support black pinesnakes. One commenter stated that Unit 8 also does not have the correct soils as described in PBF 3. Another commenter requested that several hundred acres of land under Unit 2 be removed due to the presence of wetlands and its management for pine production.

Our Response: During the process of delineating critical habitat, the Service assesses habitat to determine if it is essential for the conservation of a listed species. In order to meet the criteria of ''essential,'' the Service describes the PBFs such as those needed for normal feeding, breeding, sheltering, and population growth. Following publication of the proposed critical habitat rule, and a review of comments, we revised the PBFs slightly (see *Comments 1* and *2*). Only one PBF needs to be found in a specific area for that area to be considered critical habitat; however, we have determined that all PBFs, as currently described, are present in all designated units (see discussions under ''Final Critical Habitat Designation''). This does not mean that we expect every acre within a unit to be characterized as having all the PBFs consistently throughout. Portions of the critical habitat units that do not have the total PBF requirements for black pinesnakes (*e.g.,* wetlands and urban areas), although they are within a critical habitat polygon, are not considered critical habitat for the subspecies. Our analysis of soil maps, assessments in monitoring reports (Barbour 2009, p. 13), and soil suitability reports (Service 2012) support our conclusion that Unit 8 contains suitable soils described in PBF3.

Comment 18: Several commenters suggest the designation of critical habitat creates disincentives for landowners to manage their forest stands in a manner beneficial to the species (*e.g.,* by restoring and conserving longleaf pine forests). The reasoning behind this is the idea that by ''creating'' unsuitable habitat a landowner would not have to contend with any perceived regulatory issues with the Federal Government. As an example of this effect, one organization notes past experience with the listing of the red-cockaded woodpecker (RCW), where landowners shortened stand rotations in order to avoid providing favorable habitat for the species. As further evidence of the disincentivizing effect of regulatory interventions, a second organization states that since 2017, the number of longleaf pine acres planted annually throughout Mississippi as part of a State-run cost-share program has decreased by more than half compared to the previous 5-year average, and that this decrease was directly attributable to the listing of the black pinesnake.

Our Response: We are aware of the changes in land management practices that resulted from the listing of the RCW. Because critical habitat has not been designated for the RCW, these effects were based solely on the decision to list the species under the Act. In light of these continued perceptions, we feel it is important to reiterate that, in the absence of a Federal nexus, the designation of critical habitat has no direct regulatory impact on private landowners. As discussed in the response to *Comment 16* above, critical habitat designation does not mean a private landowner has a new obligation for recovery of that species, nor does it mean that it must maintain habitat suitable for that species. Many landowners who have economic objectives as a higher priority than wildlife objectives probably do not have much suitable habitat for black pinesnakes anyway; however, if they choose to manage for the species there are cost-share programs available that assist with managing for the native ecosystem (longleaf pine forest), as well as Safe Harbor Agreements with the Service.

Referencing the latter part of the comment about a decrease in longleaf pine acres planted, there have been several fluctuations in numbers of acres in longleaf pine planted on private lands since the black pinesnake was listed under the Act in 2015 (80 FR 60486). There was a 125% increase in longleaf establishment acres on private lands in Mississippi in the year following the pinesnake being listed (2016 versus 2015; America's Longleaf Restoration Initiative), and although acreages reported in 2017 and 2018 were back down close to those reported in 2015, there are many variables affecting fluctuations in acreage of longleaf pine trees planted year-to-year. These variables include saturated markets, reduced capacity of various agencies (*e.g.,* reduced workforce or resources), and re-focusing agency resources on management (*e.g.,* prescribed fire, thinning) instead of longleaf establishment; therefore, to associate acreage fluctuations with a single event (*i.e.,* the listing of the black pinesnake) would be inaccurate. Under Natural Resources Conservation Service (NRCS) Farm Bill programs in Mississippi promoting longleaf pine to private landowners (*i.e.,* Longleaf Pine Initiative and Working Lands for Wildlife), twice as many acres of longleaf pine were established in 2018 versus 2017 (Costanzo 2019, p. 1), supporting the argument that the listing of the black pinesnake under the Act has not disincentivized private landowners from creating habitat suitable for the subspecies.

General Comments Issue 4: Economic Analysis

Comment 19: One commenter asked whether an economic analysis had been conducted for the black pinesnake critical habitat designation.

Our Response: The Service conducted an economic analysis for designation of black pinesnake critical habitat, which began by preparing an ''Incremental Effects Memorandum'' (IEM) describing how critical habitat for the black pinesnake will be implemented. This memorandum provided the basis for a screening analysis of potential economic impacts of the proposed critical habitat rule, prepared by independent consultants. The combination of the IEM and the screening analysis, titled

''Screening Analysis of Likely Economic Impacts of Critical Habitat Designation for the Black Pinesnake,'' (IEc 2014a) represents the Service's economic analysis. Both documents were released for public comment with the proposed rules on March 11, 2015, and again on October 11, 2018. The minor changes proposed in the second comment period (83 FR 51418, October 11, 2018) were not substantial enough to justify producing a revised Economic Screening Analysis (see *Comment 21,* below).

Comment 20: One commenter stated that the Service should consider costs associated with listing in the economic analysis.

Our Response: Section 4(b)(1) of the Act specifically states that determinations for listing are to be based solely on the best scientific and commercial information available after conducting a review of the status of the species and after taking into account conservation measures by States or foreign nations. As mandated in section 4(b)(2), our economic analysis considers the economic impacts of the proposed critical habitat designation involving evaluating ''without critical habitat'' baseline versus the ''with critical habitat'' scenario (see *Consideration of Economic Impacts* section for additional discussion) to ensure that we are capturing costs associated with designation of critical habitat as required by the statute.

Comment 21: Several commenters expressed concern that the economic analysis had underestimated the economic impacts of the designation of critical habitat. One commenter stated that an economic analysis that fails to account for any effect on private lands is incomplete and fails to meet the requirements of the Act.

Our Response: The economic analysis forecasts the likely costs and benefits of the critical habitat designation for the black pinesnake using the best readily available information, and the commenters did not provide additional information that could be used to revise this analysis. Because the entirety of critical habitat is occupied by the pinesnake, significant baseline protections already exist throughout the proposed designation due to its status as a threatened species under the Act (see *Comment 12,* above). We find that the section 7-related costs of designating critical habitat for the pinesnake are likely to be limited to additional administrative effort to consider adverse modification in consultation and are likely to be less than $190,000 in the first year following the publication of the final rule (the year with the highest anticipated costs). This is due to the anticipation of no direct impacts of the designation to forestry, which is the main land use (see our response to *Comment 16,* above). The economic analysis prepared for this rule includes the costs to private landowners of future section 7 consultations and bounds the potential diminution of property values by estimating the total value of these acres. In addition, the economic analysis investigates the possible impacts of public perception (*e.g.,* reductions in land value based on the perception that critical habitat imposes use limitations on private property) using the total value of developable land near the proposed designation. As described in section 4 of the economic analysis, data limitations prevent the quantification of possible perception-related effects or its attenuation rate.

Comment 22: Commenters suggested that with the October 2018 reopening of the public comment period, the Service added acreage to proposed critical habitat without balancing considerations of the economic issues resulting from this designation.

Our Response: On October 11, 2018, the Service reopened the public comment period for the May 11, 2015, proposed designation of critical habitat for the black pinesnake. At that time, we proposed revised boundaries for Unit 8 (Fred T. Stimpson Special Opportunity Area (SOA)) in Clarke County, Alabama, resulting in smaller acreage on private land and more acres on State-owned land, with a net increase of approximately 279 acres. As described in the October 11, 2018, **Federal Register** document, we determined that some of the best habitat, located at the southern end of the Stimpson SOA, had not been incorporated in Unit 8, and other land located at the northern end of the unit had been included in error. Federal nexuses are rare within State SOAs, thus additional consultations, as associated with section 7 costs in the newly added area, are unlikely. We concluded that these minor adjustments in the Unit 8 boundary were not significant enough to warrant a new economic analysis.

Comment 23: Many commenters expressed concern that the designation of critical habitat for the black pinesnake would affect the ability of private landowners, including small landowners, to manage their lands for forestry and timber harvest. In particular, several commenters expressed concern that the designation of critical habitat would affect landowners' ability to generate income from their lands, noting that this could have cascading effects on future generations, local property tax revenue, and the local economy.

Our Response: The Service acknowledges that private forestry is an important aspect of the local economy. As noted earlier in *Comment 16,* the Act does not authorize the Service to regulate private actions on private lands or establish specific land management standards or prescriptions for private landowners. We do not anticipate that critical habitat designation will affect current timber management activities since critical habitat designation applies only to those actions with a Federal nexus (funding, authorization, or action by a Federal agency) that would destroy or adversely modify critical habitat. Section 1 of the economic analysis identifies the activities considered for the analysis, including timber management. Section 3 of the economic analysis outlines the substantial baseline protections afforded the pinesnake throughout the critical habitat area. These baseline protections result from the 2015 listing of the pinesnake, with the section 4(d) rule, under the Act; the presence of the species in all critical habitat units; as well as overlap with habitat of other listed species and designated critical habitat. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the pinesnake are likely limited to additional administrative effort on the part of Federal agencies. The Service does not anticipate requesting modifications for forest management activities on private lands because of the designation of critical habitat. As a result, impacts to income or tax revenue described by the commenters are not anticipated.

Comment 24: Multiple commenters expressed concern that the designation of critical habitat for the pinesnake could decrease the value of designated lands. In particular, one commenter stated that, given the choice between two identical properties, an investor will invariably purchase the property with no critical habitat over one designated as critical habitat. The commenter went on to state that a methodology for estimating these costs must be developed and used.

Our Response: The Service recognizes that such effects are possible. Specifically, section 4 of the economic analysis considers possible perception-related effects of critical habitat designation on the value of private property. The analysis acknowledges that public attitudes about the limits and costs that the Act may impose can cause real economic effects to the

owners of property, regardless of whether such limits are actually imposed. These effects may result from the perception that critical habitat will preclude, limit, or slow development, or somehow alter the highest and best use of the property. As described in section 4 of the economic analysis, data limitations prevent the quantification of the possible incremental reduction in private property values or its attenuation rate. However, section 4, footnote 45 references a separate memorandum (IEc 2014b) prepared for the Service providing additional detail. In that memorandum, titled ''Supplemental Information on Land Values—Critical Habitat Designation for the Black Pinesnake,'' the economic consultants review the available literature to identify existing methods for estimating the impact of public perception of the encumbrance imposed by critical habitat on private property values, and the limitations of available data. Furthermore, the memorandum provides a detailed analysis of the total value of potentially affected private acres using two separate data sources of forest land values in Mississippi and Alabama. By providing an estimate of the total value of potentially affected private acres, we provide an upper bound on the possible magnitude of this impact.

However, the analysis also describes the uncertainty associated with this upper bound and several factors that suggest the actual magnitude of the portion of the effect attributable to the critical habitat designation will be lower. These factors include the community's experience with the Act, understanding of the degree to which future section 7 consultations could delay or affect land use activities, and substantial baseline conservation already in place for the black pinesnake due to its listed status, as well as protections for the federally listed gopher tortoise, red-cockaded woodpecker, and dusky gopher frog.

Comment 25: Some commenters requested that landowners be compensated for loss of private property rights or financial losses that could happen as a result of the designation of critical habitat for the black pinesnake.

Our Response: As stated previously in *Comment 16,* the critical habitat designation does not authorize the Service to regulate private actions on private lands, nor is it considered confiscation of private property. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Critical habitat designation also does not establish specific land management standards or prescriptions, although Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. Thus, the designation of critical habitat does not deny anyone economically viable use of their property.

Our economic analysis concluded that financial impacts from critical habitat for the pinesnake are likely limited, borne primarily by the Service and Federal action agencies. Although it is possible (see response to *Comment 24,* above) that public perception of potential regulatory constraints imposed by critical habitat could also adversely affect property values, a similar effect could result from the listing of the species, or the presence of other listed species and critical habitat designations.

Comment 26: Commenters expressed concern that the designation of critical habitat would reduce land managers' flexibility in managing forested habitat on the State of Mississippi's 16th Section lands and on Wildlife Management Areas (WMAs) to meet their respective objectives. Forests on 16th Section lands are highly valued timber tracts that are intensively managed to provide a significant amount of income for public schools in Mississippi, and WMAs are often owned by multiple landowners and managed for varied economic and wildlife objectives.

Our Response: The Service acknowledges the importance to local communities of income generated on 16th Section lands from silvicultural activities, as well as the importance to the public of WMAs for hunting, fishing, recreation, and other uses. As discussed in *Comment 16,* we do not anticipate that critical habitat designation will affect current habitat management activities, particularly with respect to timber management, because critical habitat designation only applies to those actions with a Federal nexus (funding, authorization, or action by a Federal agency) that would destroy or adversely modify critical habitat.

Comment 27: One commenter states it is speculative to conclude that a Federal nexus is unlikely to be triggered on private forest lands. Federal consultation has been triggered in the context of family-owned timberlands in the past and will likely continue to occur in the future.

Our Response: The Service agrees with the statement that consultations have occurred on private land in the past and will likely occur in the future. However, consultation with the Service is not done directly with the private landowner; it is done with the responsible Federal agency (action agency) involved in the Federal permit, license, or funding. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species. Instead, it is to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*)), but even where the action is likely to destroy or adversely modify critical habitat, the Service works with the agency and landowners to amend the project to enable it to proceed without adversely affecting critical habitat. Most Federal projects are likely to go forward, but some may be modified to minimize adverse effects to the species and its critical habitat.

Summary of Changes From Revised Proposed Rule

We reviewed the above-described site-specific comments related to critical habitat for this subspecies, completed our analysis of areas considered for exclusion under section 4(b)(2) of the Act and for exemptions under section 4(a)(3) of the Act, reviewed our analysis of the PBFs essential to the long-term conservation of the black pinesnake, reviewed the application of our criteria for identifying critical habitat across the range of this subspecies to refine our designation, and completed the economic analysis of the designation as proposed. This final rule incorporates changes to our proposed critical habitat rule based on the comments that we received, and have responded to in this document, and considers efforts to conserve the black pinesnake.

As a result, our final designation of critical habitat reflects the following changes from the March 11, 2015, proposed rule (80 FR 12846) and the October 11, 2018, revisions to the proposed designation (83 FR 51418):

- Primary Constituent Elements (PCEs) are referred to as Physical and Biological Features (PBFs) in our final rule.
- Based on information we received from peer reviewers, we removed the

reference to territoriality in the subspecies; although there is some evidence that black pinesnakes may exhibit territoriality, it has not been demonstrated definitively.

- The habitat management activity of clearcutting was removed from the list of activities seen as threats to the black pinesnake and its habitat. While we recognize that some clearcut harvesting may have a negative impact on black pinesnake habitat, at other times it is a necessary management tool to restore a forest to a condition suitable for pinesnakes and other native wildlife. This is consistent with the language in our final listing rule.
- We have refined our description of PBF 1 to remove the characterization of ''open canopy'' pine forest as a specific percentage and have instead relied on the percentage metrics for mid-story and groundcover (within an open-canopied pine forest) to best define the habitat structure important to the subspecies.
- We have revised PBF 2 and removed the reference to topographic features, specifically the elevation threshold of 150 ft (46 m) or greater. PBF 2 now only references refugia sites since the elevation threshold was determined to be more of an observation rather than a habitat requirement.
- Throughout the descriptions of PBFs, we removed specific characterization of these features within longleaf pine forests. Although longleaf pine is the preferred canopy species for the long-term conservation of the black pinesnake (see the final listing rule published in the **Federal Register** on October 6, 2015 (80 FR 60468)), we recognize that it is primarily the structure of the forest that provides for the PBFs, and this structure is not exclusive to longleaf pine forests. However, these features must occur within areas historically dominated by longleaf pine.
- Within Unit 3 (Camp Shelby), we excluded the Camp Shelby Impact Area (4,647 ac [1,880 ha]), as proposed in our original critical habitat rule (80 FR 12846, March 11, 2015), and upon further assessment of this area excluded additional acreage known as the Camp Shelby Impact Area Buffer Zone for a total exclusion of 14,862 ac (6,014 ha) of Camp Shelby lands under section 4(b)(2) of the Act (see *Exclusions Based on Impacts on National Security and Homeland Security* under Exclusions, below).

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as: An area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the specific features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)),

the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the species status assessment (SSA) document and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species, the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

On August 27, 2019, we published a final rule in the **Federal Register** (84 FR 45020) to amend our regulations concerning the procedures and criteria we use to designate and revise critical habitat. That rule became effective on September 26, 2019, but, as stated in that rule, the amendments it sets forth apply to ''rules for which a proposed rule was published after September 26, 2019.'' We published our proposed critical habitat designation for the black pinesnake on March 11, 2015 (80 FR 12846); therefore, the amendments set forth in the August 27, 2019, final rule at 84 FR 45020 do not apply to this final designation of critical habitat for the black pinesnake.

Physical or Biological Features

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features (PBFs) that are essential to the conservation of the species and which may require special management considerations or protection. For example, physical features might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species. In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

We derive the specific PBFs essential for the black pinesnake from studies of the subspecies and other similar species' habitat, ecology, and life history as described below. Additional information can be found in the final listing rule published in the **Federal Register** on October 6, 2015 (80 FR 60468) and the proposed critical habitat rule published in the **Federal Register** on March 11, 2015 (80 FR 12846). We have determined that the following PBFs are essential for the black pinesnake:

Space for Individual and Population Growth and for Normal Behavior

Telemetry studies and previous records indicate that the black pinesnake prefers an open canopy, a reduced midstory, and a dense herbaceous cover typical of a classic longleaf pine forest (see the ''Habitat'' and ''Life History'' sections of the final listing rule). An abundant herbaceous groundcover is typical of those areas characterized by a more open-canopied condition, as a byproduct of the increased amount of sunlight reaching the forest floor. As an ectotherm (an organism that regulates its body temperature (*i.e.,* thermoregulates) primarily by exchanging heat with its surroundings), the black pinesnake requires this open condition to provide thermoregulatory opportunities, and possibly to provide proper incubation temperatures for nests.

Studies of black pinesnakes have supported this subspecies' preference for a relatively open canopy and reduced mid-story shrub cover (Duran 1998b, pp. 4–8; Baxley *et al.* 2011, p. 154). Values for these landscape features reflecting habitat structure have been estimated for the black pinesnake by looking to habitat conditions described for the threatened gopher tortoise (*Gopherus polyphemus*), a species sharing the same habitat within the same geographic range in the longleaf pine ecosystem. Management plans for the tortoise include targets for open-canopied upland longleaf pine forest with shrub cover of <10 percent, and a herbaceous groundcover of at least 40 to 50 percent (Florida Fish and Wildlife Conservation Commission (FWCC) 2012, p. 42; U.S. Forest Service 2014, p. 14; Service 2014, p. 1). These same metrics are all indicative of the forest

structure in suitable black pinesnake habitat as well.

Longleaf pine ecosystems have historically been maintained with fire, as it is necessary for exposing bare mineral soil for seed germination, increasing nutrient content in forage species, and reducing competition of hardwood species (DeBerry and Pashley 2008, pp. 20–21). Prescribed burning during the growing season (late spring to early summer) is more effective at controlling mid-story hardwood vegetation, thereby promoting a more abundant herbaceous groundcover; however, some understory plants respond positively to fires in the dormant season as well (Knapp *et al.* 2009, p. 2). Therefore, fire regimes should optimally incorporate variability in their seasonality and intensity, as a heterogeneous fire regime is likely to maximize plant biodiversity (Knapp *et al.* 2009, p. 3). Management of upland longleaf pine forests should include a fire return interval of 1 to 3 years (FWCC 2012, p. 42; U.S. Forest Service 2014, p. 14), primarily conducted in the growing season but with variable seasonality and intensity in the fire regime to promote the open-canopied condition and abundant, diverse forage species that sustain the prey base (small mammals) for black pinesnakes.

A broad distribution of home ranges has been estimated from various telemetry studies, from a mean Minimum Convex Polygon (MCP) (a mathematical tool for determining home range boundaries by connecting the outer location points) value of 106 acres (ac) (43 hectares (ha)) for adult female pinesnakes (Duran 1998a, p. 19) to a mean MCP value of 551 ac (223 ha) for adult male pinesnakes (Baxley and Qualls 2009, p. 287). The maximum home range reported for an individual black pinesnake in the literature is 979 ac (396 ha) for an adult male, and the maximum distance between consecutive locations in a telemetry study (reported as a straight-line distance) was 1.3 miles (2.1 kilometers) (Baxley and Qualls 2009, pp. 287–288). Examination of MCP areas for black pinesnakes occupying the same general area shows very little overlap of home ranges, potentially providing some evidence for territoriality (Duran 1998a, p. 15) although more research is needed.

The minimum amount of habitat necessary to support a viable black pinesnake population (known as the minimum reserve area) has not previously been determined, and estimating those parameters can be quite challenging, primarily based on the elusive nature of the subspecies (Wilson *et al.* 2011, pp. 42–43). We estimated a minimum black pinesnake reserve area by modeling the total area covered by two partially overlapping, circular activity ranges whose radius equals the maximum known movement distance for the subspecies (1.3 miles (2.1 km); see discussion under *Criteria Used To Identify Critical Habitat*). The resulting area of 5,000 ac (2,023 ha) is considered to be a minimum population reserve area for the black pinesnake, as long as the area is not highly fragmented (see discussion under *Criteria Used to Identify Critical Habitat*). Fragmentation by roads, urbanization, or incompatible habitat conversion continues to be a major threat affecting the subspecies (see *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* in the final listing rule).

We corroborated this value of minimum reserve area using a method previously used for Florida pinesnakes (*P.m. mugitus*). Miller (2008, pp. 27–28) calculated a minimum reserve area of approximately 7,413 ac (3,000 ha) by overlaying the non-overlapping home ranges of 50 Florida pinesnakes, using this population number because it has been previously proposed as a minimum effective population size for many vertebrate species (Franklin 1980, p. 147). Our analysis using this same population size (50) was adjusted to use partially overlapping polygons (instead of non-overlapping) that were approximately 150 ac (40.5 ha) in size, representing the mean home range for black pinesnakes described in the literature (Duran 1998a, p. 19; Yager *et al.* 2005, p. 27). This modeling exercise using varying degrees of overlap between the polygons yielded total estimates between 4,500 to 6,000 ac (1,619 to 2,428 ha), thereby supporting our initial estimate of a 5,000-acre minimum reserve area.

For further comparison we investigated the population requirements of another large-bodied, wide-ranging snake with expansive home ranges that is also a longleaf pine ecosystem specialist, the threatened eastern indigo snake (*Drymarchon couperi;* listed as *Drymarchon corais couperi*). Moler (1992, p. 185) recommended that large tracts of land (≥2,500 ac (1,012 ha)) should be protected in order to have a high probability of sustaining populations of eastern indigo snakes long term. Sytsma *et al.* (2012, pp. 39–40) estimated a reserve area of 10,000 ac (4,047 ha) to be sufficiently large to support a small population of eastern indigo snakes. Although the eastern indigo snake's home ranges are larger than the black pinesnake's, these studies support the need for sizeable areas to support large, wide-ranging snake species sensitive to landscape fragmentation. Thus, based on these estimates of eastern indigo snake reserve area, and the available long-distance movement data and home range sizes for the black pinesnake, we believe that 5,000 ac (2,023 ha) of suitable habitat is an appropriate estimate of the minimum reserve area for a population of black pinesnakes.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Black pinesnakes consume a variety of food, including nestling rabbits (*Sylvilagus aquaticus*), bobwhite quail (*Colinus virginianus*) and their eggs, and eastern kingbirds (*Tyrannus tyrannus*) (Vandeventer and Young 1989, p. 34; Yager *et al.* 2005, p. 28); however, rodents represent the most common type of prey. The majority of documented prey items are hispid cotton rats (*Sigmodon hispidus*), various mice species (*Peromyscus* spp.), and to a lesser extent eastern fox squirrels (*Sciurus niger*) (Rudolph *et al.* 2002, p. 59; Yager *et al.* 2005, p. 28). The hispid cotton rat was the most frequently trapped small mammal within black pinesnake home ranges (Duran 1998a, p. 34), and the core home ranges of telemetered black pinesnakes had higher mammal abundance (especially hispid cotton rats) compared with areas on the periphery of the snakes' home ranges (Baxley and Qualls 2009, p. 291).

To provide the refugia and food needed to support the rodent prey base of black pinesnakes, the habitat must have an abundant herbaceous groundcover. Bluestem grasses (*Andropogon* and *Schizachyrium* sp.) typically represent the dominant groundcover species of the open-canopied longleaf pine habitat within the geographic range of the black pinesnake, and bluestem grass stems are a primary food of the hispid cotton rat (Miller and Miller 2005, p. 202). Black pinesnakes more frequently occupy forested habitats with significantly higher cover of herbaceous understory vegetation and avoid areas with significantly higher percentages of leaf litter (Duran 1998a, p. 11; Baxley *et al.* 2011, p. 161; Smith 2011, pp. 86 and 100).

Therefore, based on the information above, we identify open-canopied pine forest habitat, historically dominated by longleaf pine and maintained by frequent fires, a reduced midstory (<10 percent), and a diverse and abundant native herbaceous groundcover (>40 percent) to be the PBFs necessary for the conservation of the black pinesnake.

These pine forests should be primarily unfragmented and occupy at least 5,000 ac (2,023 ha) in area.

Cover or Shelter

Black pinesnakes spend a majority of their time below ground (Duran 1998a, p. 12; Yager *et al.* 2005, p. 27; Baxley and Qualls 2009, p. 288). The subterranean environments most commonly used by black pinesnakes are burned-out or rotted-out pine stump holes (Duran 1998a, p. 12; Yager *et al.* 2005, p. 27; Baxley and Qualls 2009, p. 288). Where pine stumps have become limited, black pinesnakes may use gopher tortoise and nine-banded armadillo (*Dasypus novemcinctus*) burrows more frequently; however, the large diameters of these burrows might allow access to a wide array of potential predators (Rudolph *et al.* 2007, p. 563).

Rudolph *et al.* (2007, pp. 560–565) excavated five black pinesnake winter refugia (overwintering sites) used for significant periods of time from late fall through early spring. They were found to be located exclusively in chambers formed by the decay and burning of longleaf pine stumps and root tunnels, at depths of 3.5 to 14 inches (in) (9 to 35 centimeters (cm)) below the surface (Rudolph *et al.* 2007, pp. 560–561). There is evidence for site fidelity towards specific winter refugia sites in the genus *Pituophis,* specifically for northern pinesnakes. Burger *et al.* (2012, p. 600) documented hibernacula use by northern pinesnakes over a 26-year period in New Jersey, and they determined that even when known hibernacula do not get used for a year, those hibernacula have a 37 percent chance of being used the following year. Data on black pinesnake habitat use document site fidelity in this subspecies as well: Black pinesnakes have been shown to return to the same general location during monitoring and even to the same stump hole (Yager *et al.* 2006, pp. 34–36; Baxley and Qualls 2009, p. 288). These data on microhabitat use reinforce the importance of locating and protecting known refugia, regardless of the seasonality of their use.

Therefore, based on the information above, we identify the presence of naturally burned-out or rotted-out pine stumps and their associated root systems within historically longleaf-dominated pine forests, to be a PBF for this subspecies.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Very little information on breeding and egg-laying of wild black pinesnakes is available. Lyman *et al.* (2007, pp. 40–42) documented mating activities at the entrance to armadillo burrows, and Lee (2007, p. 93) described mating in a pair of black pinesnakes above ground, but in the vicinity of a rotted-out pine root system that the pair subsequently occupied. The only documented natural nest for the subspecies is a clutch of six recently hatched black pinesnake eggs found 29 in (74 cm) below the soil surface at the end of a juvenile gopher tortoise burrow (burrow width: 2.5 in (6 cm)) in Perry County, Mississippi (Lee *et al.* 2011, p. 301). The microhabitat within the tortoise burrow likely provides a suitable microclimate for egg incubation in warm climate areas (Lee *et al.* 2011, p. 301). Female northern pinesnakes excavate tunnels and nest chambers for egg deposition (Burger and Zappalorti 1992, p. 331), but it is unknown whether female black pinesnakes excavate their own nests or only use and modify existing tunnels.

Since there is only one documented natural black pinesnake nest, it is unknown whether the subspecies exhibits nest site fidelity; however, nest site fidelity has been described for other *Pituophis* species and subspecies. Burger and Zappalorti (1992, pp. 333–335) conducted an 11-year study of nest site fidelity of northern pinesnakes in New Jersey and documented the exact same nest site being used for 11 years in a row, evidence of old eggshells in 73 percent of new nests, and recapture of 42 percent of female snakes at prior nesting sites.

In addition to the stump holes and associated root systems commonly used by adult black pinesnakes (Duran 1998a, p. 12; Yager *et al.* 2005, p. 27; Baxley and Qualls 2009, p. 288), yearling and young juvenile black pinesnakes frequently use small mammal burrows, specifically eastern mole (*Scalopus aquaticus*) tunnels, as retreat sites (Lyman *et al.* 2007, pp. 39–41). Because of this documented use and modification of existing burrow and tunnel systems, it is necessary for black pinesnakes to have access to areas with sandy soils for ease of excavation.

Appropriate soils have been described for the gopher tortoise and are recognized as one of their key habitat requirements, as they allow for burrow excavation and nest development (Ernst *et al.* 1994, p. 466). Gopher tortoises typically occur where soils have high sand content, low clay content, and little to no stones or gravel; the soils are often well-drained, and are deep to a water table (Service 2012, p. 3). When sufficient sunlight reaches the forest floor, sandy soils also promote herbaceous groundcover (component of PBF 1) as food for rodents (primary prey of the black pinesnake), and provide the appropriate environment for egg incubation and hatching (Service 2012, p. 3). Because black pinesnakes share a requirement for sandy soils with the gopher tortoise, and the two occur within the same habitat, characteristics of suitable gopher tortoise soils can also be used to describe appropriate black pinesnake soils. These soil characteristics include: (1) No flooding or ponding; (2) <15 percent medium and coarse gravel fragments; (3) >60 in (152 cm) depth to seasonal high water table (elevation to which the ground or surface water can be expected to rise due to a normal or wet season); (4) >60 in (152 cm) depth to the hardpan (dense layer of soil impervious to plant roots and water); (5) textural components equaling >30 percent sand and <35 percent clay; and (6) a slope <15 percent (Service 2012, p. 6). The association of black pinesnakes using these soil types is corroborated by Duran (1998b, p. 15), which showed that snakes spent most of their time on well-drained soils determined to be appropriate for gopher tortoises.

Therefore, based on the information above, we identify sandy, well-drained soils characteristic of historically longleaf-dominated upland pine forest to be a PBF for this subspecies. These specific soil series and related soil associations have the following characteristics: No flooding or ponding; <15 percent medium and coarse gravel fragments; >60 in (152 cm) depth to seasonal high water table; >60 in (152 cm) depth to the hardpan; textural components equaling >30 percent sand and <35 percent clay; and a slope <15 percent.

Summary of Physical or Biological Features

We have determined the following PBFs for the black pinesnake:

(1) PBF 1: *Tract size and habitat structure.* A pine forest, historically dominated by longleaf pine and maintained by frequent fire, primarily having the following characteristics:

(a) An open canopy that sustains a reduced woody mid-story (<10 percent cover) and abundant, diverse, native herbaceous groundcover (at least 40 percent cover); and

(b) Minimum of 5,000 ac (2,023 ha) of mostly unfragmented habitat.

(2) PBF 2: *Refugia sites.* Naturally burned-out or rotted-out pine stumps and their associated root system tunnels, in pine forests historically dominated by longleaf pine.

(3) PBF 3: *Soils.* Deep, sandy, well-drained soils characteristic of longleaf pine forests:

(a) No flooding or ponding;

(b) <15 percent medium and coarse gravel fragments;

(c) >60 in (152 cm) depth to seasonal high water table;

(d) >60 in (152 cm) depth to the hardpan;

(e) Textural components equaling >30 percent sand and <35 percent clay; and

(f) A slope <15 percent.

Additional information can be found in the final listing rule and the proposed critical habitat designation for the black pinesnake.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection.

All areas designated as critical habitat require some level of management to address the current and future threats to the black pinesnake and to maintain the PBFs. Special management of the upland longleaf pine forest would be needed to ensure an open canopy, reduced mid-story, and abundant herbaceous groundcover (PBF 1); underground refugia for snakes to occupy (PBF 2); and relatively unfragmented tracts of pine forests (PBF 1).

A detailed discussion of activities affecting the black pinesnake and its habitat can be found in the final listing rule published in the **Federal Register** on October 6, 2015 (83 FR 51418). The features essential to the conservation of this subspecies may require special management considerations or protection to reduce threats posed by: Land use conversion, primarily urban development and conversion to agriculture and pine plantations; timber management practices such as disking, bedding, and stumping involving whole root ball removal that may cause significant subsurface disturbance; fire suppression and low fire frequencies; random effects of drought or floods; encroachment of invasive species; fragmentation from new roads or development; road mortality; and creation of utility pipelines and powerlines.

Management activities that could ameliorate these threats include (but are not limited to): Maintaining critical habitat areas as open pine habitat (preferably longleaf pine); conducting forestry management using frequent prescribed burning (1 to 3 years) with seasonal variability; avoiding intensive site preparation that would disturb or destroy pine stumps or stump holes; avoiding the practice of bedding when planting trees; reducing planting densities to create or maintain an open canopied forest with abundant herbaceous groundcover; maintaining forest underground structure such as gopher tortoise burrows and small mammal burrows; and retaining large tracts of unfragmented pine forest by protecting sites from development and new road construction. More information on the special management considerations for each critical habitat unit is provided in the individual unit descriptions below.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b) we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. As discussed below, we are not designating any areas outside the geographical area occupied by the species because we have determined that occupied areas are sufficient for the conservation of the species.

Areas Occupied at the Time of Listing

We began our determination of which areas to designate as critical habitat for the black pinesnake with an assessment of the critical life-history components of the subspecies, as they relate to habitat. We reviewed the available information pertaining to historical and current distributions, life histories, and habitat requirements of this subspecies. We focused on the identification of large tracts of remaining unfragmented open pine habitat in our analysis because they are requisite sites for population survival and conservation and their disappearance in the environment is one of the primary reasons that the black pinesnake is declining. Our sources included surveys, unpublished reports, and peer-reviewed scientific literature prepared by the Alabama Department of Conservation and Natural Resources; Alabama Natural Heritage Program; Mississippi Department of Wildlife, Fisheries, and Parks Natural Heritage Program; and black pinesnake researchers. Other sources are Service data and Geographic Information System (GIS) data (such as species occurrence data, elevation contours, soils, transportation, urban areas, National Wetland Inventory, 2011 National Land Cover Database, aerial imagery, ownership maps, and U.S. Geological Survey (USGS) Terrestrial Ecosystems data).

For estimation of activity ranges of black pinesnakes, we used a modified methodology of establishing species occurrence areas, which was informed by the methodology the New Jersey Department of Environmental Protection (NJDEP) uses for northern pinesnakes. These areas are derived by placing circular buffers around documented locations, in order to approximate typical activity ranges (NJDFW 2009, p. 17). There are unproven assumptions that underlie this method, such as that pinesnakes have circular activity ranges, and that the occurrence location represents the center of that individual's range; however, given the lack of representative telemetry data for many areas, this is one approach to estimate activity ranges.

We placed circular buffers around recent black pinesnake location points (post-1990) from the sources listed above, with a radius equaling the maximum known movement distance (1.3 miles (2.1 km)) to approximate the activity range of each snake (3,400 ac (1,376 ha)). The 1990 date was used as it coincides with dates chosen by black pinesnake researchers who conducted habitat assessments at what were considered recently and historically occupied locations (Duran and Givens 2001, pp. 5–9). Using GIS, we located all areas where at least two black pinesnake activity ranges overlapped, and identified those as potential populations. Outside of these activity ranges, if the area was forested and met the soils criteria, that area was considered contiguous habitat and included in potential population boundaries.

We identified 11 populations using this method: 6 in Mississippi and 5 in Alabama. These populations were then assessed in regard to impacts from nearby fragmentation sources such as major roads, wetlands and open water, incompatible land use (such as agricultural conversion), and urban development.

Soils determined to be suitable habitat for the gopher tortoise were used as a surrogate to determine suitable soils for the black pinesnake, as these species both occupy deep, sandy soils of upland longleaf pine forest. A team of biologists and soil scientists from the Service and the Natural Resources Conservation Service, with input from staff from the U.S. Forest Service, developed a model to classify soils throughout the gopher

tortoise's federally listed range (Service 2012, pp. 1–37). These specific soil characteristics are detailed in the *Physical or Biological Features for the Black Pinesnake* section, above.

To analyze potential impacts from roads and exclude areas around roads that do not provide quality habitat for the black pinesnake, a transportation layer was used with GIS, specifically examining Class 1 and 2 roads. Class 1 roads are hard-surface highways, including Interstate and U.S. numbered highways, primary State routes, and all controlled access highways; Class 2 roads include secondary State routes, primary county routes, and other highways that connect principal cities and towns. Both of these road classifications have a high probability of causing permanent black pinesnake population fragmentation and were excluded. Population boundaries were buffered at least 100 meters from all Class 1 and 2 roads in order to exclude not just the roadways themselves, but also to exclude the area capturing rights-of-way, residences, and businesses along these major roads. Major wetland areas and streams were avoided in determining population boundaries, and these generally were consistent with changes in elevation. To analyze the fragmentation effects from incompatible land uses (including but not limited to urbanization), recent aerial imagery and the 2011 National Land Cover Database (NLCD) were used. By selecting the evergreen forest layers from NLCD, it was possible to delineate large tracts of remaining pine forested habitat, and concurrent analysis from the aerial imagery further removed areas with agricultural fields, housing developments, and urban areas.

We calculated that the total area covered by two partially overlapping activity ranges (5,000 ac (2,023 ha)) would be considered a minimum population reserve area, as long as the area was not highly fragmented. This is not to say that two snakes are considered a viable population, but that this area estimate should be considered a minimum value. As was discussed in *Space for Individual and Population Growth and for Normal Behavior* (above), this estimate of minimum reserve area was corroborated by modeling 50 polygons (150 acres in size to reflect mean black pinesnake home range size) at various levels of overlap, which resulted in a similar reserve area estimate of 5,000 acres.

Once all the above analyses were complete, the level of fragmentation in each population was assessed. If fragmentation within a population boundary limited the suitable habitat to the point where less than 5,000 ac (2,023 ha) of contiguous forested habitat was available, that population was no longer considered potentially viable and was removed from critical habitat consideration.

Using the above-described process, 8 of the 11 populations examined met the criteria for consideration as critical habitat: all 6 of the populations in Mississippi and 2 of the 5 in Alabama. Five of the six Mississippi populations occur at least partially on the De Soto National Forest, the largest of which is located almost exclusively on the Camp Shelby Special Use Permit area, and the sixth occurs primarily on the Marion County Wildlife Management Area (WMA). All six populations meet the criteria of appropriate size; contiguous, pine-dominated, forested habitat; soils; and minimal fragmentation. The Service has determined that these sites contain the PBFs that are essential for the conservation of the black pinesnake.

Both of the Alabama populations that met the criteria to be considered critical habitat are located in Clarke County and include a population primarily located on lands previously identified as the Scotch WMA and a population located at the Fred T. Stimpson SOA. SOAs are State-owned properties, typically smaller than Wildlife Management Areas in acreage, that offer a different hunting format to reduce pressure and increase the quality of the hunt. Three other populations, in Washington and Mobile Counties, each have two black pinesnake records from the last 25 years, but due to urban and agricultural fragmentation no longer contain the PBFs.

The critical habitat designation does not include all forested areas known to have been occupied by the subspecies historically; instead, it focuses on occupied areas within the current range that have retained the necessary PBFs that will allow for the maintenance and expansion of existing populations. Further, as discussed in the Critical Habitat section above, we recognize that designation of critical habitat might not include all habitat areas that we may eventually determine are necessary for the recovery of the subspecies and that for this reason, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the subspecies.

Areas Not Occupied at the Time of Listing

We are not designating any areas outside the geographical areas occupied by the black pinesnake at the time of listing. The units within the area occupied by the subspecies at the time of listing are representative of the current geographical range and include both the core population areas of black pinesnakes, as well as remaining peripheral population areas. We determined that there was sufficient area for the conservation of the subspecies within the occupied areas determined above.

When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features for the black pinesnake. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands; nor all lands covered under the Camp Shelby Integrated Natural Resources Management Plan (INRMP), which are exempted from critical habitat designation (see *Application of Section 4(a)(3) of the Act* under Exemptions, below); nor all lands within the Camp Shelby Impact Area Buffer Zone, which are excluded from critical habitat designation (see *Exclusions Based on Impacts on National Security and Homeland Security* under Exclusions, below). Thus, any such lands inadvertently left inside critical habitat boundaries shown on the maps of this rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

Eight units, one of which was divided into two subunits, were designated. All eight units contain all of the physical or biological features necessary to support life-history functions essential to the conservation of the black pine snake, namely: Unfragmented tracts of pine forest of sufficient size and structure (PBF 1); suitable underground refugia sites (PBF 2); and deep, sandy soils (PBF 3).

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to

the public on *http://www.regulations.gov* at Docket No. FWS–R4–ES–2014–0065, on our internet sites *http://www.fws.gov/mississippiES/,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

Final Critical Habitat Designation

We are designating approximately 324,679 ac (131,393 ha) in eight units (one unit divided into two subunits) as critical habitat for the black pinesnake. Those eight units are: (1) Ovett, (2) Piney Woods Creek, (3) Cypress Creek, (4A) Maxie, (4B) Maxie, (5) Howison, (6) Marion County WMA, (7) Jones Branch, and (8) Fred T. Stimpson SOA.

Table 1 provides the location, approximate area, and land ownership of each critical habitat unit.

TABLE 1—CRITICAL HABITAT UNITS FOR BLACK PINESNAKE

[Area estimates reflect all land within critical habitat unit boundaries]

Unit	Counties	Ownership*			Total area
		Federal	State	Private	
MISSISSIPPI					
1—Ovett	Jones, Wayne	40,639 ac (16,446 ha)		6,540 ac (2,647 ha)	47,179 ac (19,093 ha)
2—Piney Woods Creek	Perry, Wayne	17,744 ac (7,181 ha)		4,645 ac (1,880 ha)	22,389 ac (9,061 ha)
3—Cypress Creek	Forrest, George, Greene, Perry.	115,315 ac (46,666 ha)	1,768 ac (716 ha)	14,357 ac (5,810 ha)	131,440 ac (53,192 ha)
4A—Maxie	Forrest, Stone	8,914 ac (3,607 ha)		6,303 ac (2,551 ha)	15,217 ac (6,158 ha)
4B—Maxie	Forrest, Perry, Stone	28,232 ac (11,425 ha)		16,079 ac (6,507 ha)	44,311 ac (17,932 ha)
5—Howison	Stone, Harrison	9,430 ac (3,816 ha)		3,519 ac (1,424 ha)	12,949 ac (5,240 ha)
6—Marion County WMA	Marion		5,587 ac (2,261 ha)	6,270 ac (2,537 ha)	11,857 ac (4,798 ha)
ALABAMA					
7—Jones Branch	Clarke			33,395 ac (13,515 ha)	33,395 ac (13,515 ha)
8—Fred T. Stimpson SOA	Clarke		3,843 ac (1,555 ha)	2,100 ac (850 ha)	5,943 ac (2,405 ha)
Total Area		220,273 ac (89,141 ha)	11,197 ac (4,531 ha)	93,208 ac (37,720 ha)	324,679 ac (131,393 ha)

* **Notes**: Area sizing may not sum due to rounding. Also, no lands owned by local government agencies are being designated as critical habitat.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the black pinesnake, below.

Unit 1: Ovett—Jones and Wayne Counties, Mississippi

Unit 1 encompasses approximately 47,179 ac (19,093 ha) on Federal and private land in Jones and Wayne Counties, Mississippi. This unit is located between the Bogue Homo River and Thompson Creek, is approximately 2.0 mi (3.2 km) northeast of Ovett, and is mostly within the boundary of the Chickasawhay Ranger District of the De Soto National Forest (DNF). It is located just east of State Highway 15, west of Salem Road, north of the intersection of State Highway 15 and County Road 205, and approximately 1.3 mi (2.1 km) south of the intersection of Freedom Road and Forest Road.

The majority of this unit (40,639 ac (16,446 ha)) is on Federal lands within the DNF, with the remainder of the unit (6,540 ac (2,647 ha)) on private land.

There are records of eight black pinesnakes located within Unit 1 since 1990. Many of these are located on the higher ridges within the unit boundary, but are within close enough proximity to each other (with contiguous habitat between) for all of them to belong to the same breeding population. Habitat management on the section of this unit owned by the U.S. Forest Service (86 percent) is performed under the Revised Land and Resource Management Plan for National Forests in Mississippi (U.S. Forest Service 2014, 207 pp.). This forest plan contains objectives for the threatened gopher tortoise and endangered red-cockaded woodpecker (*Picoides borealis*), both of which occur on Unit 1. These objectives include restoring and opening up canopy conditions in areas with sandy soils and in mature and old-growth pine forests and woodlands, with 1- to 3-year fire intervals; however, the management practices outlined in this plan do not specifically target all of the habitat requirements of the black pinesnake.

Threats to the black pinesnake and its habitat in Unit 1 that may require special management considerations or protection of the PBFs include: Fire suppression and low fire frequencies; detrimental forestry practices that could cause significant subsurface disturbance such as disking, bedding, or whole root ball stump removal; land use conversion and fragmentation, primarily urban development and conversion to agriculture and pine plantations; utility easements; road mortality; and encroachment of invasive species.

Unit 2: Piney Woods Creek—Wayne and Perry Counties, Mississippi

Unit 2 encompasses approximately 22,389 ac (9,061 ha) on Federal and private land located primarily in Wayne County, Mississippi, with a small portion extending into Perry County, Mississippi. This unit is located between Thompson Creek and Piney Woods Creek, is approximately 4.0 mi (6.4 km) west of Clara, and is mostly within the boundary of the Chickasawhay Ranger District of the DNF. It is located 2.3 mi (3.7 km) north of the intersection of Camp Eight Road and Will Best Road, and 0.4 mi (0.6 km) southeast of the intersection of Clara-Strengthford Road and Clara-Strengthford Reservoir Road.

The majority of this unit (17,744 ac (7,181 ha)) is on Federal lands within the DNF, with the remainder of the Unit (4,645 ac (1,880 ha)) on private land.

There are records of five black pinesnakes located within Unit 2 since 1990. Many of these are located on the higher ridges within the unit boundary, but are within close enough proximity to each other (with contiguous habitat between) for all of them to belong to the same breeding population. Habitat management on the section of this unit owned by the U.S. Forest Service (79 percent) is performed under the Revised Land and Resource Management Plan for National Forests in Mississippi (U.S. Forest Service 2014, 207 pp.) (see discussion under Unit 1, above).

Threats to the black pinesnake and its habitat in Unit 2 that may require special management considerations or protection of the PBFs include: Fire suppression and low fire frequencies; detrimental forestry practices that could cause significant subsurface disturbance

such as disking, bedding, or whole root ball stump removal; land use conversion and fragmentation, primarily urban development and conversion to agriculture and pine plantations; gas, water, electrical power, and sewer easements; road mortality; and encroachment of invasive species.

Unit 3: Cypress Creek—Forrest, Perry, George, and Greene Counties, Mississippi

Unit 3 is the largest of all the units, encompassing approximately 131,440 ac (53,192 ha) on Federal, State, and private land in Forrest, Perry, George, and Greene Counties, Mississippi. This unit is located north of Black Creek (Cypress Creek runs into part of the unit, but is not a barrier to gene flow), and is approximately 3.0 mi (4.8 km) east of McLaurin, 1.8 mi (2.9 km) south of New Augusta, and 4.6 mi (7.4 km) northwest of Benndale. Unit 3 is mostly within the installation boundary of Camp Shelby on the De Soto Ranger District of the DNF, and is bordered by State Highways 26 and 57 and U.S. Highways 49 and 98.

The majority of this unit (115,315 ac (46,666 ha)) is on Federal lands, with another 1,768 ac (716 ha) on State lands; and the remainder (14,357 ac (5,810 ha)) on private land. This unit contains 4,054 ac (1,641 ha) of State- and Department of Defense (DoD)-owned lands that are covered under the Camp Shelby INRMP, which are exempted from critical habitat designation (see *Application of Section 4(a)(3) of the Act* under Exemptions, below). The unit also contains a total of 14,862 ac (6,014 ha) of USFS-owned land within the Camp Shelby Impact Area and its associated buffer zone, which are excluded under section 4(b)(2) of the Act (see *Exclusions Based on Impacts on National Security and Homeland Security* under Exclusions, below).

There are over 100 records of black pinesnakes located within Unit 3 since 2004, as compiled by The Nature Conservancy's Camp Shelby Field Office. Many of these are located on the higher ridges within the unit boundary, but are within close enough proximity to each other (with contiguous habitat between) for all of them to belong to the same breeding population. Habitat management on the section of this unit owned by the U.S. Forest Service is performed under the Revised Land and Resource Management Plan for National Forests in Mississippi (U.S. Forest Service 2014, 207 pp.). In addition to containing objectives for the threatened gopher tortoise and endangered red-cockaded woodpecker, both of which occur on Unit 3 (see discussion under Unit 1, above), it also includes objectives for the endangered dusky gopher frog (*Rana sevosa*), which has three critical habitat units totaling 961.8 ac (389.2 ha), also located within Unit 3. Forest plan objectives for the dusky gopher frog include upland forest management to restore and improve open-canopied conditions compatible with black pinesnake habitat requirements.

Threats to the black pinesnake and its habitat in Unit 3 that may require special management considerations or protection of the PBFs include: Fire suppression and low fire frequencies; detrimental forestry practices that could cause significant subsurface disturbance such as disking, bedding, or whole root ball stump removal; land use conversion and fragmentation, primarily urban development and conversion to agriculture and pine plantations; gas, water, electrical power, and sewer easements; road mortality; and encroachment of invasive species.

Unit 4: Maxie—Forrest, Perry, and Stone Counties, Mississippi

Unit 4 encompasses a total of approximately 59,528 ac (24,090 ha) on Federal and private land in Forrest, Perry, and Stone Counties, Mississippi. Located south of Black Creek and 3.0 mi (4.8 km) north of Wiggins, this unit is bisected into two subunits (4A and 4B) by U.S. Highway 49. Both subunits are buffered from U.S. Highway 49 by at least 328 ft (100 m). The close proximity of black pinesnake records with adjacent suitable habitat would have made Unit 4 a single unit following the criteria for designation of critical habitat if not for the presence of U.S. Highway 49, which is a significant source of fragmentation and is potentially restricting gene flow between the two subunits.

Subunit 4A is located between Double Branch and U.S. Highway 49 in Forrest and Stone Counties, Mississippi. It is 0.3 mi (4.8 km) northwest of Bond and 0.5 mi (0.8 km) southwest of Maxie, and is located mostly within the boundary of the De Soto Ranger District of the DNF. Most of this subunit (8,914 ac (3,607 ha)) is on Federal lands within the DNF, with the remainder of the subunit (6,303 ac (2,551 ha)) on private land. There are records of two black pinesnakes located within subunit 4A since 1990. These are located on the eastern edge of the subunit, but have contiguous habitat with the rest of the area.

Subunit 4B is located between Black Creek and U.S. Highway 49 in Forrest, Perry, and Stone Counties, Mississippi. It is directly adjacent to Maxie on the western border, and is located mostly within the boundary of the De Soto Ranger District of the DNF. Most of this subunit (28,232 ac (11,425 ha)) is on Federal lands within the DNF, with the remainder of the subunit (16,079 ac (6,507 ha)) on private land. There are records of four black pinesnakes located within subunit 4B since 1990. These are located on the higher ridges of the subunit, but have contiguous habitat with the rest of the area.

Habitat management on the section of these subunits owned by the U.S. Forest Service (86 percent) is performed under the Revised Land and Resource Management Plan for National Forests in Mississippi (U.S. Forest Service 2014, 207 pp.). This forest plan contains objectives for the threatened gopher tortoise, which occurs on both subunits of Unit 4. These objectives include restoring and opening up canopy conditions in areas with sandy soils with 1- to 3-year fire intervals; however, the management practices outlined in this plan do not specifically target the habitat requirements of the black pinesnake. Subunit 4B also contains two units designated as critical habitat for the endangered dusky gopher frog, totaling 598.6 ac (242.2 ha) (see discussion of Unit 3, above, for more about forest plan objectives for the gopher frog).

Threats to the black pinesnake and its habitat in Unit 4 that may require special management considerations or protection of the PBFs include: Fire suppression and low fire frequencies; detrimental forestry practices that could cause significant subsurface disturbance such as disking, bedding, or whole root ball stump removal; land use conversion and fragmentation, primarily urban development and conversion to agriculture and pine plantations; gas, water, electrical power, and sewer easements; road mortality; and encroachment of invasive species.

Unit 5: Howison—Stone and Harrison Counties, Mississippi

Unit 5 encompasses approximately 12,949 ac (5,240 ha) on Federal and private land in Harrison and Stone Counties, Mississippi. This unit is located between Tuxachanie Creek and U.S. Highway 49, approximately 0.4 mi (0.6 km) east of Howison and 1.3 mi (2 km) southeast of McHenry, and this unit is mostly within the boundary of the De Soto Ranger District of the DNF. The unit is bordered on the northern edge by E. McHenry Road and on the western edge by U.S. Highway 49 (buffered from the highway by at least 328 ft (100 m)).

The majority of this unit (9,430 ac (3,816 ha)) is on Federal lands within the DNF, with the remainder of the unit

on private lands (3,519 ac (1,424 ha)) lands.

There are records of seven black pinesnakes located within Unit 5 since 1990. Many of these are located on the higher ridges within the unit boundary, but are within close enough proximity of each other (with contiguous habitat between) for all of them to belong to the same breeding population. Habitat management on the section of this unit owned by the U.S. Forest Service is performed under the Revised Land and Resource Management Plan for National Forests in Mississippi (U.S. Forest Service 2014, 207 pp.). This forest plan contains objectives for the threatened gopher tortoise, which occurs on Unit 5 (see discussion for Unit 4, above).

Threats to the black pinesnake and its habitat in Unit 5 that may require special management considerations or protection of the PBFs include: Fire suppression and low fire frequencies; detrimental forestry practices that could cause significant subsurface disturbance such as disking, bedding, or whole root ball stump removal; land use conversion and fragmentation, primarily urban development and conversion to agriculture and pine plantations; gas, water, electrical power, and sewer easements; road mortality; and encroachment of invasive species.

Unit 6: Marion County WMA—Marion County, Mississippi

Unit 6 encompasses approximately 11,856 ac (4,798 ha) on State and private land in Marion County, Mississippi. This unit is located between the Upper Little Creek and Lower Little Creek, 7.0 mi (11 km) southeast of Columbia. It is located 0.8 mi (1.3 km) north of State Highway 13, and 2.6 mi (4.2 km) south of U.S. Highway 98. Approximately half of Unit 6 is within the Marion County WMA.

The unit is divided between State lands (5,587 ac (2,261 ha)) and private lands (6,270 ac (2,537 ha)).

There are records of two black pinesnakes located within Unit 6 since 1990. These are both located on the WMA, although there is contiguous suitable habitat across the remainder of the unit. Regulations on the WMA include prohibitions of wildlife harassment; however, there are no habitat management activities occurring at the WMA that specifically target the habitat requirements of the black pinesnake.

Threats to the black pinesnake and its habitat in Unit 6 that may require special management considerations or protection of the PBFs include: Fire suppression and low fire frequencies; detrimental forestry practices that could cause significant subsurface disturbance such as disking, bedding, or whole root ball stump removal; land use conversion and fragmentation, primarily urban development and conversion to agriculture and pine plantations; gas, water, electrical power, and sewer easements; road mortality; and encroachment of invasive species.

Unit 7: Jones Branch—Clarke County, Alabama

Unit 7 encompasses approximately 33,395 ac (13,515 ha) of private land in Clarke County, Alabama. This unit is bordered by Salitpa Creek to the south, Tallahatta Creek to the north, and Harris Creek to the west. It is located approximately 2.7 mi (4.3 km) southeast of Campbell and 1.1 mi (1.8 km) north of the intersection of Old Mill Pond Road and Reedy Branch Road.

There are records of five black pinesnakes located within Unit 7 since 1994, including one as recently as 2015. Many of these are located on the higher ridges within the unit boundary, but are within close enough proximity to each other (with contiguous habitat between) for all of them to belong to the same breeding population. Most of this unit is managed by Scotch Land Management, LLC; however, there are no management practices on this unit that specifically target the habitat requirements of the black pinesnake.

Threats to the black pinesnake and its habitat in Unit 7 that may require special management considerations or protection of the PBFs include: Fire suppression and low fire frequencies; detrimental forestry practices that could cause significant subsurface disturbance such as disking, bedding, or whole root ball stump removal; land use conversion and fragmentation, primarily urban development and conversion to agriculture and pine plantations; gas, water, electrical power, and sewer easements; road mortality; and encroachment of invasive species.

Unit 8: Fred T. Stimpson SOA—Clarke County, Alabama

Unit 8 encompasses approximately 5,943 ac (2,405 ha) on State and private land in Clarke County, Alabama. This unit is located between Sand Hill Creek and the Tombigbee River, is approximately 1 mi (1.6 km) north of Carlton, and is 1.0 mi (1.6 km) south of the intersection of County Road 15 and Christian Vall Road. The southern two-thirds of this unit is on the Fred T. Stimpson SOA. Over 60 percent of the unit (3,843 ac (1,555 ha)) is on State lands, with the remainder of the unit (2,100 ac (850 ha)) on private land.

There are records of two black pinesnakes located within Unit 8 since 1992. These are both located on the SOA, although there is contiguous suitable habitat across the remainder of the unit. There are no habitat management practices outlined at the site that specifically target the habitat requirements of the black pinesnake.

Threats to the black pinesnake and its habitat in Unit 8 that may require special management considerations or protection of the PBFs include: Fire suppression and low fire frequencies; detrimental forestry practices that could cause significant subsurface disturbance such as disking, bedding, or whole root ball stump removal; land use conversion and fragmentation, primarily urban development and conversion to agriculture and pine plantations; gas, water, electrical power, and sewer easements; road mortality; and encroachment of invasive species.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species listed under the Act or result in the destruction or adverse modification of critical habitat.

We published a final regulation with a new definition of destruction or adverse modification on August 27, 2019 (84 FR 45020). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal

Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that result in a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of the black pinesnake. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the black pinesnake. These activities include, but are not limited to:

(1) Forestry management actions in pine habitat that would significantly alter the suitability of black pinesnake habitat. Such activities include, but are not limited to: Silvicultural activities such as disking and bedding that involve significant subsurface disturbance, or stumping involving whole root ball removal; conversion to densely stocked pine plantations; and chemical applications (pesticides or herbicides) that are either unlawful or that are not directly aimed at hazardous fuels reduction, mid-story hardwood control, or noxious weed control. These activities could destroy or alter the pine forest habitats and refugia necessary for the growth and development of black pinesnakes, and may reduce populations of the snake's primary prey (rodents), either through direct extermination or through loss of the forage necessary to sustain the prey base.

(2) Actions that would significantly fragment black pinesnake populations. Such activities include, but are not limited to: Conversion of timber land to other uses (agricultural, urban/residential development) and construction of new structures. These activities could lead to degradation or elimination of forest habitat, limit or prevent breeding opportunities between black pinesnakes, limit access to familiar refugia or nesting sites within individual home ranges, and increase the frequency of road mortality from road crossings.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides that the Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

We consult with the military on the development and implementation of INRMPs for installations with listed

species. We analyzed one INRMP developed by military installations located within the range of the critical habitat designation for the black pinesnake to determine if it met the criteria for exemption from critical habitat under section 4(a)(3) of the Act. The following area consists of Department of Defense lands with a completed, Service-approved INRMP within the critical habitat designation.

Approved INRMP

Camp Shelby Joint Forces Training Center (Camp Shelby), 4,054 ac (1,641 ha)

Camp Shelby is located in Forrest, George, and Perry Counties, near the town of Hattiesburg, Mississippi, and contains habitat with features essential to the conservation of the black pinesnake. The primary mission of Camp Shelby is to train U.S. Army soldiers (National Guard and Reserve) for combat and combat-related missions. Training activities at Camp Shelby primarily include troop bivouacking, wheeled vehicle maneuvers, artillery firing exercises, and tank training maneuvers.

Camp Shelby is composed of property belonging in four different categories: Department of Defense (DoD), State, United States Forest Service (USFS), and private land. The main part of Camp Shelby's training area belongs to the USFS and is operated under a special use permit (permit) from the USFS granted in 2007 for 20 years. The DoD and State lands are managed by the Mississippi Army National Guard (MSARNG) in support of the military mission, and the Camp Shelby INRMP addresses integrative management on these lands only (MSARNG 2014, p. 13). These DoD and State lands, included in the INRMP, with habitat features essential to the conservation of the black pinesnake, total approximately 4,054 ac (1,641 ha). We have examined the INRMP and determined that it outlines conservation measures for the black pinesnake, as well as management plans for important upland habitats at Camp Shelby. Conservation measures outlined in the INRMP for the black pinesnake at Camp Shelby include: Research on life history, habitat requirements, and habitat use; monitoring; prescribed burning and longleaf pine restoration programs, including increasing the frequency of growing season burns, reducing canopy closure and basal area, and restoring the natural fire regime; protecting and maintaining downed deadwood and pine stumps (when not identified as a safety hazard); and implementation of education programs for users of Camp Shelby (geared towards minimizing the negative impacts of vehicular mortality on the black pinesnake and other species) (MSARNG 2014, pp. 92–94). The INRMP will continue to be reviewed annually to monitor the effectiveness of the plan, and be reviewed every 5 years to develop revisions and updates as necessary.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands are subject to the Camp Shelby INRMP and that conservation efforts identified in the INRMP will provide a benefit to the black pinesnake. Therefore, DoD and State lands within this installation, which are covered under the INRMP, are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 4,054 ac (1,641 ha) of habitat in this final critical habitat designation because of this exemption.

Exclusions

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive due to the protection from destruction of adverse modification as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation or the continuation, strengthening, or encouragement of partnerships. In the case of the black pinesnake, the benefits of critical habitat include public awareness of the presence of black pinesnake and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the black pinesnake due to the protection from destruction or adverse modification of critical habitat. Additionally, continued implementation of an ongoing management plan that provides equal to or more conservation than a critical habitat designation would reduce the benefits of including that specific area in the critical habitat designation.

We evaluate the existence of a conservation plan when considering the benefits of inclusion. We consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

As discussed below, based on the information provided by entities seeking exclusion, as well as additional public comments received, we determined that certain lands were appropriate for exclusion from this final designation pursuant to section 4(b)(2) of the Act. Specifically, we are excluding the Camp Shelby Impact Area and the associated buffer zone (14,862 ac [6,014 ha]), located within Unit 3, from designation of critical habitat for the black pinesnake (see discussion under *Exclusions Based on Impacts on National Security and Homeland Security,* below).

Exclusions Based on Economic Impacts

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis, which, together with our narrative and interpretation of effects, constitutes our draft economic analysis (DEA) of the proposed critical habitat designation and related factors (IEc 2014). The analysis, dated May 2, 2014, was made available for public review from March 11, 2015, through May 11, 2015 (80 FR 12846), and again from October 11, 2018, through November 13, 2018 (83 FR 51418). The DEA addressed probable economic impacts of critical habitat designation for the black pinesnake. Following the close of the comment periods, we reviewed and evaluated all information submitted during the comment periods that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Information relevant to the probable incremental economic impacts of critical habitat designation for the black pinesnake is summarized below and available in the final economic analysis (also referred to below as the screening analysis) for the black pinesnake (IEc 2014a), available at *http://www.regulations.gov.*

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the black pinesnake in the May 2, 2014, IEM we identified probable incremental economic impacts associated with the following categories of activities: (1) Federal lands management (U.S. Forest Service); (2) forest management; (3) agriculture; (4) development; (5) silviculture/timber; (6) transportation activities; and (7) utilities. We considered each industry or category individually. Additionally, we considered whether the activities have any Federal involvement. Critical habitat designation does not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the black pinesnake is present, Federal agencies would be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the federally threatened subspecies, and consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into that consultation process.

In our IEM, we attempted to clarify the distinction between the effects that would result from the subspecies being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the black pinesnake's critical habitat. The following specific circumstances assisted in our evaluation: (1) The essential PBFs identified for critical habitat are the same features essential for the life requisites of the subspecies, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the black pinesnake would also likely adversely affect the essential physical and biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this subspecies. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this critical habitat designation.

The critical habitat designation for the black pinesnake consists of eight units, one of which is divided into two subunits, encompassing approximately 324,679 ac (131,393 ha) in Mississippi and Alabama. Included lands are under Federal, State, and private ownership, and all are within the area occupied by the black pinesnake at the time of listing. Federal land is predominant in Units 1 through 5. Federal lands make up from 58 to 90 percent of the acreage in these units, which account for approximately 68 percent of the total critical habitat acreage. Privately owned land is present in all eight units and ranges from 10 percent to a high of 100 percent in one unit. Private lands account for approximately 29 percent of the total critical habitat acreage. Approximately 14,862 ac (6,014 ha) of the originally proposed critical habitat designation in one unit has been excluded under section 4(b)(2) of the Act due to a national security concern (see *Exclusions Based on Impacts on National Security and Homeland Security,* below).

All lands in the critical habitat designation for the black pinesnake are currently occupied by the subspecies. In these areas any actions that may affect the subspecies or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the black pinesnake. Therefore, only administrative costs are expected in the critical habitat designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, we conclude that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

The entities most likely to incur incremental costs are parties to section 7 consultations, including Federal action agencies and, in some cases, third parties, most frequently State agencies or municipalities. Activities we expect will be subject to consultations that may involve private entities as third parties are residential and commercial development that may occur on private lands; however, cost to private entities within these sectors is expected to be minor as most of the critical habitat is in Federal ownership (68 percent) and only 29 percent of the lands are privately owned. According to a review of consultation records, the additional administrative cost of addressing adverse modification during the section 7 consultation process ranges from approximately $410 to $9,000 per consultation. Based on the project activity identified by relevant action agencies and comparison to the consultation history for species that co-occur or share habitat with the black pinesnake, the number of future formal consultations is likely to be five or fewer in the year immediately following the final designation. In addition, up to 60 informal consultations and five technical assists could occur annually following the designation. Thus, the incremental administrative burden resulting from the designation is likely to be less than $190,000 in this first year, the year with the highest anticipated costs; therefore, the costs would not be significant.

In summary, the probable incremental economic impacts of the black pinesnake critical habitat designation are expected to be limited to additional administrative efforts as well as minor costs of conservation efforts resulting from a small number of future section 7 consultations. This finding is based on the following factors:

(1) All critical habitat is occupied by the subspecies; thus, the presence of the subspecies results in significant baseline protection under the Act.

(2) Project modifications requested by the Service to avoid jeopardy to the subspecies would be the same as those likely to avoid adverse modification of critical habitat.

(3) Critical habitat would be unlikely to increase the number of consultations as a result of the awareness by Federal agencies of the need to consult for the listed subspecies, as well as the past involvement of key action agencies in consultations for co-occurring species.

(4) The designation also receives baseline protection from the presence of two other federally listed species (gopher tortoise and red-cockaded woodpecker) that have habitat needs similar to those of the pinesnake.

(5) The designation also receives baseline protection from overlap with designated critical habitat for the dusky gopher frog.

A supplemental document to the DEA, prepared by IEc (2014b), investigated possible effects on the value of private lands within critical habitat from the public perception that the designation posed restrictions on the use of these lands. Land ownership data suggested that the designation intersected about 65,000 acres of privately owned lands. Due to existing data limitations regarding the probability that such effects will occur and the likely degree to which property values will be incrementally affected by this designation (above and beyond possible perception effects resulting from the presence of co-occurring listed species, including the pinesnake, gopher tortoise, red-cockaded woodpecker, and dusky gopher frog, as well as its critical habitat), we are unable to estimate the magnitude of perception-related costs resulting from this designation.

Based on the above-described consideration of the economic impacts of the critical habitat designation, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the black pinesnake based on economic impacts.

A copy of the IEM and screening analysis with supporting documents may be obtained by contacting the Mississippi Field Office (see **ADDRESSES**) or by downloading from the field office's website at *http://www.fws.gov/mississippiES/* or the internet at *http://www.regulations.gov.*

Exclusions Based on Impacts to National Security and Homeland Security

Section 4(a)(3)(B)(i) of the Act (see discussion above) may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' Nevertheless, when designating critical habitat under section 4(b)(2) of the Act, the Service must consider impacts on national security, including homeland security, on lands or areas not covered by section 4(a)(3)(B)(i). Accordingly, we will always consider for exclusion from the designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns.

We cannot, however, automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If the agency provides a reasonably specific justification, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

Camp Shelby Joint Forces Training Center Impact Area and Buffer Zone

After review of public comments and additional consideration, we are excluding from critical habitat designation for the black pinesnake the Camp Shelby Joint Forces Training Center Impact Area (Impact Area) and its associated buffer zone, occupying a portion (14,862 ac (1,880 ha)) of Unit 3 in Perry County, Mississippi, under section 4(b)(2) of the Act. In the paragraphs below, we provide a detailed analysis of our decision to exclude this land.

The Impact Area of Camp Shelby Joint Forces Training Center (Camp Shelby) is a 4,647-ac (1,880-ha) area operated by the MSARNG for training and maneuver exercises in an area of the De Soto National Forest within Unit 3 located in Perry County, Mississippi. The MSARNG uses this area under a permit from the U.S. Forest Service, who is the primary landowner and manager within the installation boundary. The Impact Area, which is located in the center of Camp Shelby and in the northern portion of Unit 3, has been used for artillery training for decades. As a result, access of any kind is prohibited in this impact area due to the high risk of encountering unexploded ordnance. Surrounding the impact area is a buffer zone delineated by the following roads: Grapevine Road on the west; South Tank Trail on the south; Red Hill Road on the east; and Davis Range Road on the north. All roads leading into this buffer zone are gated and locked, with restricted public access and only allowed through coordination with Camp Shelby Range Control. This buffer zone (14,862 ac (6,014 ha) including the impact area) contains most of the artillery ranges on the installation; therefore, much of this landscape burns almost annually due to range fires. Portions of the acreage within this area overlap with those lands covered under the Camp Shelby INRMP (see *Approved INRMP* under the Exemptions section, above).

Benefits of Inclusion

We are not able to demonstrate any benefit to including this area in the critical habitat designation for the black pinesnake. Access into this area is restricted for human safety and to maintain effective military training; therefore, the educational benefit associated with identifying specific areas as critical habitat as a means to provide the public with areas of potential conservation value is not realized here. Furthermore, because of the restricted access, there are likely no

habitat-altering activities taking place in this area at the scale that would affect the physical and biological features essential to the conservation of this subspecies. To the contrary, due to the nature of military use in this area, it experiences frequent fires, which promote optimal conditions for the black pinesnake.

Benefits of Exclusion

The benefits of excluding approximately 14,862 ac (6,014 ha) of U.S. Forest Service lands that encompass the Impact Area and its associated buffer zone of Camp Shelby are significant. Foremost, access into this area is restricted due to the high risk of encountering unexploded ordnance and to maintain safety and security of military operations; thus, there is limited opportunity to implement habitat management. However, as stated above, the area experiences frequent fires due to the concentration of artillery ranges there, and this is the preferred management technique for maintaining optimal habitat conditions for the black pinesnake. In addition, the black pinesnake receives secondary conservation benefits from management of adjacent lands for the threatened gopher tortoise. Lands within the Impact Area and its associated buffer zone encompass a large percentage of the area used for artillery training on Camp Shelby, providing soldiers with essential combat skills that they use on the battlefield. We believe that excluding these U.S. Forest Service lands on Camp Shelby from critical habitat designation would alleviate any potential impacts that a designation of critical habitat could have on MSARNG and the military's ability to maintain national security.

Benefits of Exclusion Outweigh the Benefits of Inclusion

Though access to the Impact Area and its associated buffer zone is restricted, an analysis of GIS and aerial imagery determined that this area contains the physical and biological features essential to the conservation of the black pinesnake, thereby meeting the definition of critical habitat under the Act. This area is also contiguous with other critical habitat with known occurrences for the black pinesnake. In making our decision to exclude the Impact Area and its associated buffer zone, we considered several factors: Restricted access due to a human safety issue; the apparent maintenance of physical and biological factors essential to the conservation of the subspecies from frequent burning due to the nature of the artillery ranges in the area; protection from habitat loss associated with land conversion; and potential impacts to national security associated with a critical habitat designation. We determined there are significant benefits to excluding these lands from critical habitat designation and were unable to demonstrate a benefit to including these lands in the designation. Therefore, we have determined that the benefits of exclusion of approximately 14,862 ac (6,014 ha) of the Impact Area and its associated buffer zone of Camp Shelby from the critical habitat designation outweigh the benefits of including these lands.

Exclusion Will Not Result in Extinction of the Subspecies

The exclusion of this portion (14,862 ac (6,014 ha)) from the total critical habitat designation in Unit 3 (135,494 ac (54,833 ha)) will have minimal to no adverse effect on the subspecies. Adjacent lands contain habitat for the black pinesnake and are part of the designation. Maintenance of appropriate habitat for the black pinesnake with frequent fires is likely to continue in this area due to the use of this area for artillery training. The jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process provide additional assurances that the subspecies will not become extinct as a result of this exclusion. Thus, it is our determination that the exclusion of the Camp Shelby Impact Area and its associated buffer zone lands from the final designation of critical habitat for the black pinesnake will not result in the extinction of the subspecies.

Based on this analysis, under section 4(b)(2) of the Act, the Secretary has exercised his discretion to exclude the Camp Shelby Impact Area and its associated buffer zone within Unit 3 from the final critical habitat designation as a result of impacts to national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances, or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no permitted conservation plans or other non-permitted conservation agreements or partnerships for the black pinesnake, and the final designation does not include any tribal lands or tribal trust resources. We anticipate no impact on tribal lands, partnerships, permitted or non-permitted plans or agreements from this critical habitat designation. Accordingly, the Secretary is not exercising his discretion to exclude any areas from this final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Executive Order 13771

This rule is not an E.O. 13771 (''Reducing Regulation and Controlling Regulatory Costs'') (82 FR 9339, February 3, 2017) regulatory action because this rule is not significant under E.O. 12866.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory

Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

The Service's current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and therefore, not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the Agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7 only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. There is no requirement under RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that the final critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this final critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration.

The economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with black pinesnake conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate

in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. Consequently, we do not believe that the critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the black pinesnake in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for the black pinesnake does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies in Alabama and Mississippi. We did not receive written comments from Alabama or Mississippi specifically on the critical habitat designation. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the National Government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical and biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the black pinesnake. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that no tribal lands are affected by the designation.

References Cited

A complete list of all references cited is available on the internet at *http://www.regulations.gov* and upon request from the black pinesnake (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rulemaking are the staff members of the Mississippi Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entry for ''Pinesnake, black'' under ''REPTILES'' in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
REPTILES				
*	*	*	*	*
Pinesnake, black	*Pituophis melanoleucus lodingi.*	Wherever found	T	80 FR 60468, 10/6/2015; 50 CFR 17.42(h)[4d]; 50 CFR 17.95(c).[CH]
*	*	*	*	*

* * * * *

■ 3. In § 17.95, amend paragraph (c) by adding an entry for ''Black Pinesnake (*Pituophis melanoleucus lodingi*)'' after the entry for ''St. Croix Ground Lizard (*Ameiva polops*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(c) * * *

Black Pinesnake (*Pituophis melanoleucus lodingi*)

(1) Critical habitat units are depicted for Forrest, George, Greene, Harrison, Jones, Marion, Perry, Stone, and Wayne Counties, Mississippi, and Clarke County, Alabama, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of black pinesnake consist of the following components:

(i) *Tract size and habitat structure.* A pine forest, historically dominated by longleaf pine and maintained by frequent fire, primarily having the following characteristics:

(A) An open canopy that sustains a reduced woody mid-story (<10 percent cover) and abundant, diverse, native herbaceous groundcover (at least 40 percent cover); and

(B) Minimum of 5,000 ac (2,023 ha) of mostly unfragmented habitat.

(ii) *Refugia sites.* Naturally burned-out or rotted-out pine stumps and their associated root system tunnels, in pine forests historically dominated by longleaf pine.

(iii) *Soils.* Deep, sandy, well-drained soils characteristic of longleaf pine forests:

(A) No flooding or ponding;

(B) <15 percent medium and coarse gravel fragments;

(C) >60 in (152 cm) depth to seasonal high water table;

(D) >60 in (152 cm) depth to the hardpan;

(E) Textural components equaling >30 percent sand and <35 percent clay; and

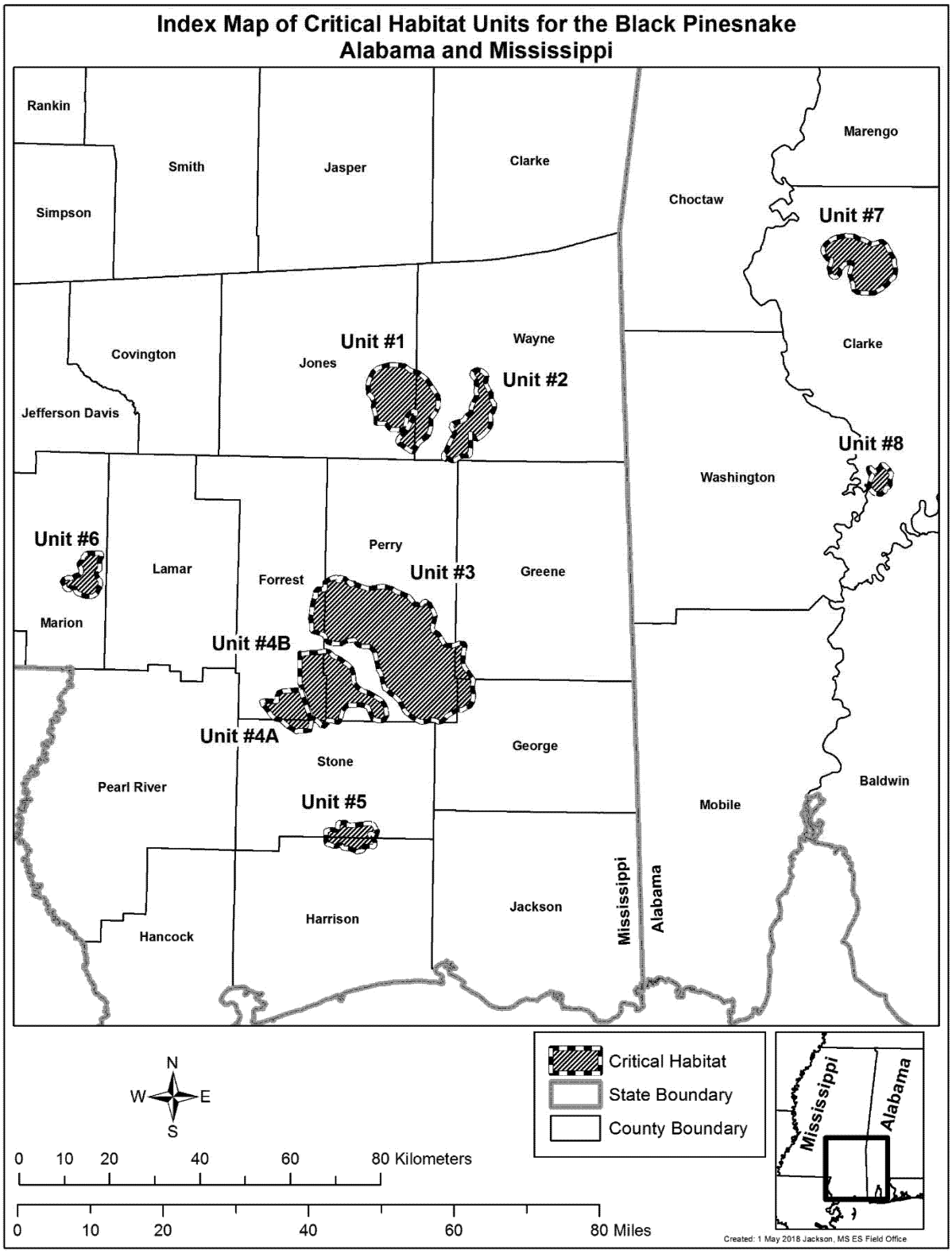
(F) A slope <15 percent.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on March 27, 2020. In addition, State and Department of Defense lands covered under the Camp Shelby Integrated Natural Resources Management Plan (INRMP) are not considered critical habitat in Unit 3; nor are U.S. Forest Service lands within the Camp Shelby Impact Area Buffer Zone.

(4) *Critical habitat map units.* Data layers defining map units were developed from USGS 7.5' quadrangles, and critical habitat units were then developed using Universal Transverse Mercator Zone 15N coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *http://www.fws.gov/mississippiES/,* at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2014–0065, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map follows:

BILLING CODE 4333–15–P

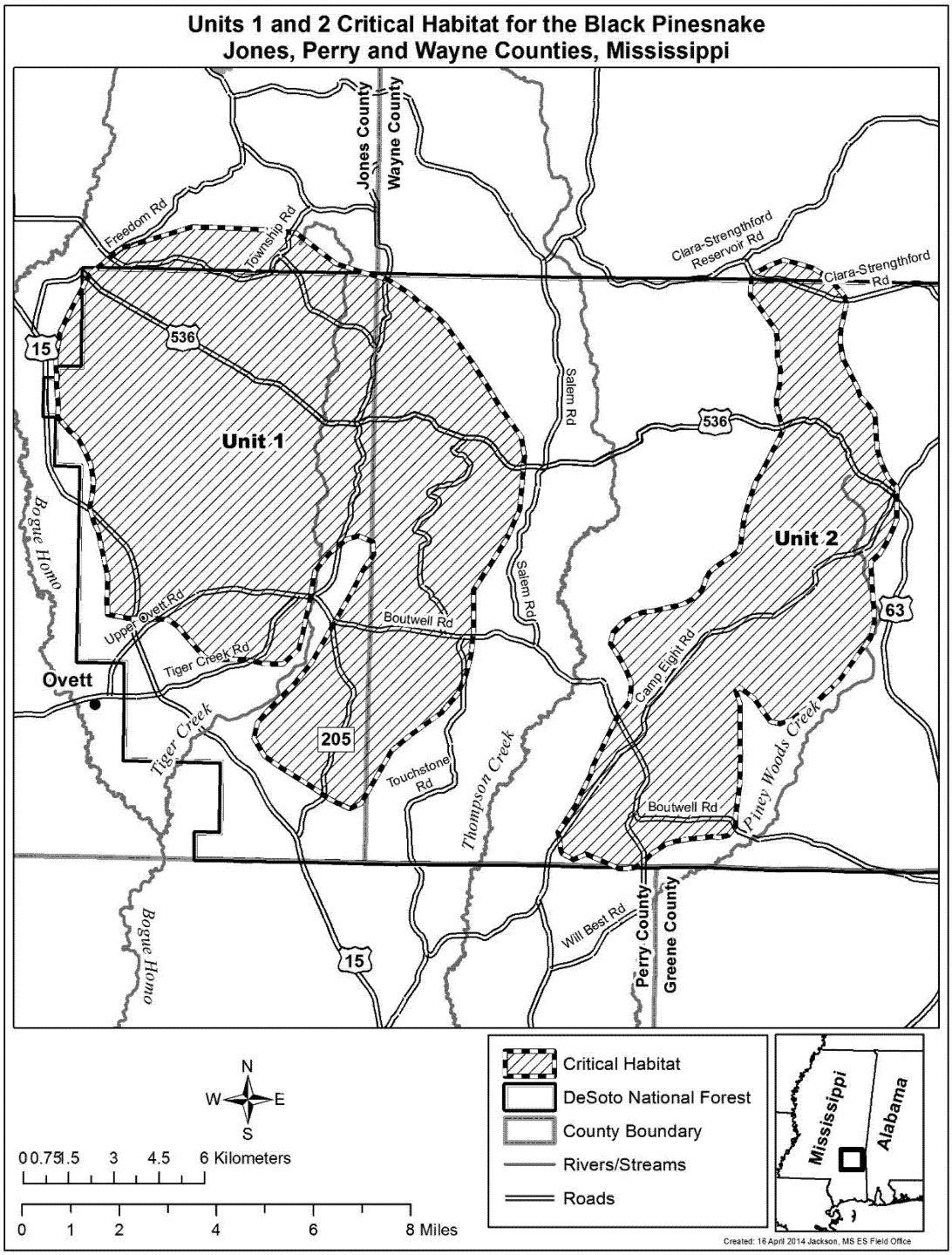


(6) Unit 1: Ovett—Jones and Wayne Counties, Mississippi.

(i) Unit 1 encompasses approximately 47,179 ac (19,093 ha) on Federal and private land in Jones and Wayne Counties, Mississippi. The majority of this unit (40,639 ac (16,446 ha)) is on Federal lands within the De Soto National Forest, with the remainder of the unit (6,540 ac (2,647 ha)) on private land. This unit is located between the Bogue Homo River and Thompson Creek, is approximately 2.0 mi (3.2 km) northeast of Ovett, and is mostly within the boundary of the Chickasawhay Ranger District of the De Soto National Forest. It is located just east of State Highway 15, west of Salem Road, north of the intersection of State Highway 15 and County Road 205, and approximately 1.3 mi (2.1 km) south of

the intersection of Freedom Road and Forest Road.

(ii) Map of Units 1 (Ovett) and 2 (Piney Woods Creek) follows:



(7) Unit 2: Piney Woods Creek—Perry and Wayne Counties, Mississippi.

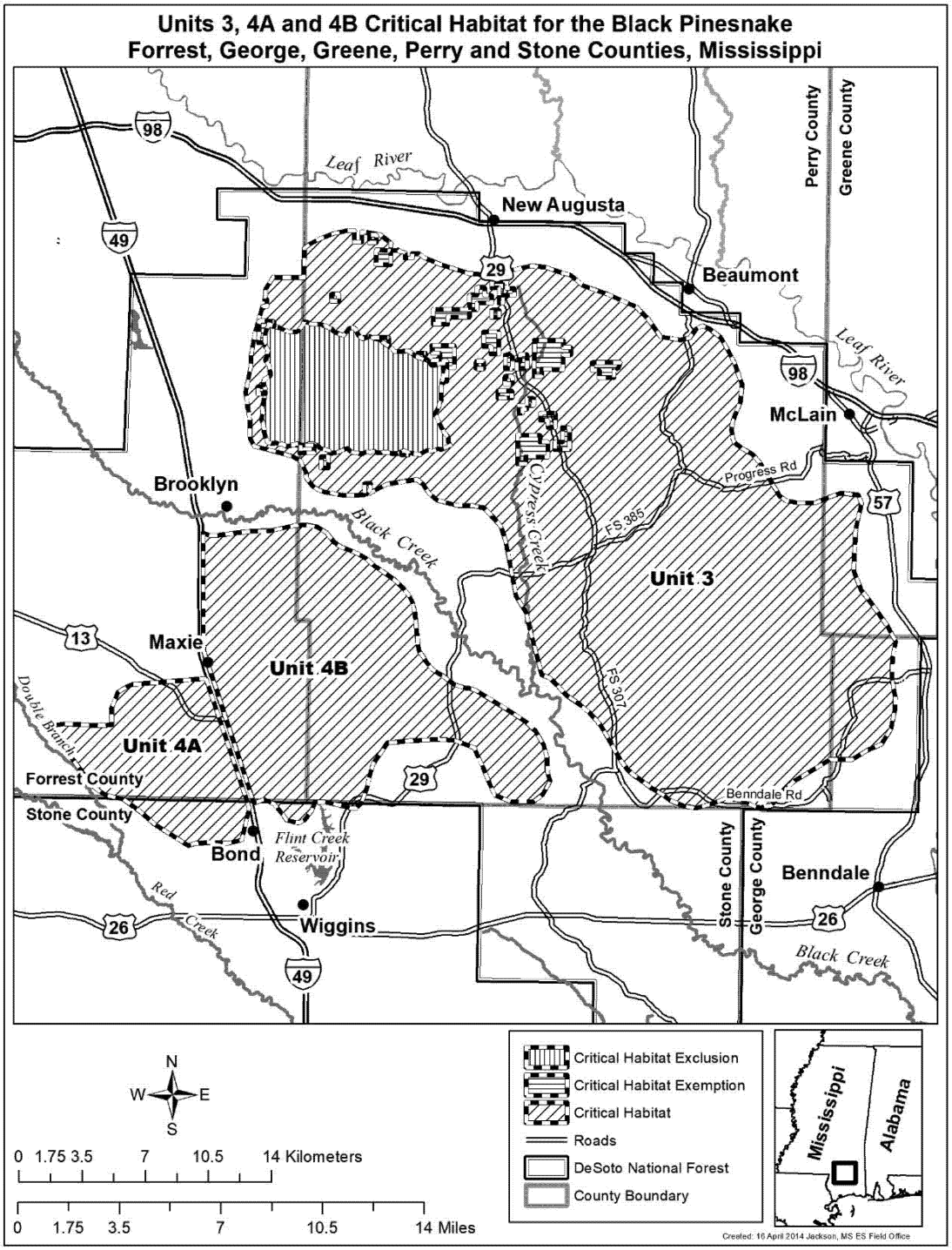
(i) Unit 2 encompasses approximately 22,389 ac (9,061 ha) on Federal and private land located primarily in Wayne County, Mississippi, with a small portion extending into Perry County, Mississippi. The majority of this unit (17,744 ac (7,181 ha)) is on Federal lands within the De Soto National Forest, with the remainder of the Unit (4,645 ac (1,880 ha)) on private land. This unit is located between Thompson Creek and Piney Woods Creek, is approximately 4.0 mi (6.4 km) west of Clara, and is mostly within the boundary of the Chickasawhay Ranger District of the De Soto National Forest. It is located 2.3 mi (3.7 km) north of the intersection of Camp Eight Road and Will Best Road, and 0.4 mi (0.6 km) southeast of the intersection of Clara-Strengthford Road and Clara-Strengthford Reservoir Road.

(ii) Map of Unit 2 (Piney Woods Creek) is provided at paragraph (6)(ii) of this entry.

(8) Unit 3: Cypress Creek—Greene, George, Forrest, and Perry Counties, Mississippi.

(i) This unit is located north of Black Creek (Cypress Creek runs into part of the unit, but is not a barrier to gene flow), and is approximately 3.0 mi (4.8 km) east of McLaurin, 1.8 mi (2.9 km) south of New Augusta, and 4.6 mi (7.4 km) northwest of Benndale. Unit 3 is mostly within the installation boundary of Camp Shelby on the De Soto Ranger District of the De Soto National Forest, and is bordered by State Highways 26 and 57 and U.S. Highways 49 and 98. The majority of this unit (115,315 ac (46,666 ha)) is on Federal lands, with another 1,768 ac (716 ha) on State lands, and the remainder (14,357 ac (5,810 ha)) on private land. This unit contains 4,054 ac (1,641 ha) of State- and Department of Defense (DoD)-owned lands (covered under the Camp Shelby INRMP) that are exempted from critical habitat designation; and 14,862 ac (6,014 ha) of U.S. Forest Service-owned lands excluded from critical habitat designation.

(ii) Map of Units 3 (Cypress Creek) and 4 (Maxie) follows:



(9) Unit 4: Maxie—Forrest, Perry, and Stone Counties, Mississippi.

(i) Subunit 4A—Forrest and Stone Counties, Mississippi. Subunit 4A is located between Double Branch and U.S. Highway 49 in Forrest and Stone Counties, Mississippi. It is 0.3 mi (4.8 km) northwest of Bond and 0.5 mi (0.8 km) southwest of Maxie, and is located mostly within the boundary of the De Soto Ranger District of the De Soto National Forest. Most of this subunit (8,914 ac (3,607 ha)) is on Federal lands within the De Soto National Forest, with the remainder of the subunit (6,303 ac (2,551 ha)) on private land.

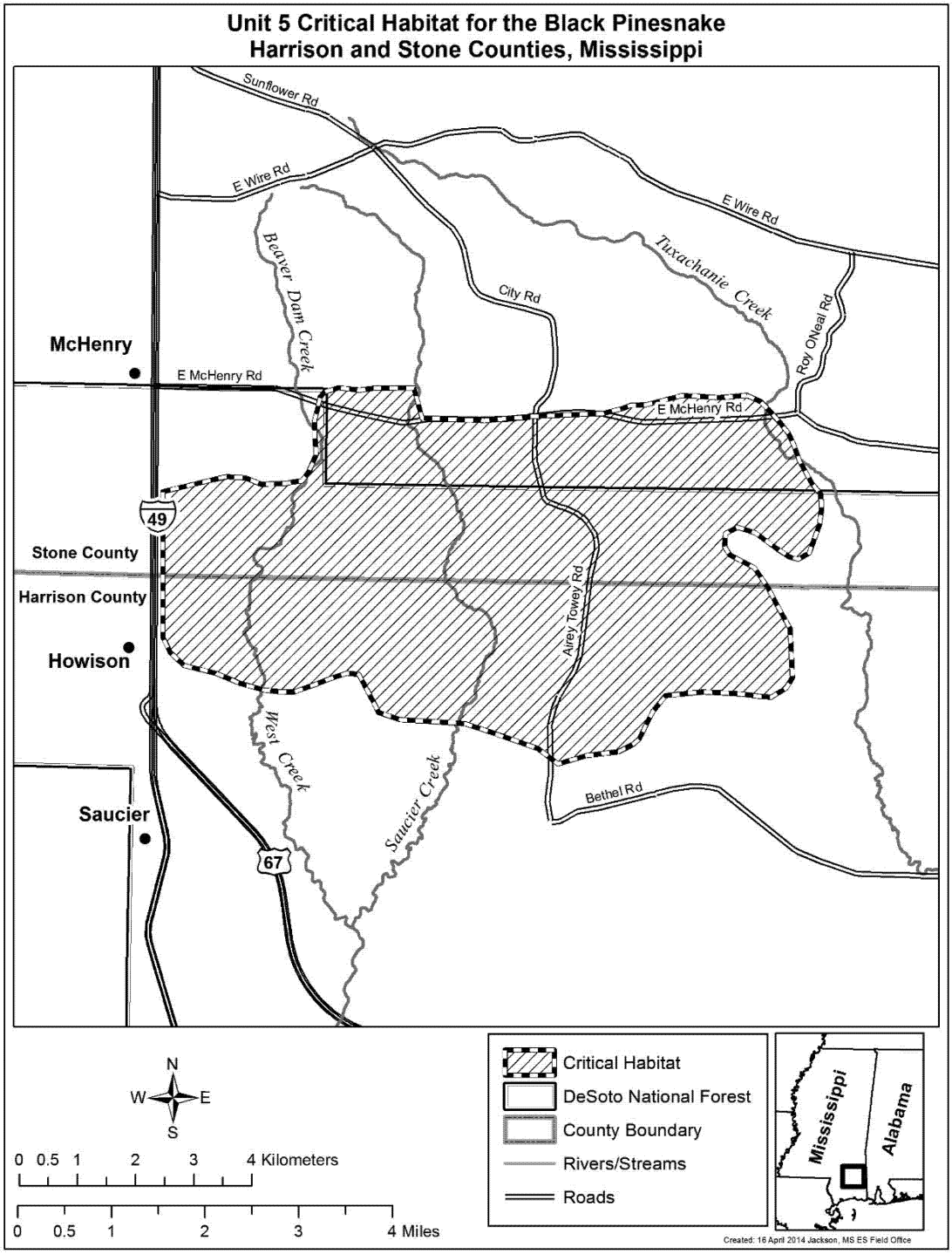
(ii) Subunit 4B—Forrest, Perry, and Stone Counties, Mississippi. Subunit 4B is located between Black Creek and U.S. Highway 49 in Forrest, Perry, and Stone Counties, Mississippi. It is directly adjacent to Maxie on the western border, and is located mostly within the boundary of the De Soto Ranger District of the De Soto National Forest. Most of this subunit (28,232 ac (11,425 ha)) is on Federal lands within the De Soto National Forest, with the remainder of the subunit (16,079 ac (6,507 ha)) on private land.

(iii) Map of Unit 4 (Maxie) is provided at paragraph (8)(ii) of this entry.

(10) Unit 5: Howison—Harrison and Stone Counties, Mississippi.

(i) Unit 5 encompasses approximately 12,949 ac (5,240 ha) on Federal and private land in Harrison and Stone Counties, Mississippi. The majority of this unit (9,430 ac (3,816 ha)) is on Federal lands within the De Soto National Forest, with the remainder of the unit on private lands (3,519 ac (1,424 ha)). This unit is located between Tuxachanie Creek and U.S. Highway 49, approximately 0.4 mi (0.6 km) east of Howison and 1.3 mi (2 km) southeast of McHenry. The unit is bordered on the northern edge by E. McHenry Road and on the western edge by U.S. Highway 49 (buffered from the highway by at least 328 ft (100 m)).

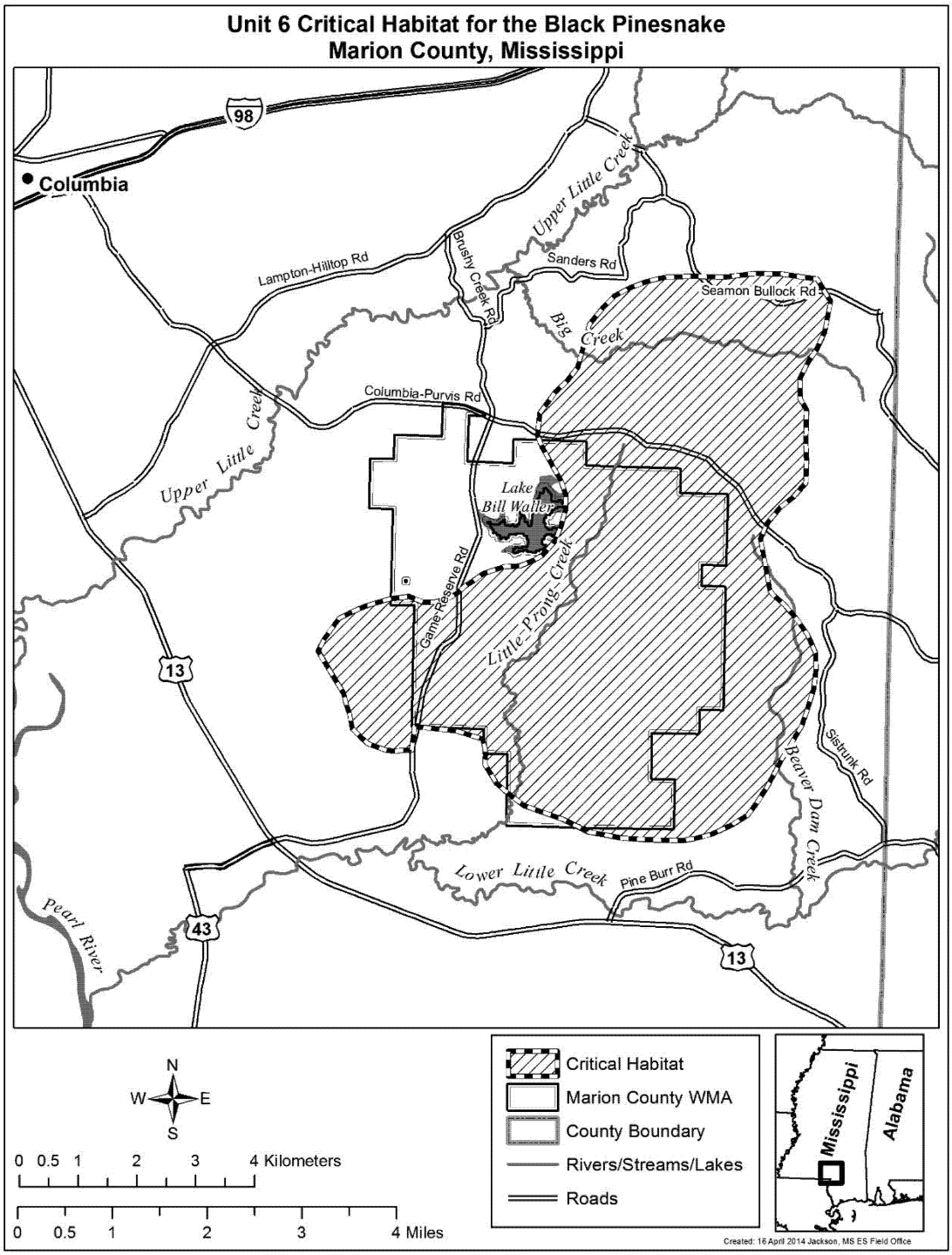
(ii) Map of Unit 5 (Howison) follows:



(11) Unit 6: Marion County Wildlife Management Area (WMA)—Marion County, Mississippi.

(i) Unit 6 encompasses approximately 11,856 ac (4,798 ha) on State and private land in Marion County, Mississippi. The unit is divided between State lands (5,587 ac (2,261 ha)) and private lands (6,270 ac (2,537 ha)). This unit is located between the Upper Little Creek and Lower Little Creek, 7.0 mi (11 km) southeast of Columbia. It is located 0.8 mi (1.3 km) north of State Highway 13, and 2.6 mi (4.2 km) south of U.S. Highway 98. Approximately half of Unit 6 is within the Marion County Wildlife Management Area.

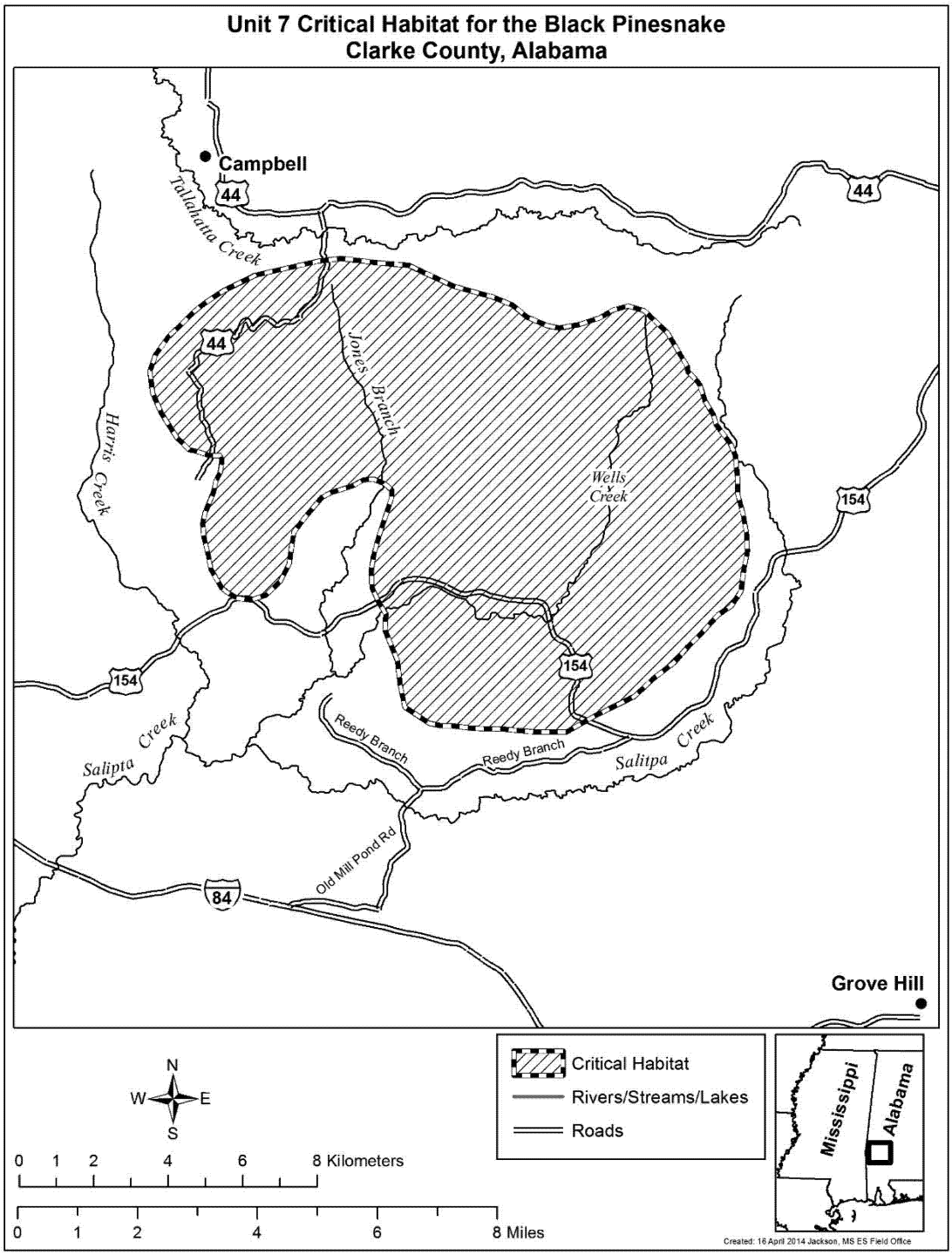
(ii) Map of Unit 6 (Marion County WMA) follows:



(12) Unit 7: Jones Branch—Clarke County, Alabama.

(i) Unit 7 encompasses approximately 33,395 ac (13,515 ha) of private land in Clarke County, Alabama. This unit is bordered by Salitpa Creek to the south, Tallahatta Creek to the north, and Harris Creek to the west. It is located approximately 2.7 mi (4.3 km) southeast of Campbell and 1.1 mi (1.8 km) north of the intersection of Old Mill Pond Road and Reedy Branch Road.

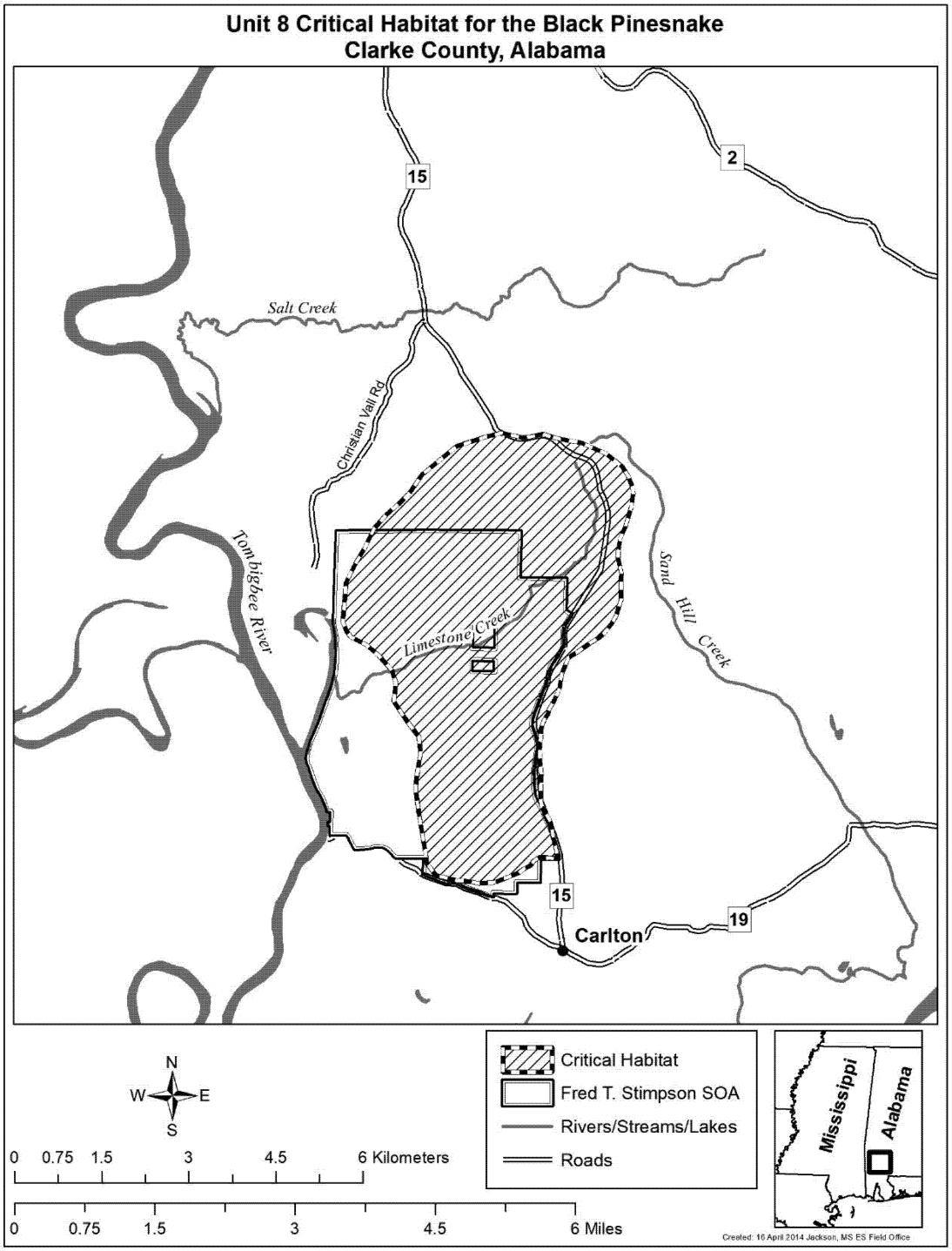
(ii) Map of Unit 7 (Jones Branch) follows:



(13) Unit 8: Fred T. Stimpson Special Opportunity Area (SOA)—Clarke County, Alabama.

(i) Unit 8 encompasses approximately 5,943 ac (2,405 ha) on State and private land in Clarke County, Alabama. Over 60 percent of the unit (3,843 ac (1,555 ha)) is on State lands, with the remainder of the unit (2,100 ac (850 ha)) on private land. This unit is located between Sand Hill Creek and the Tombigbee River, is approximately 1 mi (1.6 km) north of Carlton, and is 1.0 mi (1.6 km) south of the intersection of County Road 15 and Christian Vall Road. The southern two-thirds of this unit is on the Fred T. Stimpson SOA.

(ii) Map of Unit 8 (Fred T. Stimpson SOA) follows:



* * * * *

Dated: January 28, 2020.

Aurelia Skipwith,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020–02281 Filed 2–25–20; 8:45 am]

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FEDERAL REGISTER

Vol. 85 Wednesday,
No. 38 February 26, 2020

Part IV

The President

Memorandum of February 19, 2020—Developing and Delivering More Water Supplies to California

Federal Register
Vol. 85, No. 38
Wednesday, February 26, 2020

Presidential Documents

Title 3—

The President

Memorandum of February 19, 2020

Developing and Delivering More Water Supplies to California

Memorandum for the Secretary of the Interior[,] the Secretary of Commerce[, and] the Chair of the Council on Environmental Quality

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct the following:

Section 1. *Policy.* For decades, many of our Federal western water infrastructure investments have been undermined by fragmented and outdated regulatory actions. In a memorandum dated October 19, 2018 (Promoting the Reliable Supply and Delivery of Water in the West), I directed the Secretary of the Interior and the Secretary of Commerce to work together, to the extent practicable and consistent with applicable law, to complete the review of the long-term coordinated operations of the Central Valley Project (CVP) and the California State Water Project (SWP), and subsequently to issue an updated Plan of Operations (Plan) and Record of Decision (ROD). It is the policy of the United States to modernize our Federal western water infrastructure to deliver water and power in an efficient, cost-effective way.

Sec. 2. *Enhancing Water Supplies While Appropriately Protecting Species and Habitats.* In response to my memorandum, a Plan and ROD were issued today. The new framework set forth in these documents is expected to deliver more water to communities while using science and investments appropriately to protect affected species and their habitats. This is a good first step, but I believe more can be done. Therefore, I direct the Secretary of the Interior and the Secretary of Commerce to build upon the success of the Plan and ROD by supplementing the resulting operations, consistent with applicable law, to make deliveries of water more reliable and bountiful. To help develop and deliver water supplies in the Central Valley of California, I direct those Secretaries to coordinate efforts to:

(a) implement the relevant authorities of subtitle J of the Water Infrastructure Improvements for the Nation Act (Public Law 114–322), which include provisions focused on (1) developing water storage, (2) capturing more water during storm events, and (3) giving agricultural and municipal water users more regulatory certainty;

(b) fully implement, with respect to future agency actions, recent Administration improvements to management of programs established pursuant to the Endangered Species Act of 1973 (Public Law 93–205); and

(c) provide quarterly updates to the Chair of the Council on Environmental Quality and, at the request of other components of the Executive Office of the President, to each such component, regarding progress in carrying out sections 2(a) and (b) of this memorandum.

Sec. 3. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

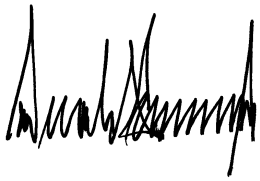
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of the Interior is hereby authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, February 19, 2020

[FR Doc. 2020–04089
Filed 2–25–20; 11:15 am]
Billing code 4310–10–P

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